NO. 72120-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM PHILLIP, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID SEAVER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Rules and Regulations

Washington State:

A. ISSUES PRESENTED

1. Whether the trial court properly denied the appellant's suppression motion.

2. Whether the trial court properly denied the appellant's motion to dismiss due to intrusion into attorney-client communications.

3. Whether the trial court properly allowed a witness employed by a cell phone service provider to testify about the contents of his company's records relating to the appellant's usage of his subscribed cell phone.

4. Whether the trial court properly denied the appellant's motion for mistrial due to juror misconduct.

5. Whether the trial court properly exercised its discretion in denying the appellant's motion to have all physical restraints removed from him at his sentencing hearing.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, William Phillip, Jr., was charged on December 9, 2010, by information with one count of murder in the first degree, for intentionally, and with premeditation, causing the death of Seth Frankel on or about May 21, 2010. CP 1.

Phillip's first trial on this charge ended in a mistrial, declared on December 18, 2013, when the jury was unable to reach a unanimous verdict. 36RP 17-19, 24-25.[1]

At his second trial, Phillip was found guilty as charged by jury verdict on April 11, 2014. CP 845.

2. SUBSTANTIVE FACTS

At roughly 8:00 p.m. on Friday, May 21, 2010, Bonny Johnson spoke by phone with her boyfriend, Seth Frankel, while he shopped at a Fred Meyer supermarket near the pair's home in Auburn, Washington. 57RP 88-89. Johnson phoned Frankel from Portland, Oregon, where she worked on a part-time basis at the local PBS radio affiliate. 57RP 53. Johnson, who was planning on spending the weekend with a Portland-area friend, told Frankel that she would call him later that evening, after her shift at the radio station ended at 10:00 p.m. 57RP 90-91.

Johnson phoned Frankel several times that night, but he neither answered his phone nor returned the voicemail messages she left for him. 57RP 90-91. Johnson became increasingly concerned, because Frankel was always quick to respond. 57RP 91. By the following morning, when Johnson had still neither

[1] The verbatim report of proceedings consists of 69 volumes, designated hereinafter in this brief as indicated in Appendix A.

received a call from Frankel nor been able to reach him, she phoned their landlord, who provided Johnson with the phone number of James Funston, who lived nearby Frankel and Johnson's home. 57RP 110.

At Johnson's request, Funston went to Frankel's home, shortly before noon, and knocked on his front door. 49RP 20-21. Frankel did not answer. 49RP 22-23. His car was in the driveway. 49RP 22.

Funston went to the back of Frankel's house and looked through a window into the living room. 49RP 27-28. Funston, who was still talking to Johnson by phone, saw a body on the floor inside, amidst knocked-over furniture. 49RP 27-28. Funston told Johnson what he saw, then disconnected with her, and phoned 911. 49RP 31.

Within minutes, medics and Auburn Police Department (APD) officers responded to Frankel's home. 49RP 143-44, 146. Neither the front nor rear door appeared to bear indication of a forced entry. 49RP 23, 150. A medic kicked open the front door, and found Frankel's lifeless body on the floor of his blood-spattered living room. 50RP 23-25. Frankel's body was cold to the touch, and rigor mortis had already set in. 50RP 26-27. Frankel had a

number of puncture wounds, including a deep gash of his throat and a sizeable cut in the webbing of his left hand. 49RP 194; 50RP 28. He was not wearing shoes, and around his right arm, above the elbow, was a black zip-tie. 50RP 30.

King County Associate Medical Examiner Aldo Fusaro responded to the scene and later performed Frankel's autopsy. 65RP 66. He observed superficial stab wounds on both of Frankel's forearms, and cutting injuries to his left thigh. 65RP 105, 115-16. Fusaro found a long wound on the webbing between Frankel's left thumb and forefinger, and saw that the top of Frankel's left middle finger had been cut off. 65RP 117-18. Frankel had also suffered blunt force injuries to the left side of his head, causing significant subdural hemorrhaging. 65RP 111-12. Fusaro measured a five-inch incised wound on the left side of Frankel's throat; the cutting injury went through Frankel's neck muscle, jugular vein, carotid artery, esophagus, thyroid gland, and trachea, even notching a vertebra in Frankel's neck. 65RP 119. To Fusaro, this injury was consistent with a sawing action, and would have caused death within minutes of infliction. 65RP 124-28.

Although the living room of Frankel's home was a horrific, bloody mess, the remainder of the home appeared completely

ordinary and untampered. 51RP 55-96. Officers found Frankel's keys and wallet in the kitchen, and cash and Frankel's credit cards were still inside the wallet. 51RP 198.

Johnson had spoken to Phillip, a co-worker whom she had briefly dated in late 2008 and early 2009, by phone and via text message throughout that week. 57RP 25, 126. Johnson had told Phillip, either on the evening of May 20 or the morning of May 21, 2010, that she was planning on going to the Oregon coast with a friend for the coming weekend. 57RP 127.

Johnson explained to the jury that when she decided to end her short-lived romantic relationship with Phillip, he became very upset, to the point that she began to worry about his emotional health and feared he might commit suicide. 57RP 31. She made an effort to remain on platonic, friendly terms with him, though he continued to express an amorous interest in her. 57RP 33-34. Phillip became upset when, during an April 2010 lunch, Johnson told him of her excitement about an upcoming trip she was planning on taking to Hawaii with Frankel. 57RP 66-67. On May 21, 2010, Phillip sent a text message to Johnson imploring her to "ditch that unhot old man you are attached to." 57RP 170. Johnson chastised

Phillip by electronic response, telling him, "Don't talk about him like that to me, I mean it." 57RP 170-71.

Based on information that Johnson provided to investigators, several APD detectives traveled to Portland on May 28, 2010, and paid a call on Phillip at his apartment. 58RP 135, 139. Phillip told the detectives that his romantic relationship with Johnson had ended a year earlier, and that he knew she had moved to Auburn to live with Frankel. 58RP 143-44. The investigators noticed that Phillip's right hand was injured; two fingers were badly bruised, and he had a bandage over the webbing of his right hand, through which blood had soaked. 58RP 148-49. Phillip attributed the injury to a workplace event weeks earlier, when he had dropped something on his hand. 58RP 150-51.

A co-worker of Phillip told the jury that he was present when Phillip had hurt his hand when it was caught between two decks of a stage he was assembling, and that Phillip had not been cut. 63RP 124-25.

Kenneth Carter, a network manager for AT&T, presented to the jury a number of records relating to Phillip's usage of his AT&T-subscribed cell phone device. 60RP 22-23, 47, 56. The records indicated that on the morning of May 21, 2010, Phillip's phone

utilized cell towers in the Portland area whenever he used his phone. 60RP 91-99. By the afternoon of May 21st, however, Phillip's phone began utilizing towers north of Portland situated near or alongside the I-5 freeway. 60RP 100. By 4:05 p.m., Phillip's phone connected with a tower in Kent, Washington, and, by 7:57 p.m., it utilized an Auburn tower. 60RP 109-10, 113-15. At 9:59 p.m., Phillip's phone began connecting with cell towers south of King County, and, by 12:25 a.m. on the morning of May 22, 2010, it was utilizing Portland towers once again. 60RP 122-29. Michael Fowler, a friend of Phillip's, told the jury that he had spoken with Phillip by phone on two occasions on the night of May 21, 2010. 63RP 16.

Phillip's mother informed the jury that Phillip had briefly borrowed her car in May 2010. 63RP 55. She also expressed her belief that Phillip loved Johnson, and wanted a future with her. 63RP 64-66.

Besides the zip-tie found around Frankel's arm, investigators found another zip-tie in Frankel's living room, underneath a table that had been knocked over. 53RP 97. Johnson explained to the jury that she and Frankel never had any zip-ties at their home. 57RP 158. However, zip-ties identical to those discovered on and

near Frankel's body were readily available at the convention center where Phillip worked as an audio-video technician. 63RP 130-32.

On June 2, 2010, APD detectives again called on Phillip at his Portland apartment. 58RP 157, 163. During that conversation, they discussed with him the possibility of taking a DNA sample from him via buccal swab. 58RP 164. In a forensic examination of Phillip's smartphone, which had been seized pursuant to warrant on June 22, 2010, it was discovered that on June 19, 2010, a search had been run on the phone's internet browser titled "how to ruin a buccal swab." 61RP 18-19, 71-72, 150. The forensic analyst also found hundreds of text messages to and from Johnson in Phillip's phone, many of which were of a romantic nature, in which Phillip told Johnson that she was the most beautiful creature he had even seen, that he dreamt of her constantly, and that he loved her. 61RP 117-18, 126-27, 132. In a text sent to Johnson on April 3, 2010, after she had told him that they would not be together, but that she wanted him to be happy, Phillip complained that Johnson "took my love, my best friend and completely shattered my ego." 61RP 135-37.

A buccal swab of Phillip's DNA was indeed performed on Phillip in November 2010. 61RP 35-36. The swab was provided to

Washington State Patrol Crime Lab forensic scientist Amy Smith, along with a number of other items, including a blood-stained towel found next to Frankel's body. 61RP 137; 65RP 37-38. Within one stain on the towel Smith found a mixture of two male profiles; the majority component matched Frankel's DNA, and the likelihood that Phillip was the contributor of the minor component was over one in 2.2 million. 62RP 137.

APD Detective Anna Weller read to the jury a number of excerpts from journals seized from Phillip's apartment. In those excerpts, Phillip wrote of his obsession with Johnson, and that she was his "main focus in life." 66RP 103-04. Phillip also noted that he and Johnson should be raising their own children, and that Frankel was a liar, cheat, and "douche bag" for ending an earlier marriage. 66RP 108-09.

Phillip rested his defense case-in-chief without calling any witnesses. 66RP 120.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED PHILLIP'S CRR 3.6 MOTION TO SUPPRESS

Phillip challenges the trial court's ruling on his trial attorneys' CrR 3.6 suppression motion at length, in a somewhat haphazard manner. Distilled to its essence, Phillip's contention is two-fold.

First, he asserts that the trial court, after ruling that the investigators' original search warrant affidavit in May 2010 for records from his cell phone service provider failed to establish probable cause, erred by determining that later warrants for other searches nevertheless withstood constitutional scrutiny after excision from the underlying affidavits of any reference to information obtained from the invalid warrant for cell phone usage records. Second, Phillip contends that the trial court erred when it concluded that the State could present information found within the cell phone provider's records because that information derived from an independent source, i.e., a March 2012 warrant for the same records, issued upon presentation of a revised affidavit that the trial court found to be more thorough than the initial May 2010 submission and which did not depend on or incorporate information obtained as a result of the original, invalid warrant.

Phillip's contentions should be rejected. The May 27, 2010, warrant provided some probative information regarding Phillip's movement on the night of Frankel's violent death, but cannot in any way be characterized as crucial evidence that the police relied upon when seeking additional search warrants, such that those warrants would not have issued in its absence. And the investigators'

subsequent submission of a more thorough affidavit for the usage records of Phillip's cell phone service provider should be recognized for what it was: a reasonable effort to obtain a warrant based on independent information, in order to correct an earlier infringement of Phillip's privacy interest.

a. Each subsequent warrant was supported by probable cause after invalidly-obtained information was excised.

In the course of investigating Frankel's murder on May 22, 2010, investigators with, or working in association with, the Auburn Police Department obtained the following search warrants relating to Phillip:

Date of Warrant's Issuance	**Items/Locations relating to Phillip to be Searched Pursuant to Warrant**
May 27, 2010	Usage records in possession of AT&T relating to Phillip's personal cell phone device
June 22, 2010	Phillip's apartment, vehicle, and person
November 5, 2010	Phillip's DNA, to be collected via buccal swab
January 25, 2012	Phillip's cell phone device
March 22, 2012	Usage records in possession of AT&T relating to Phillip's personal cell phone device

CP 21-138.

The trial court ruled that the affidavit supporting the request for the May 27, 2010, search warrant failed to establish probable cause that Phillip had been involved in criminal activity or that his phone records would include evidence of such activity. 9RP 62-63; CP 908. However, the trial court held that the initial obtainment of the invalid warrant did not require suppression of evidence obtained through the later warrants issued from June 2010 through January 2012, because those warrants were supported by probable cause that did not depend on information gathered through the execution of the May 2010 warrant. 11RP 4-13; CP 908.

An affidavit in support of a search warrant must contain sufficient facts to lead a reasonable person to conclude there is a probability that the defendant was involved in criminal activity and that evidence of the crime may be found at a certain location. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Probable cause requires only a probability of criminal activity and not a prima facie showing of guilt. State v. Cherry, 61 Wn. App. 301, 304, 810 P.2d 940 (1991); see also State v. Fore, 56 Wn. App. 339, 344, 783 P.2d 626 (1989) (observing that probable cause "is not negated merely because it is possible to imagine an innocent explanation" for certain events). The affidavit is evaluated in a commonsense,

rather than hypertechnical, manner, and any doubts are resolved in favor of the warrant. Jackson, 150 Wn.2d at 265. Reasonableness is the key. State v. Patterson, 83 Wn.2d 49, 52, 515 P.2d 496 (1973). A judge's decision to issue a warrant is reviewed for abuse of discretion, and great deference is accorded to that decision. Jackson, 150 Wn.2d at 265. However, where, as here, a trial court assesses an affidavit for probable cause at a suppression hearing, this Court reviews the trial court's conclusions *de novo*. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

At the outset, it is critical to identify precisely what was obtained from Phillip's cell phone service provider after the initial search warrant was obtained. In his brief to this Court, Phillip appears to equate the breadth of a cell phone provider's records of a customer's usage to what can be found in a search of the customer's cell phone device itself. This is mistaken, as was made clear in the investigators' affidavits in support of their requests for later warrants, and at trial through the testimony of cell phone company personnel and a police forensic specialist. In actuality, the service provider delivered records that documented only the following facts: when Phillip used his phone to make and receive phone calls and text messages between April 1, 2010, and May 26,

2010; the phone numbers of the parties with whom Phillip communicated, and the cell tower nearest to Phillip's phone when he began a phone call, connected to the internet, or received a text message. 60RP 47-51, 57-70. CP 31.

For purposes of this appeal, the State does not take issue with the trial court's ruling that this information from Phillip's cell service provider was improperly obtained due to a too-short, insufficient affidavit that omitted significant facts already known to the police.[2] This does not end the inquiry, however, as to the admissibility of evidence obtained from subsequent warrants.

A search warrant is not rendered totally invalid if the underlying affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005) (emphasis added), quoting State v. Coates, 107 Wn.2d 882, 735 P.2d 64

[2] The State also does not dispute that phone company records implicate privacy concerns protected by the state constitution. See State v. Gunwall, 108 Wn.2d 54, 63, 720 P.2d 808 (1986). However, these records do not include the intensely private matters that can be found within a cell phone itself, and Phillip is incorrect when he cites to inapposite case law to sensationalize his claim. See Brief of Appellant, at 11-13, citing Riley v. California, __ U.S. __, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). Indeed, it was only following the acquisition of a separate warrant in 2012 that the police examined Phillip's personal phone itself, and it was only then that investigators discovered the content of many text messages that he had sent to Johnson, which were not available on her phone, along with his internet browsing history. CP 128-29; 61RP 71-73, 86, 116-32, 149-50.

(1987). Thus, it was entirely appropriate for the trial court to look at the more-extensive affidavits submitted in support of the warrants obtained in June and November 2010, and in January 2012, to see if they established probable cause to believe that Phillip was involved in criminal activity, after excising all references to information obtained from Phillip's cell service provider.

The trial court's conclusion that each of these warrants withstood constitutional scrutiny even after such excision is eminently justifiable. Post-elision of any reference within the June 2010 affidavit to facts obtained from Phillip's cell service provider pursuant to the May 2010 warrant, the affidavit described:

- The violent nature of the crime scene in Frankel's home.
- The presence of two zip-ties at the crime scene, including one wrapped around Frankel's right wrist.
- Frankel's romantic relationship with Johnson.
- Johnson's previous romantic relationship with Phillip.
- The fact that Johnson, when asked to identify anyone whom she knew who would want to harm Frankel, stated that the only person she could think of was Phillip.
- The fact that when investigators spoke to Phillip in early June 2010, he had a significant cut on his right hand, which he attempted to keep concealed from the investigators. When asked about the injury, Phillip claimed to have injured his hand at his workplace.

- That although Phillip was willing to speak to the detectives, he refused to answer any questions about travel to Auburn.
- The fact that zip-ties identical to those found at the crime scene were readily available at Phillip's workplace.
- That although Phillip had indeed hurt his hand while at work, a co-worker who was present at the event told investigators that Phillip's hand had not been cut.
- Phillip sent a number of text messages to Johnson, which Johnson showed to police on her phone, of a continuing romantic nature.

CP 47-55.

After excision of any reference to the records obtained from Phillip's cell service provider, the affidavit in support of the November 2010 search warrant for a buccal swab of Phillip's DNA included all of the above-listed items, as well as the fact that forensic analysis of a blood stain on a towel located at the crime scene revealed the presence of both Frankel's DNA and that of another, unidentified man. CP 90-91. This affidavit further explained that Phillip's mother had told police that Phillip, who typically used a motorcycle for his transportation needs, had borrowed her car on May 21, 2010, and returned it to her the following day. CP 86. Also, Phillip's mother explained to investigators that Phillip was in love with Johnson. CP 115.

Lastly, the January 2012 affidavit submitted by Auburn detectives in order to be allowed to examine Phillip's phone referred to the fact that it was Phillip's DNA that had been found on the towel located at the crime scene, and that Phillip had been arrested for this murder in December 2010. CP 125.

All of this information led the trial court to reasonably conclude that suppression of the evidence obtained via the June and November 2010 and January 2012 was uncalled-for. The superior court presented with the June 2010 affidavit was told of an horrific crime scene, suggesting an attack motivated by personal hostility, as opposed to an interrupted burglary or other crime between strangers. Johnson identified Phillip, an ex-boyfriend, as the only person she could imagine who would want to harm Frankel. Thus, the court learned of a romantic triangle involving a rejected and frustrated lover, who bore an injury, seen by police days after Frankel's stabbing death, which was consistent with a cutting attack, and which was something that Phillip attempted to hide from the investigators. Phillip had easy access at his job to a distinctive object found at the crime scene – zip-ties, one of which had been wrapped around Frankel's wrist. Furthermore, the warrant-issuing court was informed that though Phillip voluntarily

spoke to investigating detectives, he affirmatively refused to answer questions about any travel he may have made to the city where Frankel and Johnson lived.[3] Also, Phillip's explanation for his injured hand was inconsistent with the description provided by a third party with no stake in the investigation. The superior court in June 2010 was thus provided with substantial evidence implicating Phillip that had nothing to do with the information contained in the records released by his cell phone service provider.

As to the November 2010 and January 2012 warrants, the trial court logically concluded that all of the information presented in the June 2010 warrant affidavit (post-excision of references to cell phone records), coupled with the trace evidence gathered and analyzed after June 2010, along with information gathered from Phillip's mother, and discussed in the November 2010 and January 2012 warrant affidavits, justified the issuance of those warrants as supported by probable cause. Given that nothing in the later affidavits undermined the information presented in the June 2010 warrant, and, instead, confirmed the investigators' belief in Phillip's

[3] Although a refusal to cooperate cannot, by itself, justify police suspicion, it can be taken into consideration among the totality of circumstances supporting a seizure. See Florida v. Bostick, 501 U.S. 429, 437, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); see also State v. Grenning, 142 Wn. App. 518, 534, 174 P.3d 706 (2008) (noting that affidavits of probable cause need not meet the standards governing admissibility of evidence at trial).

culpability, suppression of the later-obtained evidence would have been ill-advised.

b. The trial court properly admitted the records from Phillip's cell phone service provider under the "independent source" exception to the exclusionary rule.

Much of the abundant, validly-obtained information provided to the superior court that issued the June 2010 warrant was known to the police before they sought the May 27, 2010, warrant for records from Phillip's cell service company. Unfortunately, the investigators, in their urgency to capture a violent killer, failed to include a good deal of that evidence in their affidavit to the May 2010 court. CP 26-27 (discussing Phillip only as a co-worker of Johnson's whom she briefly dated, and whose phone number was found on Johnson's cell phone). It was this scarcity of information connecting Phillip to Frankel's death that led the trial court to find an absence of probable cause that would justify a search of Phillips cell phone usage records. 9RP 62-63.

The inadequacy of the May 2010 affidavit had already come to the attention of the deputy prosecutor assigned to this matter. In March 2012, the prosecutor directed a lead detective in the investigation to prepare a more thorough affidavit in an effort to

obtain a second warrant for the cell company's usage records. CP 132. The detective did so, including in her affidavit only information that was known to the police *prior to* their obtainment of the May 2010 warrant. CP 131-35. The detective presented the revised affidavit to the superior court that had initially (and erroneously) issued the May 2010 warrant, and that court, satisfied with the improved affidavit, issued a new warrant for the same records, on March 22, 2012. CP 137-38.

The trial court denied Phillip's motion to suppress the cell phone records obtained pursuant to the March 2012 warrant, concluding that they had been obtained on the basis of a presentation of facts that were separate from, and independent of, information unlawfully obtained pursuant to the invalid May 2010 warrant. 9RP 63-65; CP 907-08.

Phillip's appeal to this Court of this aspect of the trial court's CrR 3.6 ruling should be rejected. The "independent source" exception to the exclusionary rule applies when the State lawfully seizes evidence that had originally been obtained during an unlawful search, so long as the later seizure is genuinely independent of the earlier, tainted search. State v. Miles, 159 Wn. App. 282, 295, 244 P.3d 1030 (2011), quoting Murray v. United

States, 487 U.S. 533, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988). This exception, which prohibits admission of evidence gathered illegally while still permitting the trier of fact to learn of information properly acquired, "finely balances the rights of the accused with society's interest in prosecuting criminal activity and ensures that the State is placed in neither better nor worse position as a result of the officers' improper actions." Gaines, 154 Wn.2d at 720.[4]

The inquiry into whether the independent source exception applies in a particular instance focuses on two issues: the motivation of the investigators seeking the warrant (in this case, the second warrant), and the question of whether the information presented in the warrant, including no reference whatsoever to facts unlawfully obtained, nevertheless satisfied the probable cause standard. Miles, 159 Wn. App. at 294.

As to the first question, the decision here to seek the second warrant was reached by the prosecutor assigned to the matter, who was concerned with the validity of the initial warrant. CP 132. His motivation, thus, was not the product of what the investigators had

[4] See also Sutton v. U.S., 267 F.2d 271, 272 (4th Cir. 1959) (observing that it "is one thing to say that officers shall gain no advantage from violating the individual's rights; it is quite another to declare that such a violation shall put him beyond the law's reach even if his guilt can be proved by evidence that has been obtained lawfully.").

learned *as a result* of the first, invalid warrant but *of his doubt as to the validity of the warrant itself.* The instant matter is very closely aligned with the circumstances present in Miles, in which the investigators sought to obtain a search warrant for the defendant's bank records after the state supreme court ruled, in reversing his original conviction, that the administrative subpoena which the investigators had originally used to acquire those records was unconstitutional. Miles, 159 Wn. App. at 287-88. This Court observed that it was the supreme court's ruling that motivated the investigators to seek a warrant, and that this was a critical distinction. Id. at 296.

In other words, it is not fatal to the independent source inquiry that the police are already acquainted with evidence they are seeking to lawfully obtain and thus aware of its relevance. If such were the case, it is highly unlikely that the independent source exception could *ever* apply. Instead, courts properly concern themselves with the motivation of the investigators to obtain the warrant itself, as opposed to their interest in the sought-after evidence. Here, the trial court deemed as an undisputed fact that the March 2012 warrant had been sought due to the prosecutor's unease with the sufficiency of the original affidavit. CP 904.

As to the second issue, the trial court reasonably determined that probable cause existed, solely on the basis of information known to the police prior to the issuance of the May 2012 warrant, to justify the March 2012 warrant. The facts of which the police were aware included the violent nature of the crime scene; the absence of any signs at the scene of a burglary or any intent other than to kill Frankel; the fact that Phillip had told Johnson he loved her only a few weeks earlier, only to again be rejected by Johnson; the fact that Phillip continually disparaged Frankel, Johnson's boyfriend; numerous text messages of a romantic bent recently sent by Phillip to Johnson, as seen on her phone; Phillip's denial to police three days after the discovery of Frankel's body of any amorous interest in Johnson; Phillip's refusal to answer police inquiry as to whether he had traveled to Auburn; and Johnson's explanation to police that she could imagine Phillip as the only person who would hurt Frankel, and blamed herself for leading him to believe that she still cared for him even while she dated Frankel. CP 131-34. Under the circumstances, the trial court's determination of probable cause cannot be scoffed at, nor can its conclusion that the police were motivated to seek Phillip's cell

phone records for reasons independent of what they had learned while looking at invalidly-obtained copies of those records.

Finally, Phillip claims that the independent source exception should not apply because the cell usage records generated in April and May 2010, seized pursuant to the May 27, 2010, warrant, would not have existed in March 2012 due to routine destruction of such records by Phillip's cell service provider. Brief of Appellant, at 28-30. This Court rejected this premise – that the independent source exception can apply only when information, as opposed to tangible evidence, was originally unlawfully seized – in Miles. See Miles at 294-95 (holding that the independent source doctrine does not depend on "metaphysical analysis" as to whether unlawfully seized evidence would continue to exist in the absence of that initial seizure, and focuses instead on whether the later seizure is genuinely independent of the original one). Phillip presents no reason for this Court to depart from its reasoning in Miles. Moreover, it must be noted that, for his argument to this Court, Phillip relies on the testimony of a cell service records custodian at Phillip's first trial. Phillip did not present this argument to the trial court at his original pretrial suppression hearing, nor did he renew his CrR 3.6 motion, incorporating this information, at his retrial.

This Court should reject this component of Phillip's argument on the basis of waiver. See RAP 2.5(a).

2. THE TRIAL COURT PROPERLY DENIED PHILLIP'S MOTION TO DISMISS FOR MISCONDUCT.

After obtaining a search warrant in January 2012 to allow investigators to examine Phillip's personal smartphone, the primary investigator, APD Detective Jason Blake, learned from a forensic examiner that Phillip's phone contained an e-mail he sent on the morning after Frankel's murder to a Portland law firm. 40RP 38. In the e-mail, Phillip asked if the firm could represent him for an "alleged violent crime that occurred in Washington State." 40RP 38. The firm responded via an e-mail, also found in Phillip's smartphone, that it was not licensed to practice in Washington, but might be able to help with a referral. 40RP 38. Det. Blake advised the trial prosecutor of his discovery, to which the prosecutor replied, via e-mail, "Holy crap." 40RP 40.

Prior to Phillip's first trial in late 2013, he moved for dismissal, pursuant to CrR 8.3, on the basis of an unconstitutional intrusion into attorney-client protected communication. CP 264-99; 7RP 83-84. Following lengthy argument by counsel, the trial court concluded that Phillip's inquiry with the Portland firm was indeed a

privileged electronic conversation, but that Phillip had failed to demonstrate prejudice such that dismissal was the only appropriate remedy. 8RP 74-82. The court barred the State from offering this e-mail exchange as evidence at trial, something which the State had already indicated it had no interest in doing. 7RP 122-23; 8RP 80-81.

After retrial commenced in late February 2014 following Phillip's initial mistrial, the trial court conducted a second hearing into this intrusion, in light of the state supreme court's decision in State v. Pena Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014), which had been issued 18 days earlier. Phillip sought reconsideration due to the fact that the Pena Fuentes court had definitively held that prejudice was presumed in any instance in which the State intruded into protected communications between a defendant and his counsel, but that the State was permitted to disprove that presumption with proof beyond a reasonable doubt. Pena Fuentes, 179 Wn.2d at 812.

At the hearing on the renewal of Phillip's CrR 8.3 motion, the trial court heard testimony from Det. Blake and the forensic examiner who extracted the electronic communication from Phillip's cell phone. 40RP 14-60; 41RP 3-41. Following testimony,

admission of Det. Blake's entire follow-up report as a pretrial exhibit, an affidavit submitted by the assigned prosecutor,[5] and argument of counsel, the trial court held that the State had indeed rebutted the presumption that Phillip had been prejudiced, and that it could not find any injury to Phillip's rights to due process, counsel, and a fair trial. 42RP 2-7.

Phillip is unable to demonstrate that the trial court erred. It is a matter of well-settled case law that the State is forbidden, at risk of having its charges against a defendant dismissed, from engaging in "purposeful, wrongful intrusion into attorney-client privilege...." State v. Webbe, 122 Wn. App. 683, 697, 94 P.3d 994 (2004). However, while eavesdropping on protected communications is highly problematic, there are circumstances where there is no possibility of prejudice to the defendant, and the extreme remedy of dismissal is not required. Pena Fuentes, 179 Wn.2d at 819. A trial court's decision to dismiss in these circumstances is reviewed for abuse of discretion. Id. at 820.

Such was the case here, as the State proved beyond a reasonable doubt to the trial court's satisfaction. The trial court, while understandably critical of the intrusion itself, sensibly found

[5] CP 764-68.

an absence of harm given that the very brief communication itself did not touch on trial strategy or preparation, and had been discovered by Det. Blake over a year after Phillip had been charged, when the police and prosecutors already had no doubt as to Phillip's involvement in Frankel's death; moreover, they had already been made aware, directly by Phillip, very shortly after the murder, that he had retained an attorney. 42RP 3-4. As the State had shown through Det. Blake's testimony, the police took no meaningful action and discovered no new evidence as a result of his learning of the protected communication. 40RP 23, 24-27, 41-42. The trial court found both Det. Blake's testimony, and the prosecutor's declaration, in which he explained that he had not altered his approach to the investigation or trial of this case after being alerted to Det. Blake's discovery, to be credible. 42RP 5. In addition, the trial court noted that, unlike in other instances of intrusion, here neither the investigators nor the State set out to eavesdrop, but merely stumbled onto a privileged exchange. 42RP 6.

Under these circumstances, the extreme remedy of dismissal of a first-degree murder charge would have been entirely unwarranted. This situation is in no plausible way akin to the cases

on which Phillip relies, in which police set up covert listening devices in jail meeting rooms where attorneys met with their incarcerated clients, or where a State agent took advantage of a court recess to pore over a defense attorney's unmonitored notes during trial. See State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963); State v. Grannacki, 90 Wn. App. 598, 959 P.2d 67 (1998). The trial court properly exercised its discretion in finding that the State had proved beyond a reasonable doubt that the degree of prejudice to Phillip that would justify dismissal had not occurred.

3. THE TRIAL COURT DID NOT ERR BY ALLOWING A REPRESENTATIVE FROM PHILLIP'S CELL PHONE SERVICE PROVIDER TO TESTIFY AT HIS TRIAL.

Phillip next contends that the trial court erred by permitting Kenneth Carter, manager of AT&T's network of cell phone service in the Pacific Northwest, to testify regarding his company's records of Phillip's usage of his AT&T-subscribed smartphone. Phillip maintains that reversal of his murder conviction is necessary because the trial court failed to ensure that Carter was qualified as an expert, pursuant to ER 702, before he took the witness stand. Brief of Appellant, at 52.

Prior to Phillip's first trial, he moved to exclude Carter on the basis that he could not qualify as an expert on the subject of cell phone service and coverage. 11RP 108. The State responded that Carter was only a fact witness, who would simply decipher his company's records concerning Phillip's usage and explain to the jury where cell towers reflected in those records were situated geographically and in which direction the panels on those towers were oriented when they "interacted" with Phillip's phone. 11RP 113-15, 126-27. The State further noted that it did not intend to elicit any opinions from Carter. 11RP 126-27.

The trial court denied the defense motion and indicated it would permit Carter to testify "if the appropriate foundation can be laid, the direction of the phone vis-à-vis the tower, provided, of course, that Mr. Carter can indicate how he knows that and qualifies as an expert on that." 12RP 13. At Phillip's retrial, he ensured that his original objection to Carter's testimony under ER 702 was preserved. 60RP 11.

In his brief to this Court, Phillip fails to cite to any point during Carter's testimony at his first trial at which the appropriateness of the witness's foundation was objected to or challenged, such that the trial court was called upon to assess

Carter's qualifications. Thus, it is unclear whether Phillip even preserved this issue for appeal, as he did not voice any objections anew at his retrial, instead asking the trial court to simply incorporate his original complaints. Moreover, Phillip's contention, below and to this Court, that Carter is an expert witness is dubious, in light of the fact that he was neither asked to offer informed opinion or do anything beyond (a) describing what was in his company's standard-issue usage records and (b) locating the cell tower sites reflected in those records, and their estimated coverage area, on a road map. He is no more an expert under ER 702 than is a bank manager who deciphers for the trier of fact her institution's account records of a particular customer's transaction history, or a city engineer who describes to a jury where a school bus stop is and whether a particular event occurred within 1000 feet of that stop.

Regardless, if this Court chooses to review Phillip's claim on its merits, it can affirm the admissibility of Carter's testimony on any ground supported by the record. State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007). Even if the trial court here was never asked to definitively rule on Carter's qualifications, his testimony provided abundant reason for this Court to be satisfied with them.

A witness need not possess particular academic credentials in order to qualify as an expert witness. State v. Flett, 40 Wn. App. 277, 284, 699 P.2d 774 (1985) (citations omitted). Practical experience may suffice, as ER 702 states that a witness may have particular expertise by virtue of knowledge, skill, experience, training, or education. Id.; see also State v. McPherson, 111 Wn. App. 747, 761-62, 46 P.3d 284 (2002) (observing that an expert witness does not have to be a "rocket scientist," and, in the appropriate context, may be considered an expert due to his practical experience).

Here, Carter more than met the minimum under ER 702. He testified that he had worked in the cell phone industry since 1999, with an emphasis on tower-related assignments and radio frequency engineering. 60RP 29-31. His current position involved monitoring his company's network and setting up temporary special cell tower coverage for special events that could spike usage. 60RP 22-23. He explained that another of his responsibilities at AT&T was to testify in court about his company's network and recordkeeping when asked to do so by AT&T's legal department. 60RP 24-26. He was able to discuss with fluency the technology involved when a person's cell phone interfaces with a cell tower,

and how his company automatically generates records of such interaction as part of its bookkeeping. 60RP 27-36. The only opinion that Carter offered had to do with the accuracy of the usage records his company provided to the State. 60RP 139. In this sense, he was doing little more than authenticating exhibits, an act that can be performed by any fact witness with sufficient familiarity with those exhibits.

Ultimately, Phillip offers nothing other than Carter's lack of an academic degree to cast doubt on the witness's qualification. As the Flett court noted, education is only one of several ways by which a person can obtain particular expertise, and it is not a mandatory means. By virtue of his long professional experience in network coverage, Carter was amply able to testify regarding the tower-related information in his company's records of Phillip's smartphone usage. Phillip's argument should be rejected.

4. THE TRIAL COURT PROPERLY DENIED PHILLIP'S MOTION TO DISMISS DUE TO JUROR MISCONDUCT.

Immediately after the conclusion of the evidentiary phase of Phillip's retrial, the bailiff informed the court and the parties that two jurors had just complained to her regarding a third juror, Juror #10. 66RP 137-38. According to the two complainants, Juror #10

seemed to know more about the case than had been presented during the trial, and had tried without success to engage other members of the jury in conversation about what she knew. 66RP 138. At the request of both parties, the trial court spent the following morning conducting individual examination of the membership of the entire panel, in order to find out what had actually transpired among them.

Jurors #1, #2, #4, and #12 each told the court and counsel that Juror #10 had expressed her belief that this was not Phillip's first trial, and that there must have been an earlier mistrial. 67RP 6-7, 13-14, 19, 38. Jurors #2 and #6 complained that Juror #10 laughed at inappropriate times during a witness's testimony. 67RP 10-12, 24-25. Juror #9 and Juror #15 criticized Juror #10 for wanting to talk to them about items of evidence that had been admitted or to speculate about the parties' strategies; both rebuffed her. 67RP 32-33, 44-47.

Each of these jurors confirmed to the court that he or she would follow the court's instructions and would decide the case based only on the evidence presented. 67RP 8, 13, 20, 26, 33-34, 40-41, 47.

When individually questioned, Juror #10 denied having any discussions with other jurors about the evidence, or that she had discovered information about the case outside of court, or that she had talked about any such information with other jurors. 66RP 34-35.

While the parties agreed with the trial court that Juror #10 needed to be dismissed, the State did not join Phillip's motion for mistrial. 67RP 50. Defense counsel recognized the unlikelihood that its mistrial motion would be granted based on the information presented, and the trial court agreed with counsel's prediction, finding an insufficient basis to declare mistrial, and instead released Juror #10 before proceeding thereafter to providing closing instructions to the jury and to the parties' delivery of their summations. 67RP 56, 60-61.

Phillip challenges the denial of his relatively half-hearted motion for mistrial due to juror misconduct. Such rulings are reviewed for abuse of discretion, and reversal is justified only when no reasonable judge would have reached the same conclusion. State v. DeLeon, 185 Wn. App. 171, 195, 341 P.3d 315 (2014). A trial court's decision to deny a motion for mistrial will be overturned only when there is a substantial likelihood of prejudice that affected

the jury's verdict. Id.; see also State v. Wilmoth, 31 Wn. App. 820, 824, 644 P.2d 1211 (1982).

Here, the trial court took prudent and extensive care to ensure that Juror #10's misbehavior did not infect the other jurors' discharge of their duty, either individually or collectively. The court engaged in particularized inquiry with each juror to assess the scope of any problematic interaction each may have had with Juror #10 and to ensure that such interaction would not interfere with the members' exercise of their task, i.e., to decide the case solely on the evidence presented within the confines of the courtroom. Assured that Juror #10's misconduct, while exasperating and justifying her dismissal, was relatively innocuous in terms of its impact on the other members of the panel, the trial court reasonably deemed it unnecessary to engage in a third trial of the defendant. The trial court did not abuse its discretion in denying Phillip's motion for mistrial.

5. RESENTENCING IS NOT REQUIRED DUE TO PHILLIP'S RESTRAINTS AT RESENTENCING

Lastly, Phillip contends that even if his conviction survives, he is nevertheless entitled to resentencing because he was restrained by handcuffs and foot shackles at his sentencing

hearing. Citing primarily to cases concerning inmates who have been subject to physical restraints *at their trials and in the presence of the jury*, Phillip contends that he was deprived of numerous aspects of his constitutional right to a fair trial because he was subject to shackling at the time of his sentencing, well after his guilt had been determined. Brief of Appellant, at 62-66 (citing, *inter alia*, State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999)).

Phillip's claim should be rejected. As defense counsel acknowledged to the trial court, she could find no case law supporting the proposition that a defendant's rights to the presumption of innocence and to testify on his own behalf without physical restriction are at risk even after the defendant has been convicted and is present only for imposition of punishment. 69RP 9. The illogic of that proposition is self-evident.

Moreover, the trial court did, in fact, engage in consideration particularized to the individual defendant, which it must undertake when deciding whether to restrain a defendant who has not yet been convicted. 69RP 22-24. The court heard from counsel for the King County Department of Adult and Juvenile Detention, who presented a substantive brief addressing the specific reasons why Phillip should be restrained. 69RP 12-21; CP 876-83. The trial

court's individualized determination to keep Phillip restrained was a rational exercise of its discretion. See State v. Walker, 185 Wn. App. 790, 344 P.3d 227 (2015) (holding that it is within the trial court's discretion to keep a defendant restrained at sentencing).[6]

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Phillip's conviction for first-degree murder and leave intact his judgment and sentence.

DATED this 29th day of March, 2016.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: _____
DAVID SEAVER, WSBA# 30390
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

[6] Moreover, Phillip has demonstrated no prejudice that resulted from the trial court's decision. Jail staff agreed to loosen Phillip's restraints so that he could write at counsel table, and his claim to this Court that the trial court's decision to keep him restrained caused him to forgo allocution is entirely without support in the record. 69RP 26; Brief of Appellant, at 66.

APPENDIX A

The Verbatim Report of Proceedings consists of 69 volumes, identified in this brief as follows:

RP NUMBER	HEARING DATE
1RP	5/4/2012
2RP	5/18/2012
3RP	4/5/2013
4RP	7/12/2013
5RP	7/25/2013
6RP	8/9/2013
7RP	9/9/2013
8RP	9/30/2013
9RP	10/15/2013
10RP	10/16/2013
11RP	10/17/2013
12RP	10/21/2013
13RP	10/22/2013
14RP	10/23/2013
15RP	10/25/2013
16RP	10/28/2013
17RP	10/29/2013
18RP	10/30/2013
19RP	10/31/2013
20RP	11/4/2013
21RP	11/19/2013
22RP	11/20/2013
23RP	11/21/2013
24RP	11/25/2013
25RP	11/26/2013
26RP	11/27/2013
27RP	12/3/2013
28RP	12/4/2013
29RP	12/5/2013
30RP	12/9/2013
31RP	12/10/2013
32RP	12/11/2013
33RP	12/12/2013

34RP	12/16/2013
35RP	12/17/2013
36RP	12/18/2013
37RP	12/20/2013
38RP	2/7/2014
39RP	2/21/2014
40RP	2/24/2014
41RP	2/25/2014
42RP	2/26/2014
43RP	2/27/2014
44RP	3/3/2014
45RP	3/4/2014
46RP	3/5/2014
47RP	3/6/2014
48RP	3/10/2014
49RP	3/11/2014
50RP	3/12/2014
51RP	3/13/2014
52RP	3/17/2014
53RP	3/18/2014
54RP	3/19/2014
55RP	3/20/2014
56RP	3/24/2014
57RP	3/25/2014
58RP	3/26/2014
59RP	3/27/2014
60RP	3/31/2014
61RP	4/1/2014
62RP	4/2/2014
63RP	4/3/2014
64RP	4/7/2014
65RP	4/7/2014 (different reporter)
66RP	4/8/2014
67RP	4/9/2014
68RP	4/11/2014
69RP	6/27/2014

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Nancy Collins, containing a copy of the Brief of Respondent, in State v. William Phillip, Jr., Cause No. 72120-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name

3/28/16
Date

Done in Seattle, Washington