

FILED  
Court of Appeals  
Division II  
State of Washington  
10/17/2018 3:30 PM  
NO. 51473-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

LYNN MEREDITH LEWIS, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-02268-3

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly denied Lewis's motion to suppress the evidence found in his cell phone because an independent source provided probable cause that supported the issuance of the search warrant for Lewis's phone.**
- II. **The trial court properly instructed the jury that they had a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict.**

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

Lynn Meredith Lewis was charged by second amended information with Possession of a Controlled Substance with Intent to Deliver – Methamphetamine, which included a school bus route stop enhancement, Possession of Ephedrine or Pseudoephedrine with Intent to Manufacture Methamphetamine, and seven counts of Unlawful Possession of a Firearm in the First Degree as a result of evidence discovered pursuant to a search warrant that was executed on or about October 17, 2017 at a residence at which Lewis was staying. CP 17-19, 31-39. On December 14, 2017, the police executed a search warrant on Lewis's cellphone and discovered text message evidence that connected him to the crimes for which he was charged. RP 305-329, 331-354; CP 43-51.

Prior to trial, Lewis moved to suppress the evidence that the police found during the execution of each warrant arguing that the first warrant lacked probable cause due to staleness, that the initial search of his cellphone was unlawful absent a warrant, and that the second search of his cell phone, which was pursuant to a search warrant, was unlawful due to a *Franks*<sup>1</sup> issue. CP 21-29. The trial court, the Honorable Bernard Veljacic, denied Lewis's motion and concluded that even if Lewis was correct as to unlawful nature of the initial search of his phone that the independent source doctrine applied to search warrant that authorized the search of his phone. RP 44-46; CP 251-55.

The case proceeded to a jury trial where the jury convicted Lewis as charged to include the school bus stop route enhancement. RP 523-27; CP 203-212. The trial court sentenced Lewis to a standard range sentence of 120 months of confinement. RP 548; CP 222-23. Lewis filed a timely notice of appeal. CP 235-36.

#### B. STATEMENT OF FACTS

On October 17, 2017, the police obtained a search warrant to search for evidence of methamphetamine distribution at a residence at 4501 Addy Street in Washougal, Washington. Instead of going to the residence right away to serve the warrant and search the residence, the

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<sup>1</sup> *Franks v. Delaware*, 438 U.S. 154, 99 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

police conducted a ruse to get known resident Stacey Kinley out of the home. RP 113-14. The police told Kinley that she had been the victim of identity theft, though she had not been, and asked her to meet at the local Bi-Mart parking lot. RP 113-14. Lynn Lewis, who was unknown to the police at the time, drove Kinley to the parking lot to meet the officers. RP 114.

Following a conversation with Kinley and a search of her person and her cell phone, the officers suspected that Lewis was involved with Kinley in the distribution of methamphetamine. RP 115-16, 202-06, 296-97. Lewis initially told the police neither he nor Kinley sold or used drugs. RP 206. But when he was searched prior to transport over to the Addy Street address, the police discovered methamphetamine on his person and Lewis exclaimed "I guess I have dope on me." RP 115-16, 206, 250-51, 296. During this contact the police also seized Lewis's cell phone. RP 297.

The police then executed the search warrant at the 4501 Addy Street address. Sharon Cowen owned the residence but in the recent past had often been absent due to her frequent travelling to see relatives and to receive medical treatment. RP 99, 105, 110, 205. Cowen's daughter, Kinley, lived at the residence too and her boyfriend, Lewis, had been staying there about four days a week for some time. RP 99-100, 105, 110-

11, 204-05. Lewis was working on repairing or remodeling the home. RP 109-110, 204.

Upon searching the residence, the police discovered the following in the room that Lewis and Kinley shared: methamphetamine, a digital scale, hundreds of allergy pills (pseudoephedrine, hydrochloride, and chlorpheniramine), which are utilized in the manufacture of methamphetamine, red phosphorous powder, which can be used to manufacture methamphetamine, a large amount of small plastic baggies some of which contained residue, a methamphetamine pipe, U.S. currency, and an automotive product called "HEET," which can also be used in the manufacture of methamphetamine. RP 151-59, 172-76, 207-211, 213-14, 217, 246-250, 253-262, 299-300. The police also discovered nine firearms in a closet in Cowan's room, closet, or safe, two of which she owned, and the others, which Cowan indicated part of a collection that Lewis had brought over to the residence, formed the basis for the Unlawful Possession of Firearm charges. RP 106, 108-09, 160-64, 186-196. The police also found additional methamphetamine, baggies, and a scale in Cowan's bathroom and even more methamphetamine in a hallway location. RP 157, 159, 179-183, 196-98.

During the execution of the search warrant at the residence the police confronted Lewis with what they had found. RP 218-19, 227. Lewis

admitted that he was not truthful with the police initially and told the police that he knew that Kinley was involved in frequent and on-going methamphetamine possession and sales, and that these sales occurred within the Addy Street residence multiple times a day. RP 219. Lewis said that he personally witnessed these transactions, named some of Kinley's buyers, and claimed that Kinley made about \$1,000 a month selling methamphetamine. RP 219-220, 223-25. Lewis also told the police that methamphetamine that was earlier discovered on him was just a "nickel of methamphetamine" and that he smoked some of it in Portland, but that he was not a regular user. RP 220-21. Additionally, Lewis was able to tell the police where the drug evidence would be found in the room that he shared with Kinley and discussed a couple of the firearms. RP 222, 302-303.

Finally, the police searched Lewis's cell phone pursuant to a search warrant. RP 305, 308. The messages contained therein, many to or from Kinley, linked Lewis to the methamphetamine distribution occurring at the Addy Street residence as well as the discovered firearms. RP 308-329, 331-354. For example, in one message from Kinley to Lewis, Kinley states "Shawna and Mike both want a ball in forty-five minutes. I'm gonna give her your number." RP 319. After some additional back and forth, Lewis responds to say "Mike and Shawna has [sic] not contact me yet. Should I just go to your house and get the ice? . . ." RP 320-21. Regarding

the firearms, Lewis sent multiple texts about his desire to sell firearms consistent with the firearms found at the residence to include one that stated “I’ve been waiting for a guy to buy this pistol but he’s already at three days. He’s trying to get the money up for it. Eight hundred and fifty bucks – that’s how much that pistol he wants.” RP 352-54.

## ARGUMENT

### **I. The trial court properly denied Lewis’s motion to suppress the evidence found in his cell phone because an independent source provided probable cause that supported the issuance of the search warrant for Lewis’s phone.**

Lewis argues that the initial search of his phone was unlawful and that the independent source doctrine does not apply to the second search of his phone, which was authorized by a search warrant. Br. of App. at 10-20. As a preliminary matter, the State agrees with Lewis’s contention that the initial *search* of Lewis’s phone was unlawful.<sup>2</sup> Br. of App. at 10-15.

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<sup>2</sup> Lewis does not now, nor did he below, challenge the seizure of his person *or* of his cell phone. RP 23-30, 40-42; CP 21-29; Brief of Appellant at 9-20. On the contrary, Lewis’s arguments have always focused on the search of the phone. RP 23-30, 40-42; CP 21-29; Br. of App. at 9-20. At the CrR 3.6 hearing, Lewis did not develop a factual record, but instead relied on the facts contained in the search warrant affidavit for his legal arguments. Thus, arguments based on the seizure of either his person or phone were not preserved. That Lewis did not claim his cell phone was unlawfully seized makes sense since officers can seize items that they immediately recognize may be “useful as evidence of a crime.” *State v. O’Neill*, 148 Wn.2d 564, 583, 62 P.3d 489 (2003) (citing *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)); *State v. Huff*, 64 Wn. App. 641, 648-653, 826 P.2d 698 (1992); *see also State v. Ng*, 104 Wn.2d 763, 770-71, 713 P.2d 63 (1985). By the time Lewis’s phone was seized he had been implicated in Kinley’s drug dealing. RP 49-50, 55-56, 60-63, 66, 80, 202-06, 296-97; CP 46.

Accordingly, the police should not have included any information obtained from the initial search of Lewis's phone in the search warrant affidavit authored to obtain the search warrant for his phone. But the search warrant affidavit contained sufficient facts, independent of the illegal search, to establish probable cause to search Lewis's phone. Thus, the independent source doctrine applies and the trial court properly denied Lewis's motion to suppress.

The information, in total, that the police included in the search warrant affidavit obtained from the initial search of the phone follows:

Pursuant to the authority granted in the search warrant, I viewed text messages in *both* cellular phones. I observed text messages in *both* phones, which supported the suspicion that *both* Kinley and Lewis are selling methamphetamine.

CP 46 (emphasis added). After a straightforward and grammatically correct excising of the information learned from the search of Lewis's phone the above passage—supported by the evidence adduced at trial—should be read to say:

Pursuant to the authority granted in the search warrant, I viewed text messages in [*Kinley's*] cellular phone[]. I observed text messages in [*Kinley's*] phone[], which supported the suspicion that *both* Kinley and Lewis are selling methamphetamine.

CP 46 (emphasis added), 253 (Finding of Fact #9).

The search warrant affidavit also contained the following independently obtained information suggesting that probable cause existed to believe Lewis was involved in methamphetamine distribution: (1) a separate search warrant that authorized the search of a residence for evidence of methamphetamine distribution; (2) Lewis admitted he had been staying at this residence about 4 days a week; (3) Kinley informed officers that she was selling methamphetamine out of this residence for Lewis, but that he was the primary seller; (4) methamphetamine was found on Lewis's person; (5) methamphetamine, a pipe, and a scale were found in the bedroom that Lewis and Kinley shared; (6) additional methamphetamine, packaging materials, a scale, ephedrine pills, US currency, and other methamphetamine production materials were found in the residence; (7) Lewis later admitted to being aware of the presence of methamphetamine in the bedroom, smoking methamphetamine, and that Kinley was selling methamphetamine out of the bedroom; (8) information from Cowan, Kinley, and Lewis himself that linked him to the found firearms; and (9) Lewis had been charged with multiple drug and firearm crimes based on the discovered evidence prior to police authoring the search warrant affidavit for this phone. CP 45-50. Based on the above information, the training, knowledge, and experience of the police author of the search warrant affidavit regarding cell phones and drug distributors,

and the text messages found on Kinley's cell phone that supported the suspicion that both Kinley and Lewis were selling methamphetamine, probable cause existed to believe that evidence of drug distribution would be found on Lewis's phone. Consequently, an independent source provided the probable cause to search Lewis's phone after the unlawfully obtained information was excised from the search warrant affidavit.

a. Standard of Review

Reviewing courts are to examine affidavits in support of a search warrant in "a commonsense, not a hypertechnical manner." *State v. Ollivier*, 178 Wn.2d 813, 847, 312 P.3d 1 (2013) (citations omitted). Moreover, "[d]oubts concerning the existence of probable cause are generally resolved in favor" of the validity of the search warrant. *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002); *State v. Chenoweth*, 160 Wn.2d 454, 158 P.3d 595 (2007). And while typically a magistrate's decision to issue a search warrant is reviewed for abuse of discretion, when an affidavit supporting a search warrant contains information that was illegally obtained the determination of whether the remaining information "amounts to probable cause is legal question that is reviewed de novo." *Ollivier*, 178 Wn.2d at 847-48 (citing *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010)); *State v. Eisfeldt*, 163 Wn.2d 628, 640, 185 P.3d 580 (2008) (holding that a reviewing court "must view the

warrant without the illegally gathered information to determine if the remaining facts present probable cause to support the search warrant”) (citation omitted).

b. Probable Cause

Under both the Constitution of the United States and Washington’s Constitution, a search warrant may issue only upon a determination of probable cause.<sup>3</sup> *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference” that that evidence of the crime can be found at the place to be searched. *Id.*

When examining an affidavit for probable cause judges ““may draw reasonable inferences about where evidence is likely to be kept. . . .”” *State v. Dunn*, 186 Wn.App. 889, 897, 348 P.3d 791 (2015) (quoting *State v. Gebaroff*, 87 Wn.App. 11, 16, 939 P.2d 706 (1997)). Nonetheless, “[a]lthough common sense and experience inform the inferences reasonably to be drawn from the facts, broad generalizations do not alone establish probable cause.” *Thein*, 138 Wn.2d at 148-49.

Probable cause itself “may be based on hearsay, a confidential informant’s tip, and other unscrutinized evidence that would be

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<sup>3</sup>“In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Brinegar v. U.S.*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949).

inadmissible at trial.” *Chenoweth*, 160 Wn.2d at 475 (citing *State v. Huft*, 106 Wn.2d 206, 209-210, 720 P.2d 838 (1986)); *Franks v. Delaware*, 438 U.S. 154, 164-65, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). That these types of evidence can establish probable cause is unsurprising since “the concept of probable cause . . . requires not certainty but only sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity will be found.” *Id.* (citation omitted).

c. Independent Source Doctrine

Under the independent source doctrine, evidence tainted by “unlawful police action is not subject to exclusion ‘provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action.’” *State v. Betancourth*, 190 Wn.2d 357, 364-65, 413 P.3d 566 (2018) (quoting *State v. Gaines*, 154 Wn.2d 711, 718, 116 P.3d 993 (2005)). “The independent source doctrine recognizes that probable cause may exist for a warrant based on legally obtained evidence when the tainted evidence is suppressed.” *Id.* at 365. Therefore, reviewing courts are to uphold a search warrant unless the illegally obtained information in the search warrant affidavit was “*necessary* to the finding of probable cause.” *State v. Garrison*, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992) (emphasis in original) (citations omitted); *State v. Coates*, 107 Wn.2d 882, 887-89, 735 P.2d 64 (1987).

The independent source doctrine ensures that the State neither benefits from its unlawful conduct nor is it placed in a worse position than it otherwise would have occupied. *Gaines*, 154 Wn.2d at 720; *Betancourth*, 190 Wn.2d at 365, 371-72.

Our Supreme Court recently described the independent source doctrine in *Betancourth*:

In its classic form, the independent source doctrine applies when the State procures the challenged evidence pursuant to a valid warrant, untainted by prior illegality. In the first type of independent source scenario, police conduct an initial unwarranted search of a constitutionally protected area, during which they discover but do not seize incriminating items. Police later obtain a search warrant for the area and seize the evidence during the warranted search.

For example, in *Gaines*, the police performed an illegal warrantless search of the trunk of the defendant's car, during which officers saw what appeared to be the barrel of an assault rifle and numerous rounds of ammunition. Rather than seizing the items, officers immediately closed the trunk without disturbing the contents. The following day, the police sought a search warrant for the defendant's trunk, which included a single reference to the officer's observation of the weapon, as well as other evidence to establish probable cause. After obtaining the warrant and searching the vehicle, the police recovered the rifle and ammunition from the trunk of the defendant's car. We concluded that this conduct violated article I, section 7 and that the appropriate remedy was to strike all references to the initial illegal search from the warrant affidavit when assessing whether probable cause existed to issue the original warrant; we held that the evidence was ultimately seized pursuant to a lawful warrant.

190 Wn.2d at 368-69 (internal citations omitted). *Betancourth* also described a second scenario in which the independent source doctrine can apply, which “involves police executing a valid warrant authorizing the seizure of evidence that had initially been seized illegally.” *Id.* at 369. Just as with the “classic” scenario, so long as the evidence “was later lawfully obtained” that the evidence was originally, unlawfully *seized* does not render the evidence inadmissible. *Id.* at 369 (citing *State v. Miles*, 159 Wn.App. 282, 294-95, 244 P.3d 1030 (2011)). As our Supreme Court explained, “our law does not require a ‘do over’ in situations such as this . . .” and the “lack of a seizure under [a] second warrant” should not be deemed fatal.” *Betancourth*, 190 Wn.2d at 371. To hold otherwise and “[t]o always require the physical reseizure of evidence initially seized unlawfully but later authorized would go beyond protecting the privacy interests of individuals in this state and would not serve the ends of justice.” *Id.*

Additionally, to determine whether a search warrant is truly an independent source for the discovery of the challenged evidence a court must determine whether the “police would have sought the warrant even absent the initial illegality.” *Id.* at 365. If not originally ruled upon, oftentimes this determination must be made by the trial court following remand. *State v. Spring*, 128 Wn.App. 398, 405, 115 P.3d 1052 (2005)

(citations omitted); *Miles*, 159 Wn.App. at 296-98; *but see Gaines*, 154 Wn.2d at 721-22 (concluding that a finding that the police would have obtained the items “through the course of predicable police procedures” was adequate and did not require remand).

Here, Lewis contends that the independent source doctrine does not apply to the search of his phone and advances four arguments in which he attempts to distinguish his case from the cases of *State v. Gaines*<sup>4</sup> and *State v. Smith*.<sup>5</sup> 154 Wn.2d 711, 113 Wn.App. 846, 55 P.3d 686 (2002). He argues that contrary to *Gaines* and *Smith* that (1) the search warrant that authorized the search of his phone contained “significant discussion of the seizure and inspection of the cell phone;” (2) “the evidence was actually seized;” (3) “law enforcement waited a significant period of time before obtaining a search warrant;” and (4) “law enforcement had [in]sufficient information to obtain a search warrant . . . prior to the illegality.” Br. of App. at 18-19. Lewis’s narrow focus on these two

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<sup>4</sup> *Gaines* is summarized, *supra*, by our Supreme Court in *Betancourth*. 190 Wn.2d at 368-69. An additional fact in *Gaines* is that the suspect vehicle was impounded and then searched the following day pursuant to the search warrant. 154 Wn.2d at 714-15.

<sup>5</sup> Lewis accurately summarizes the facts of *Smith* as follows: “[P]olice developed probable cause to search a residence for drugs and some officers left to contact a magistrate about a search warrant. While waiting for the warrant, the remaining officers continued to search the property, although nothing was seized. None of the information learned during this intervening period was included in the search warrant affidavit. After the search warrant was authorized, the illegal contraband previously observed was seized.” Br. of App. at 17.

factually distinguishable cases and misapplication of the independent source doctrine defeats his arguments.

First, the search warrant affidavit in this case did not contain a significant discussion of the evidence found on Lewis's phone. CP 46. On the contrary, it contains two sentences, one referencing that text messages were viewed and one stating that the text messages provided evidence of Lewis and Kinley selling methamphetamine:

Pursuant to the authority granted in the search warrant, I viewed text messages in both cellular phones. I observed text messages in both phones, which supported the suspicion that both Kinley and Lewis are selling methamphetamine.

CP 46. The rest of the search warrant affidavit discussing the investigation and other evidence discovered totals approximately 130 sentences. CP 45-49. Thus, this case is not meaningfully distinguishable from *Gaines*, in which a single statement referencing the unlawfully observed firearm was included in the subsequent search warrant affidavit.

Moreover, as Lewis notes, the text message evidence retrieved from Lewis's phone—some of which he excerpts in his Statement of Facts—was “powerful evidence,” yet none of that evidence appears in the search warrant affidavit. Br. of App. at 20; CP 46. Nonetheless, the actual question is not “how much unlawfully observed information was included in the affidavit?” but, instead, whether when “view[ing] the warrant

without the illegally gathered information . . . the remaining facts present probable cause to support the search warrant.” *Eisfeldt*, 163 Wn.2d at 640. Here, the remaining facts, to include Kinley’s statements and text messages inculcating Lewis, Lewis’s own statements regarding his knowledge of the drug dealing at the home and drug use, the methamphetamine found on his person, and the drug evidence found in the bedroom in the home at which he regularly stayed, all together constitute probable cause.

Second, Lewis claims that the evidence (text messages) “was actually seized” prior to the procurement of the warrant and that this case’s posture is, therefore, in contrast to the situations in *Gaines* and *Smith*. Br. of App. at 18. This is a questionable proposition. In *Gaines*, where Lewis claims no seizure occurred prior to the procurement of the warrant, the police had control of the defendant’s car, opened the trunk and observed the firearm (the unlawful search), closed the trunk, *impounded the vehicle*, and executed a search warrant the next day to collect the evidence. 154 Wn.2d at 714-15. In *Smith*, the officers were conducting an illegal search prior to procurement of the warrant by wandering around the premises of the suspect residence making observations. Br. of App. at 18.

Here, the police seized Lewis's phone, looked into and observed some of the *actual evidence* (the unlawful search), and then secured the cell phone for the purposes of getting a search warrant to retrieve or seize the evidence. CP 44-46. Thus, just as in *Gaines*, the police in this case seized the suspect's property that contained evidence, unlawfully looked into that property and observed evidence of criminality, and then secured that property in anticipation of a search warrant. Similarly, in *Smith* the police controlled the defendant's property until search warrant was procured to commence the full, lawful search despite the unlawful observations. Accordingly, there is no meaningful distinction to be made as to when the "evidence was actually seized" when considering this case with *Gaines* and *Smith*. If in *Gaines* the latter search of the trunk pursuant to the search warrant was valid under the independent source doctrine then so was the latter search of Lewis's phone.

Furthermore, whether the evidence "was actually seized" prior to procurement of the warrant is of no moment since our Supreme Court has explicitly concluded that the independent source doctrine can apply when "police execut[e] a valid warrant authorizing the seizure of evidence that had initially been seized illegally." *Betancourth*, 190 Wn.2d at 369. The real inquiry is not into the sequence of the search or seizure, but, following an unlawful seizure, whether "the evidence was later lawfully obtained."

*Id.* (citing *Miles*, 159 Wn.App. at 294-95). Here, the text message evidence was later lawfully obtained since it was obtained pursuant to a valid search warrant for Lewis's phone supported by probable cause.

Third, Lewis's apparent contention that the time between the illegality and the execution of the search warrant in some way determines whether the independent source doctrine applies is incorrect and not supported by authority. Br. of App. at 18-19. Lewis comments that in *Gaines* and *Smith* the police obtained a search warrant the next day and as the illegality occurred, respectively. Br. of App. at 19. Lewis then notes that here the search warrant for his phone was not obtained for "57 days to be exact." Br. of App. at 19. Lewis does not, however, explain why this time period is significant. *Miles* and *Betancourth* suggest that this time period is not significant and not part of determining whether the independent source doctrine applies.

In *Miles*, on June 13, 2001, the State issued an administrative subpoena to Washington Mutual Bank for the defendant's bank records. 159 Wn.App. at 286-87. Based on those records the State charged the defendant with multiple financial crimes. *Id.* 287. The defendant filed a motion to suppress arguing that bank records required a search warrant, but the trial court denied the defendant's motion. *Id.* In 2007, the Supreme Court granted discretionary review and reversed holding that a search

warrant was needed to search or seize bank records. *See State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007). Then, following the mandate, and approximately 6 years after the unlawful seizure of the defendant's bank records (the administrative subpoena), the State obtained a search warrant for a portion of the same records. *Miles*, 159 Wn.App. at 287-88.

Nonetheless, the independent source doctrine could still apply so long as the State showed that the motivation to seek the warrant was not based on information gained in the illegal search. *Id.* at 292-98; *see also Betancourth*, 190 Wn.2d at 369-372.

Similarly, in *Betancourth* our Supreme Court held that a valid warrant issued over one year after an invalid warrant, which was used to obtain the same records, was an independent source of the evidence. 190 Wn.2d at 370-73.<sup>6</sup> Accordingly, that the State waited 57 days from the time Lewis's phone was seized to obtain a warrant to search the phone is irrelevant to the determination of whether the independent source doctrine applies.

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<sup>6</sup> “[I]f the lack of a seizure under the second warrant were deemed fatal, then it would seem difficult to justify *Coates* and *Gaines* as legitimate independent source cases. In neither of those cases did the State obtain a second, valid warrant; rather, on appeal we backed out the unlawfully obtained information in the original warrant and held the warrant was otherwise valid. Similarly here, it is possible to back out the 2012 district court warrant and deem the records seized under the valid 2013 superior court warrant.” *Betancourth*, 190 Wn.2d at 371.

Fourth, Lewis argues that at the time of the unlawful search of his phone the police lacked probable cause to “obtain a search warrant” for it, stating that “at the time [the police] seized and examined the cell phone, [t]he[y] knew nothing of Mr. Lewis.” Br. of App. at 19. But this claim cannot be made with any degree of confidence, and should be considered waived, as Lewis’s decision not to raise the point below prevented the development of a robust record on the point.<sup>7</sup> The record that does exist, on the other hand, as part of the CrR 3.5 hearing and the second search warrant affidavit, suggests that by the time Lewis’s phone was seized that the police knew who he was, where he had been staying (the location at which they were going to serve a search warrant to look for evidence of drug crimes), and that he had been implicated in Kinley’s drug dealing. RP 49-50, 55-56, 60-63, 66, 80, 202-06, 296-97; CP 46.

Nonetheless, to the extent that Lewis’s point is true, this factual distinction between his case and *Gaines* and *Smith* is legally insignificant. And Lewis presents no argument as to why it should matter when determining whether the independent source doctrine applies. Br. of App. at 19. As indicated above, the independent source doctrine states that evidence tainted by “unlawful police action is not subject to exclusion ‘provided that it ultimately is obtained pursuant to a valid warrant or other

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<sup>7</sup> As noted above, no witnesses were called as part of the CrR 3.6 hearing.

lawful means independent of the unlawful action.” *Betancourth*, 190 Wn.2d at 364-65 (quoting *Gaines*, 154 Wn.2d at 718). Thus, the question of whether the police had probable cause to obtain a search warrant for Lewis’s phone at the time it was unlawfully examined need not be answered to determine whether the police ultimately obtained the evidence “pursuant to a valid warrant or other lawful means independent of the unlawful action.” *Id.* As a result, Lewis’s argument fails.

Finally, the trial court properly concluded that “[t]he Independent Source Doctrine also applies here and would have allowed for a search of the defendant’s phone *in that it would have been seized and searched pursuant to the warrant regardless*, after Ms. Kinley stated she was dealing Meth [sic] at the direction of Mr. Lewis, and after all the aforementioned evidence was found at the residence.” CP 255 (Conclusion of Law #6). Consequently, just as in *Gaines*, the trial court’s findings support the conclusion that the “police would have sought the warrant even absent the initial illegality” as is required for the independent source doctrine to apply. *Betancourth*, 190 Wn.2d at 365; *Gaines*, 154 Wn.2d at 721-22. Because the text message evidence from Lewis’s phone was ultimately obtained pursuant to a valid warrant and the police would have sought the warrant absent the initial unlawful search of the phone, the

independent source doctrine applies and the trial court correctly denied Lewis's motion to suppress.

**II. The trial court properly instructed the jury that they had a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict.**

Lewis argues that it was constitutional error for the trial court to decline to modify WPIC 1.04 to include the language "You may only deliberate when all twelve jurors are present." Br. of App. at 20, 22. Lewis contends that without this modification that the jury instructions given denied him his right to a unanimous verdict. Br. of App. at 22. Because the jury was (1) properly instructed that "[a]s jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict;" and (2) individually polled after the verdict that the verdict was "the verdict of the jury," the trial court did not err and the jury returned a unanimous verdict. WPIC 1.04; RP 523-27; CP 156.

a. Standard of Review

Alleged errors of law in a trial court's jury instructions are reviewed de novo. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Absent a legal error, however, a trial court's decision regarding the specific language of an instruction is reviewed for an abuse of discretion. *State v. Jensen*, 149 Wn.App. 393, 399, 203 P.3d 393 (2009).

b. Unanimous Verdict

Criminal defendants have a constitutional right to a unanimous jury verdict. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (citations omitted). WPIC 1.04 properly instructs the jury how “to deliberate together in the constitutionally required manner” and states, in relevant part: “As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors.” *Id.* at 585-86; WPIC 1.04; *State v. Sullivan*, 3 Wn.App.2d 376, 380, 415 P.3d 1261 (2018) (recognizing *Lamar*’s approval of instructions patterned on WPIC 1.04). Furthermore, “[p]olling a jury, when properly carried out, is generally evidence of jury unanimity.” *Id.* at 587. When a jury has affirmatively been misinformed about how to deliberate or other evidence on the “record affirmatively shows a reason to seriously doubt that the right [to unanimity] has been safeguarded” then polling the jury may not be sufficient to establish that the jury returned a unanimous verdict. *Id.* at 587-88.

Here, the trial court gave an instruction patterned on WPIC 1.04 and properly polled the jury to ensure that the verdicts were unanimous. RP 523-27; CP 156. Thus, in following *Lamar*, the trial court did not

abuse its discretion in rejecting Lewis's proposed modification to WPIC 1.04.

Lewis does not attempt to wrangle with *Lamar*, explain why the jury polling was insufficient, advance an argument that the "record affirmatively shows a reason to *seriously* doubt" that his right to unanimity was violated, or argue why the instruction given, patterned on WPIC 1.04, was constitutionally insufficient. 180 Wn.2d at 587-88 (emphasis added). Nor does he cite authority for the proposition that his modified jury instruction must be given in order to ensure a unanimous verdict, i.e., that his proposed instruction is constitutionally required. Consequently, Lewis's claim fails.

Nonetheless, to the extent that Lewis has established instructional error, said error is harmless. Here, the drug and firearm evidence discovered in the residence in which Lewis was staying, the methamphetamine found on Lewis's person, Lewis's own statements evincing his knowledge of the drug trade and the drug dealing from the residence, and the text messages from his phone showing his intimate involvement in the distribution of the drugs and sole responsibility for the presence of the unlawful firearms established beyond a reasonable doubt that the complained about instructional error was harmless.

**CONCLUSION**

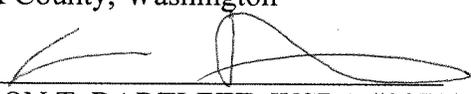
For the reasons argued above, this Court should affirm Lewis's convictions.

DATED this 17<sup>th</sup> day of October, 2018.

Respectfully submitted:

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October 17, 2018 - 3:30 PM

## Transmittal Information

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**Appellate Court Case Number:** 51473-7  
**Appellate Court Case Title:** State of Washington, Respondent v. Lynn M. Lewis, Appellant  
**Superior Court Case Number:** 17-1-02268-3

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