

No. 98591-0

NO. 78704-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

LYNELL DENHAM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Helen Halpert, Judge

CORRECTED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The searches of appellant Lynell Denham's residence and cell phone records violated the Fourth Amendment and article I, section 7 of the Washington Constitution, where they were based on constitutionally invalid warrants.

2. The trial court erred in relying on illegally obtained evidence discovered in the searches of Denham's residence and cell phone records in finding Denham guilty of second degree burglary and first degree trafficking in stolen property. CP 322-23 (Findings of Fact 25-30, 34, 39).

3. The trial court erred in admitting ER 404(b) evidence for knowledge where knowledge is not an element of burglary.

4. Defense counsel was constitutionally ineffective to the extent he agreed to admission of prior bad acts as evidence of knowledge.

5. The trial court erred in relying on inadmissible ER 404(b) evidence in finding Denham guilty of burglary and trafficking in stolen property. CP 322-23 (Findings of Fact 31, 32, 34, 39).

6. Cumulative error deprived Denham of his right to a fair trial.

7. The trial court erred in concluding Denham was guilty of second degree burglary and first degree trafficking in stolen property. CP 324 (Conclusions of Law II, III).

Issues Pertaining to Assignments of Error

1. Are the warrants to search Denham's residence and cell phone records unconstitutional, where the affidavits in support of the warrants (1) failed to establish a nexus between the items to be seized (stolen jewelry and burglary tools) and Denham's residence, and (2) failed to establish a nexus between criminal activity and Denham's cell phone?

2. Did the trial court err in admitting ER 404(b) evidence of Denham's specialized knowledge of burglaries, where knowledge is not an element of burglary and the evidence really went to Denham's identity—an excluded and impermissible basis for it?

3. Did cumulative error deprive Denham of a fair trial, where little admissible evidence remains?

B. STATEMENT OF THE CASE

On October 9, 2017, the State charged Lynell Denham with one count of second degree burglary, contrary to RCW 9A.52.030, and one count of first degree trafficking in stolen property, contrary to RCW 9A.82.050. CP 1-2. Denham proceeded to a bench trial in spring of 2018. RP 7-8; CP 90. The following evidence was introduced.

1. Break-in at Mallinak's Jewelry Shop

Frank Mallinak designs and sells jewelry at a retail jewelry shop in Kirkland, Washington, called Mallinak Design Jewelers. RP 317-18. The

shop is equipped with an alarm system, including door sensors and motion detectors, but no cameras. RP 322, 333. Every night, Mallinak stores cash, loose gemstones, and any jewelry of value in a large safe behind the jewelry showroom. RP 330-32, 361-63, 792. The safe is also equipped with a proximity alarm and door sensors. RP 329. The back door of Mallinak's shop enters into a locked utility room, which leads to an alley. RP 327, 333-34.

Mallinak closed the shop for the weekend on Friday evening, November 11, 2016. RP 320-21. He returned Monday morning, November 14. RP 319-20. Mallinak immediately noticed the alarm panel was not beeping as usual and there was a burnt oil smell inside. RP 319-20, 340-43. He saw the wires to the alarm panel had been cut and the large safe opened. RP 341-44. Mallinak called 911. RP 343.

Sergeant Michael Vickers arrived first, followed later by Detective Allan O'Neill. RP 46-48, 785-86. Together with Mallinak, they surmised that someone had scaled outdoor utility pipes to the roof and then accessed the back utility room through a roof hatch, which was missing a padlock. RP 53-55, 359-60. From the utility room, the door into Mallinak's shop was sawed laterally in half below a metal security bar. RP 50-51, 339-40.

Inside Mallinak's shop, two holes had been drilled in the large safe. RP 48-49, 379-83. The safe had been emptied of all its contents,

including a large 5.29 carat diamond with its Gemological Institute of America (GIA) certificate. RP 361-64, 384, 791-92, 798-99. GIA evaluates the gemstone's quality (clarity, color, etc.), inscribes a serial number on the edge of the stone, and issues a certificate for it. RP 363-66. The certificate "is like a fingerprint"; "It shows ownership." RP 1003.

An alarm report showed one of Mallinak's motion detectors went into trouble mode at 11:22 p.m. on November 11 and was restored at 11:26 p.m. RP 757. There was another motion activation at 1:40 a.m. on November 12, but nothing else of note. RP 757-58. Neither Mallinak nor the police were notified, though, because Mallinak's alarm system required door or glass alarm activation in addition to motion activation. RP 761.

Mallinak's shop and the utility room were dusted for fingerprints. RP 791. The only fingerprints of value came from an electrical panel in the utility room and belonged to a person who had serviced the panel. RP 947-53. An empty rum bottle was found inside Mallinak's shop, which had been mostly full when Mallinak closed on Friday. RP 48-49, 72-74. There was too little DNA on the rum bottle to find a match. RP 948, 953-54. Nor could any prints or DNA be recovered from an out-of-place plastic cap Mallinak found near the safe. RP 799-803, 947. Latex gloves

were found discarded in the alley behind Mallinak's shop, but were never tested for DNA. RP 57-58, 1033-34.

2. Police Investigation of Denham

On November 15 or 16, Denham approached Andy Le wanting to sell the 5.29 carat diamond. RP 702, 720-21. Le owns a jewelry store in Seattle, but works mostly with gold rather than gemstones. RP 698-703. Le initially refused but ultimately agreed to buy the diamond for \$29,000 once he learned Denham needed the money for his father and Le talked to his friend Edwin Jue, another jeweler. RP 703-10, 724. Denham told Le his family was in the jewelry business, explaining he bought the diamond and showing Le a receipt. RP 709, 719. Denham gave Le the diamond's GIA certificate, readily presented his identification, and averred under penalty of perjury that the gem was not stolen. RP 707-08, 713, 725-27, 814-18.

Le then sold the diamond for \$30,000 to Jue, who also owns a jewelry shop in Seattle. RP 243-57. Jue sold the diamond for \$32,000 to Bryan Chrey, who owns a jewelry shop in Bremerton. RP 262-63, 566-68, 574. Within a couple days, Chrey sold the diamond on note for \$37,000 to Mark Miceli, a diamond broker in Seattle. RP 574-76, 581, 994-97, 1005-07. Miceli also subsequently sold the diamond, but was able to retrieve it

and turn it over to the Kirkland police.¹ RP 844, 1009. Everyone testified they had no reason to believe the diamond was stolen, given the GIA certification that accompanied it—“[T]he certification shows you own it.” RP 255, 275, 578-79, 725-27, 1004-05, 1010.

On November 14, Denham sold necklace clasps to Mark Kosin at Topkick Jewelry and Loan, a pawn shop in Tacoma. RP 452-53, 460-61. Denham readily presented his identification to Kosin and the two have done business together before without issue. RP 467-68. On November 28, Denham sold a ring to Kosin. RP 462-64. Both the clasps and the ring were identified as belonging to Mallinak. RP 837-40.

On November 21, Denham sold several rings to Joseph Lennon at Porcello’s, a jewelry store in Bellevue. RP 479-82. The rings were also identified as Mallinak’s. RP 831-32, 842-43. Denham told Lennon the rings had belonged to his mother, who passed away. RP 485. Two days later, Denham traded in a Rolex, which was not linked to the Mallinak burglary. RP 487, 492. Lennon noted Denham was “a very nice guy,” and also readily provided his identification. RP 486-87, 489-90.

Police searched Denham’s home in Tacoma on December 29, 2016. RP 438-43, 766, 925-26. In laundry room off the kitchen were two

¹ A tip led Detective O’Neill to Jue, which eventually led to recovery of the diamond. RP 472-75, 793-98, 844.

brand new headlamps, with the tags still on. RP 444, 450-51. The on/off dial for the headlamps appeared similar to the plastic cap found in Mallinak's store. RP 930, 1022-26. Inside what appeared to be Denham's bedroom, police found various items, including wire crimpers, safe schematics, and books about electronics, but no gemstones or jewelry of any kind. RP 939-46. Denham's vehicle was also seized that same day, but nothing of evidentiary value was found inside. RP 961-62.

Police also searched Denham's cell phone records. RP 963-67. A cell phone number allegedly associated with Denham made an outgoing call at 11:53 p.m. on November 11, 2016. RP 634-36, 859-60. The phone connected to a cell tower in the parking lot of Mallinak's store. RP 633-36. Calls at 2:22 p.m. and 2:42 p.m. the following day connected to the same cell tower. RP 640. These were the only times the phone connected to the Kirkland tower. RP 641-43. The most frequently used cell tower was in Tacoma, about a mile from Denham's home. RP 628-29. However, the maximum range of cell towers is two and a half miles. RP 866-67. There are several main thoroughfares near Mallinak's store and I-405 is only about a mile away. RP 658-62.

The State also believed it was significant that Denham put \$9,000 in cash down on a \$24,000 Range Rover on November 17. RP 684-86, 1028. However, the car salesman emphasized Denham was "nice

gentleman,” and he had “no suspicions of anything.” RP 688-89. Others also noted Denham wearing a necklace with a large aquamarine stone, though no one was ever able to identify it as Mallinak’s, so the trial court gave it “virtually no weight.” RP 537, 768-69, 1147.

Finally, Denham wrote a letter to Mallinak on October 10, 2017, explaining he bought some of the jewels at a swap meet in Tacoma not realizing they were stolen. RP 399, 976-77; Ex. 10.

3. Denham’s Defense, Verdict, and Sentencing

Denham’s defense to the burglary charge was identity and good faith claim of title to the trafficking charge. RP 1091-92, 1117-18. The trafficking charge was based solely on Denham’s sale of the 5.29 carat diamond to Le. RP 1082-84.

In closing argument, defense counsel emphasized no direct evidence linked Denham to the Mallinak burglary—no eyewitnesses, no DNA, and no fingerprints. RP 1091-93. Nor did the State establish who was actually using the cell phone associated with Denham when it connected to the cell tower near Mallinak’s store. RP 1102-05.

Defense counsel further asserted the safe schematics found in Denham’s home were relics from prior burglaries. RP 1110-12. Four of the five schematics were for different safe manufacturers than the one in Mallinak’s shop, and the final blueprint was the same manufacturer but a

different model. RP 1106-07. And, the police did not find any drawings of Mallinak's store, nor any heavy-duty drills, electrical saws, or bolt cutters that would have been necessary for the burglary. RP 1107-08.

Counsel also emphasized Denham's letter to Mallinak where he explained he purchased the jewelry at a swap meet unaware it was stolen. RP 1117-18, 1121. This was consistent with Denham readily presenting his identification and contact information to Le, Kosin at Topkick, and Lennon at Porcello's—Denham had nothing to hide. RP 1119.

The trial court found Denham guilty of both charges. RP 1144-51 (oral ruling); CP 319-25 (written findings). The court sentenced Denham to 68 months of confinement on the burglary conviction and 78 months of confinement on the trafficking conviction, to run concurrently. RP 1181; CP 335. Denham timely appealed. CP 349.

C. ARGUMENT

1. THE SEARCH WARRANT AFFIDAVITS IN DENHAM'S CASE LACKED PROBABLE CAUSE WHERE THEY FAILED TO STATE AN ADEQUATE NEXUS BETWEEN THE ALLEGED CRIMES AND THE PLACES TO BE SEARCHED.

Probable cause for a search warrant requires a nexus between criminal activity and the items to be seized, and a nexus between the items to be seized and the places to be searched. The search warrant in Denham's case lacked a nexus between the items to be seized (stolen jewelry and

burglary tools) and the placed to be searched (Denham's residence). The warrant also lacked a nexus between criminal activity and the item to be seized (Denham's cell phone records). The illegally discovered evidence should be suppressed and Denham's convictions reversed.

- a. Lack of nexus can be challenged for the first time on appeal as a manifest constitutional error.

Detective O'Neill sought and was granted two search warrants in Denham's case. CP 417-29 (Affidavit for Search Warrant, 12/22/16), 430-33 (Search Warrant, 12/22/16), 434-42 (Affidavit for Search Warrant Addendum, 4/20/17), 443-50 (Search Warrant Addendums, 4/20/17); see also CP 322 (Finding 24); RP 925-26, 963-67. The first, approved on December 22, 2016, authorized police to search Denham's residence in Tacoma, along with Denham's person, cell phone, and vehicle, the Range Rover. CP 430-33. This first warrant was executed on December 29, 2016 at Denham's home. RP 438-43, 925-26. Denham's cell phone was not found, but law enforcement found two new headlamps, along with safe schematics, books about electronics, and so on. RP 931-46.

The second warrant, approved on April 20, 2017, authorized police to obtain and search Denham's cell phone records with MetroPCS and T-Mobile. CP 443-50; RP 963-67. The subsequent search of Denham's call detail records showed the cell phone associated with him connected to a cell

tower near Mallinak's jewelry shop late in the evening on November 11, 2016, and then twice again the following afternoon. RP 633-36, 640.

Before trial, Denham moved for a hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). CP 82-84; RP 31-40. Denham argued law enforcement either intentionally or recklessly omitted material facts from the first search warrant, including the exculpatory fingerprints found on the electrical panel and the significant delay in DNA testing. CP 82-84; RP 31-37, 173-79. Denham challenged the second warrant as fruit of the poisonous tree. CP 178-79. After reviewing the two search warrants and supporting affidavits, the trial court found the omissions would not impact the determination of probable cause and denied the request for a Franks hearing. RP 178-79, 220-22.

Thus, the trial court considered the search warrants, but the nexus issue was not raised below. However, manifest constitutional errors may be raised for the first time on appeal. RAP 2.5(a)(3). Privacy violations under the Fourth Amendment and article I, section 7 are errors of constitutional magnitude. State v. Jones, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011). Such errors are not "manifest," though, unless "[a]ll the facts necessary to adjudicate the claimed error are in the record on appeal." Id. at 360.

The issuance of a warrant is generally reviewed for abuse of discretion, with great deference given to the issuing judge or magistrate.

State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). At the suppression hearing, however, the trial court acts in an “appellate-like capacity.” Id. Its review, like the appellate court, “is limited to the four corners of the affidavit supporting probable cause.” Id. A trial court’s assessment of probable cause is therefore a legal conclusion reviewed de novo. Id.; see also State v. Lyons, 174 Wn.2d 354, 363, 275 P.3d 314 (2012) (“We cannot defer to the magistrate where the affidavit does not provide a substantial basis for determining probable cause.”).

As such, all the facts necessary to review Denham’s nexus claims are in the record on appeal, because review is limited to the affidavits in support of the search warrants. Neth, 165 Wn.2d at 182; see also State v. Murray, 110 Wn.2d 706, 709-10, 757 P.2d 487 (1988) (“When adjudging the validity of a search warrant, we consider only the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested.”). These arguments can be raised for the first time on appeal as manifest constitutional errors.

- b. Speculation about general criminal behavior does not establish a nexus between the crime and the items to be seized or the place to be searched.

A search warrant may issue only upon a determination of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause to search “requires a nexus between criminal activity and the item to

be seized, and also a nexus between the item to be seized and the place to be searched.” Id. (quoting State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). The affidavit in support of the warrant must set forth facts and circumstances sufficient to establish a reasonable inference that evidence of the crime can be found at the place to be searched. Id.

A warrant to search for evidence in a particular place must be based on more than generalized belief of the supposed practices of the type of criminal involved. Id. at 147-48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. Id. “Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.” Id. at 147.

“Probable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect’s home.” United States v. Ramos, 923 F.2d 1346, 1351 (9th Cir. 1991), overruled on other grounds by United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001); accord Thein, 138 Wn.2d at 148 (“We reiterate that ‘[p]robable cause to believe that a man has committed a crime . . . does not necessarily give rise to probable cause to search his home.’” (quoting State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994)).

In Thein, for instance, there was probable cause to believe Thein was dealing drugs but no independent evidence linking his drug dealing activities to his home. 138 Wn.2d at 150. Law enforcement included generalized statements in the search warrant affidavit regarding common habits of drug dealers; specifically, that drug dealers often keep drugs or other evidence of dealing in their homes. Id. at 138-39. The court held that general statements about what drug dealers generally do, even based on the training and experience of law enforcement, did not establish a sufficient nexus between the criminal activity and the location to be searched. Id. at 150-51.

- i. *The warrant affidavit lacked any nexus between items to be seized and Denham's residence.*

Here, the affidavit in support of the search warrant for Denham's residence lacked a sufficient nexus to the suspected criminal activity—burglary and trafficking in stolen property. In the affidavit, O'Neill summarized the break-in at Mallinak's shop and noted a prior burglary arrest of Denham's. CP 418-19. O'Neill then described how Denham sold the 5.29 carat diamond to Le. CP 420-21. Denham provided Le his identification, listing his home address in Tacoma, which O'Neill verified with Denham's community corrections officer (CCO). CP 421. Denham's CCO told O'Neill she had seen Denham's new Range Rover parked at his home, which O'Neill confirmed was purchased after the burglary on

November 17. CP 421-22. O’Neill also noted the other jewelry Denham sold at Topkick in Tacoma and Porcello’s in Bellevue. CP 422-23.

In all these allegations, however, nothing linked evidence of the alleged crimes to Denham’s home. O’Neill speculated, because numerous pieces of jewelry were stolen, “[i]t would be difficult to traffic/sell such a large quantity of jewelry quickly, thus it would be reasonable to suspect that he is storing the jewelry at his residence.” CP 423. O’Neill explained Denham’s residence includes a main house, guest house, other buildings, and several vehicles—“All of these are places that Denham could hide the stolen jewelry and tools used to commit the above listed crimes.” CP 423.

Like in Thein, O’Neill’s support for searching Denham’s home amounted to generalized statements, in his training and experience, about the common habits of burglars. Essentially, burglars are likely to keep stolen property at their residence. This is no different than the conclusory statements in Thein that drug dealers are likely to keep evidence of illegal drug dealing in their homes.

The Thein court emphasized there was no independent evidence linking Thein’s supposed drug dealing to his residence. 138 Wn.2d at 150. For instance, police did not observe him leaving the house with packages; the house did not have any sealed windows; police did not investigate any power records; nor did they observe any other suspicious activity. Id. The

Thein court refused to infer “evidence is likely to be found in a certain location simply because police do not know where else to look for it.” Id.

So, too, here. Law enforcement did not observe any suspicious activity at Denham’s home. The affidavit established probable cause that Denham lived at the Tacoma residence, identifying it as his address and parking his car there. But the vehicle in question, the Range Rover, was purchased after the Mallinak burglary, and so would not have transported jewelry or tools away from the scene. RP 684-85. Nothing at all connected the burglary or trafficking to Denham’s residence, except for the fact that he lived there and burglars, in general, may store stolen property and burglary tools at their home. Thein holds this is an insufficient nexus between the evidence to be seized (stolen jewelry and burglary tools) and the place to be searched (Denham’s residence).

The State may argue evidence of theft and burglary is different from evidence of drug dealing. In State v. McReynolds, 104 Wn. App. 560, 570, 17 P.3d 608 (2000), the court suggested a somewhat limited reading of Thein. The McReynolds court reasoned that inferences considered improper for drug crimes may be appropriate for theft, burglary, or robbery, based on the nature of those offenses. Id. The court believed “stolen property is not inherently incriminating in the same way as narcotics” and “is usually not as readily concealable in other possible hiding places as a small stash of drugs.”

Id. at 569-70 (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(d), at 381-85 (3d ed. 1996)). Courts have therefore “been more willing to assume that such property will be found at the residence of the thief, burglar or robber,” particularly where the suspect had “ample opportunity to make a trip home to hide the stolen property before his apprehension.” Id. at 570 (quoting LAFAVE, supra, at 381-84).

However, as the Thein and McReynolds courts stressed, “the existence of probable cause is to be evaluated on a case-by-case basis.” McReynolds, 104 Wn. App. at 569 (quoting Thein, 138 Wn.2d at 149). And, in fact, the McReynolds court found probable cause lacking to search the defendants’ home when the police caught them at the scene of the burglary. Id. at 570. The question was whether there was a basis for inferring evidence of other crimes would be at the defendants’ residence. Id. A pry bar stolen along with a large quantity of other tools several weeks earlier was found at the scene near one of the suspects. Id. at 566, 570. Yet the affidavit failed to establish a nexus between any criminal act and the defendants’ residence, even though they were connected with a large amount of property stolen several weeks earlier. Id. at 570.

By contrast, in State v. Dunn, 186 Wn. App. 889, 899, 348 P.3d 791 (2015), there was a sufficient nexus between the item to be seized (a missing ATV), and the place to be searched (the defendant’s home). The defendant

was seen driving a stolen truck carrying an ATV on the road where his home was located. Id. The ATV was also bulky and, “therefore, likely to be hidden inside a building.” Id.

The State may also point out Denham was seen by Le and his CCO wearing a large aquamarine necklace after the burglary. CP 421-22. O’Neill noted in the affidavit that “Mallinak had an aquamarine stone taken from his store.” CP 421. Any such argument should be rejected based on the cases discussed. Unlike Dunn, a necklace is not a bulky item likely to be hidden inside a building. Rather, a necklace is easily concealed, like evidence of drug dealing at issue in Thein. Furthermore, McReynolds held possession of stolen property (the pry bar) does not allow for a residence search. 104 Wn. App. at 570.

Denham’s case is akin to Thein and McReynolds rather than Dunn. No specific facts in the affidavit linked illegally activity to Denham’s home. The search of Denham’s home amounted to a “[g]eneral, exploratory” search, which is “unreasonable, unauthorized, and invalid.” Thein, 138 Wn.2d at 149. This Court should hold the search warrant was not supported by probable cause because it lacked a factual nexus between the evidence sought and Denham’s home.

- ii. *The warrant affidavit lacked any nexus between the alleged criminal activity and Denham's cell phone records.*

Cell phones are capable of storing immense amounts of private information, including tracking a person's location over long periods of time and collecting any personal contacts. Riley v. California, 573 U.S. 373, 394-96, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). Cell phones contain “a digital record of nearly every aspect of their [owners'] lives—from the mundane to the intimate.” Id. at 395. “[A] cell phone search would typically expose to the government far more than the most exhaustive search of a house.” Id. at 396. Consequently, cell phones searches “involve a degree of intrusiveness much greater in quantity, if not different in kind” from other searches. United States v. Payton, 573 F.3d 859, 861 (9th Cir. 2009).

The sensitive personal information conveyed over telephones is also private affair protected by article I, section 7. State v. Hinton, 179 Wn.2d 862, 871-72, 319 P.3d 9 (2014); State v. Gunwall, 106 Wn.2d 54, 68, 720 P.2d 808 (1986) (article I, section 7 protects phone numbers dialed, even without listening to the content of the calls); cf. State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) (holding a warrant is required before police may attach a GPS tracking device to a citizen's vehicle). The vast amount of private information available on cell phones demands that both law enforcement and judicial officers “be especially cognizant of privacy risks

when drafting and executing search warrants for electronic evidence.”
United States v. Schesso, 730 F.3d 1040, 1042 (9th Cir. 2013).

The warrant for Denham’s cell phone records must be examined with this backdrop in mind. In the first warrant affidavit, O’Neill sought to seize Denham’s cell phone. CP 418. The affidavit stated Denham called both Le and Lennon at Porcello’s during their transactions. CP 421, 423. The affidavit also stated, “[r]eviewing prior arrests of Denham, he used two way radios to communicate with other suspects during the commission of his crimes. With cellular phones being easier to obtain and Denham having two cellular phones, I believe evidence of the above listed crimes may be on his cellular phones.” CP 423-24. O’Neill did not provide any other specific facts related to Denham’s cell phone use.

O’Neill otherwise provided only broad, generalized statements about cell phone usage: “Courts have recognized that the majority of Americans possess and use cellular telephones, and that most of those keep the phones within their reach at all times.” CP 424. Like the general habits of drug dealers in Thein, O’Neill continued:

A person’s use of the phone can reveal where a person had been at dates and times relevant to the crime(s) under investigation; a person’s activity at relevant dates and times, and/or places a person frequents at which that person is likely to be found for arrest or at which the suspect store or inadvertently left evidence behind.

CP 424.

Police ultimately did not locate Denham's cell phone during the search of his home on December 29, 2016. RP 931-32. O'Neill accordingly sought a search warrant addendum on April 20, 2017 for Denham's call detail records from MetroPCS and T-Mobile. CP 435, 441. O'Neill did not provide any new information linking the alleged crimes to Denham's cell phone, stating only that, "[o]btaining the records from Denham's cellular phone service providers, I believe would assist in providing information on his location during the above listed crimes." CP 437. Otherwise, O'Neill described the general habits of criminals. CP 438-39 ("Based on my experience, those involved in criminal enterprises sometimes will use multiple phones in the commission of crimes, to facilitate criminal activity, and/or to avoid detection by law enforcement.").

The affidavit and addendum in support of the search warrant again fail to establish any nexus between alleged criminal activity and Denham's cell phone. O'Neill noted Denham used two-way radios with coconspirators in previous crimes. But there was no evidence whatsoever that more than one person was involved in the Mallinak burglary or in selling the stolen Mallinak jewelry. There was no suggestion Denham communicated with a coconspirator, by cell phone or otherwise. Moreover, the prior arrest O'Neill described in the affidavit occurred in 2014, only two years before the

Mallinak burglary, when cell phones were already ubiquitous. It cannot be assumed Denham changed his methods between 2014 and 2016. The prior use of two-way radios does not establish current use of cell phones. And, Denham called Le and Lennon during their transactions, but this established only that Denham had a cell phone and used it to communicate, just like the vast majority of Americans.

The only remaining basis to search Denham's cell phone was generalized statements about the common habits of criminals and, more broadly, all people with cell phones. O'Neill's reasoning was, basically, that everyone nowadays has a cell phone and uses it to communicate. Ergo, criminals use cell phones to communicate and so there must be evidence of the suspected criminal activity on their phones. But this means a suspect's cell phone can be searched in virtually any criminal investigation. Thein has already condemned this result for searches of the home. Cell phones, with all their private information, deserve at least as much protection as the home, if not more. Riley, 573 U.S. at 396; Payton, 573 F.3d at 861. The result in Denham's case cannot stand.

State v. Nordlund, 113 Wn. App. 171, 53 P.3d 520 (2002), provides an apt analogy. There, Nordlund was suspected of sexually assaulting a woman on July 2. Id. at 177-78. After his arrest and subsequent release on bail, Nordlund prepared a "Statement of Day" on his personal computer,

which described his whereabouts on July 2. Id. at 178. Police then executed a search warrant at Nordlund's home, seizing and thereafter searching his personal computer. Id.

The court of appeals held the warrant affidavits lacked "particularized information demonstrating the required nexus between the computer and the possible evidence of the crimes under investigation."² Id. at 182. The affidavits alleged the computer would help establish Nordlund's "location at critical times relevant to the alleged crimes." Id. at 183 (quoting CPs). The court agreed "examination of the computer could show the times that Nordlund was using his computer and, thus, support an inference that he was home at those times," but held there was "no factual nexus between this information and any alleged criminal activity." Id. Otherwise, the affidavit made only generalized statements about the habits of sex offenders, which is insufficient to establish probable cause under Thein. Id. at 183-84.

Like Nordlund's use of his personal computer, the affidavits here established only that Denham had and used a cell phone. The affidavits

² The court of appeals noted a personal computer is "the modern day repository of a man's records, reflections, and conversations." Nordlund, 113 Wn. App. at 181-82 (quoting CPs). A search of a computer therefore "has first amendment implications that may collide with fourth amendment concerns." Id. at 183. "When this occurs," the court emphasized, "we closely scrutinize compliance with the particularity and probable cause requirements." Id. The same exacting standard should apply to cell phones, as well, which are essentially tiny computers.

otherwise made only general statements about the cell phone habits of criminals. No specific facts linked Denham's cell phone to the burglary or trafficking. Under Thein and Nordlund, the affidavits failed to establish a nexus between the alleged criminal activity and Denham's cell phone. This Court should therefore hold the search warrant for Denham's cell phone records was not supported by probable cause.

c. The unlawfully obtained evidence must be suppressed and Denham's convictions reversed.

A search conducted pursuant to a warrant unsupported by probable cause violates article I, section 7 and the Fourth Amendment. Lyons, 174 Wn.2d at 357, 359; Nordlund, 113 Wn. App. at 179. Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. The State cannot make that showing here.

In the search of Denham's home, police found two new headlamps with plastic on/off dials that matched the plastic cap found in Mallinak's jewelry shop. RP 799-803, 930, 947, 1022-26. In Denham's room, police also found such items as safe schematics, books about electronics, an owner's manual for a digital inspection camera, wire crimpers, and so on.

RP 939-46. The trial court relied on this evidence in finding Denham to be the burglar. CP 322-23 (Findings 24, 34).

The search of Denham's cell phone records revealed an outgoing call at 11:53 p.m. on November 11 connected to the cell tower in the parking lot of Mallinak's shop in Kirkland. RP 633-36. The alarm in Mallinak's shop activated at 11:22 p.m. that same evening. RP 757. The cell phone then connected to the same tower two more times the following afternoon. RP 640. These were the only times the phone connected to the Kirkland tower. RP 641-43. The trial court also relied on this evidence in finding Denham to be the burglar. CP 322-23 (Findings 26-30, 34); RP 1145-46.

Little other evidence established Denham's identity as the burglar. No fingerprints or DNA placed him at the scene. RP 947-54. Denham was in possession and sold some of the jewelry missing from Mallinak's shop, but "[i]t is well settled law in Washington that proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence of burglary." State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). Otherwise, Denham had knowledge of bypassing alarms and cracking safes,³ and gave inconsistent statements in selling the stolen jewelry. CP 322-23. This evidence is far from overwhelming.

³ This evidence should have been excluded, as argued in section 2 below. Denham does not concede here that it was properly considered by the trial court.

The trial court's finding that Denham was the burglar then informed its finding of guilt on the trafficking charge. First degree trafficking in stolen property requires knowledge that the property is stolen. RCW 9A.82.050(1); State v. Killingsworth, 166 Wn. App. 283, 288-90, 269 P.3d 1064 (2012). The trial court found "Mr. Denham knew that the [5.29 carat diamond] was stolen as he was the one who stole it." CP 323 (Finding 39).

In summary, the trial court relied on the illegally obtained evidence from Denham's home and cell phone records to find him guilty of second degree burglary. The court's finding of guilt on the burglary charge was then inextricably intertwined with its finding of guilt on the trafficking charge. The State cannot establish the constitutional errors were harmless beyond a reasonable doubt, given the thin circumstantial evidence remaining. This Court should accordingly reverse both of Denham's convictions and remand for the trial court to suppress the illegally gained evidence. Thein, 138 Wn.2d at 151.

2. THE TRIAL COURT ERRED IN ADMITTING ER 404(b) EVIDENCE OF KNOWLEDGE WHERE KNOWLEDGE IS NOT AN ELEMENT OF BURGLARY.
 - a. The trial court admitted ER 404(b) evidence of knowledge.

Before trial, the State moved to admit ER 404(b) evidence. CP 394-96. Specifically, in 2008, Denham was interrogated as a suspect in several

federal bank burglaries. RP 104-07, 200. After initially denying involvement, Denham spoke about the skills he had developed in committing burglaries, such as cracking safes and disabling alarm systems, and doing so undetected. RP 189-96. Denham ultimately pleaded guilty to four federal bank burglaries. RP 188; CP 169-70. The State contended this evidence was admissible under ER 404(b) to prove knowledge, identity, and modus operandi (MO). CP 396; RP 187-98.

The trial court held an evidentiary hearing on the matter, listened to the 2008 interrogation, and heard argument from the parties. RP 110, 173, 187-98 (State), 198-207 (defense). The State reiterated “the purpose for which we are seeking to introduce the evidence it ultimately comes down to identity.” RP 188. The State emphasized similarities in the burglaries, as well as the “sophistication and precision that Mr. Denham spoke of and demonstrated in the 2008 course of burglaries.” RP 193. The State claimed, “this is not simply a coincidence or similarity, but a specific MO that goes to identity, that identifies Mr. Denham as the burglar.” RP 197.

Defense counsel opposed admission of the ER 404(b) evidence, specifically on the basis of modus operandi, asserting it has an “extremely prejudicial effect.” RP 199; see also CP 92-93; RP 206-07. Counsel believed, however, Denham’s 2008 interview “lends itself to admission for

the purposes of knowledge,” which counsel claimed was not “direct propensity.” RP 206.

Regarding modus operandi, defense counsel contended the Mallinak burglary was not a signature event, emphasizing the many differences in the burglaries. RP 199-205. For instance, none of the federal burglaries involved a sawed door and only one or two involved access through a roof hatch. 199-200. The federal burglaries involved tampering with cell phone towers, while the Mallinak burglary did not. RP 203-04. The only real similarity was the drilled safe. RP 204-06.

The trial court admitted Denham’s interrogation as evidence of knowledge, noting defense counsel “appropriately agreed that Mr. Denham’s sophisticated knowledge of how to bypass alarms, and how to deal with various electronics was admissible as showing knowledge and the ability to have undertaken this very sophisticated burglary.” RP 225; Exs. 41, 42. The court excluded the evidence for modus operandi, noting differences in the burglaries. RP 226. The court emphasized, “[u]nder no circumstances would I consider any of this for propensity that Mr. Denham does have an unusual skill set.” RP 226. Yet the court acknowledged “it’s a hard apple to slice,” because “Mr. Denham has the sophistication and knowledge to commit these and in some ways does go to the potential identity.” RP 226.

- b. The evidence was not admissible for knowledge where knowledge is not an element of burglary.

Under ER 404(b), evidence of prior bad acts is presumptively inadmissible to prove character and show action in conformity therewith. State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). The “acts” inadmissible under ER 404(b) include any “used to show the character of a person to prove the person acted in conformity with it on a particular occasion,” not just “acts that are unpopular or disgraceful.” State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). Prior acts may be admissible for other purposes “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

The State “must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions” to ER 404(b)’s general prohibition. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). For prior bad acts to be admissible, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose of the evidence, (3) determine whether the evidence is relevant to prove an element of the charged crime or rebut a defense, and (4) weigh the probative value against the prejudicial effect. State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014); DeVincentis, 150 Wn.2d at 17.

Doubtful cases must be resolved in the accused's favor. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

A trial court's decision to admit ER 404(b) evidence is reviewed for abuse of discretion. Gunderson, 181 Wn.2d at 922. “[T]here is an abuse of discretion when the trial court’s decision is manifestly unreasonable or based upon untenable grounds or reasons,’ such as the misconstruction of a rule.” Id. (quoting State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)).

Prior bad acts are relevant to identity “only if the method employed in the commission of both crimes is ‘so unique’ that proof that an accused committed one of the crimes creates a high probability that he also committed the other crimes with which he is charged.” State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994). “In other words, the device used must be so unusual and distinctive as to be like a signature.” Id. at 67. Thus, prior misconduct is admissible for identity only if it meets the “stringent test” for a unique modus operandi. State v. Coe, 101 Wn.2d 772, 778, 684 P.2d 668 (1984); State v. Thang, 145 Wn.2d 630, 643, 41 P.3d 1159 (2002).

The trial court excluded the federal bank burglaries as evidence of modus operandi, which is the same as identity. RP 226. Rightly so. As defense counsel noted, there were numerous differences between the federal burglaries and the Mallinak burglary, not to mention a 10-year gap in time. RP 199-206; Thang, 145 Wn.2d at 643-44 (emphasizing 18-month gap in

time in holding prior crimes did not establish MO). The only similarities were the drilled safe and the use of gloves, the latter of which is hardly unusual or unique to a burglary. RP 204-05; State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986) (emphasizing some of the similarities were “not unusual, let alone unique” in holding prior crimes did not establish MO).

That leaves admission of the evidence for Denham’s knowledge of sophisticated burglary techniques. Yet Washington courts have repeatedly recognized prior bad acts are admissible only if relevant to prove an element of the charged crime or to rebut an asserted defense. Gunderson, 181 Wn.2d at 923; DeVincentis, 150 Wn.2d at 17; Thang, 145 Wn.2d at 642. As such, evidence used to prove knowledge is typically admissible only if knowledge is an element of the crime. State v. Bacotgarcia, 59 Wn. App. 815, 821, 801 P.2d 993 (1990); KARL B. TEGLAND, 5 WASH. PRACTICE, EVIDENCE LAW AND PRACTICE § 404.21 (6th ed. 2018).

Several cases provide examples of proper admission of ER 404(b) evidence to establish knowledge. In State v. Daniels, 87 Wn. App. 149, 157, 940 P.2d 690 (1997), for instance, the State needed to prove Daniels recklessly inflicted substantial bodily harm. A person acts “recklessly” when he or she “knows of and disregards a substantial risk.” Id. The trial court therefore properly admitted a prior bad act to show Daniels’s knowledge of the risk of harm. Id.

Similarly, in State v. Essex, 57 Wn. App. 411, 418, 788 P.2d 589 (1990), the trial court properly admitted a prior illegal act to prove Essex's knowledge, where knowledge was "a specific element of the accomplice liability charge." See also State v. Toennis, 52 Wn. App. 176, 186-87, 758 P.2d 539 (1998) (evidence properly admitted where State had to prove Toennis knowingly inflicted grievous bodily harm); State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993) (evidence properly admitted where knowledge was an element of the crime).

In Bacotgarcia, 59 Wn. App. at 821, by contrast, the court held, "[i]t is difficult to comprehend why the defendant's knowledge of promoting prostitution was an 'essential ingredient' of the crime charged since the mere fact that such a crime had been committed would establish knowledge."

Unlike the cases above, where knowledge was an element of the charged crime, knowledge is not an element of second degree burglary.⁴ The elements of second degree burglary are (1) unlawfully entering or remaining in a building other than a vehicle or dwelling (2) with intent to commit a crime against persons or property therein. RCW 9A.52.030(1); State v. Schroeder, 67 Wn. App. 110, 116-17, 834 P.2d 105 (1992).

⁴ Knowledge is an element of first degree trafficking in stolen property. RCW 9A.82.050(1). However, the trial court admitted and relied on the evidence for the burglary rather than the trafficking charge. CP 322-23 (Findings 31-34). The prejudicial effect on the trafficking charge is discussed in section 2.d. below.

Denham's knowledge of how to commit sophisticated burglaries was therefore not relevant to any element of the charged offense.

Nor did Denham assert any defense that knowledge would be relevant to rebut, such as mistake or accident. Denham's defense to the burglary was identity. RP 1091-92. The trial court readily acknowledged the identity defense: "[T]he defense argument was correct: the only issue as to the burglary was identity." CP 322 (Finding 33).

As such, Denham's knowledge of how to commit a sophisticated burglary like the one at Mallinak's store really went to his identity as the burglar. In other words, Denham must be the burglar because few people have the skills to commit such a sophisticated break-in. But, as established, identity was an impermissible basis for the evidence because it did not meet the stringent test for *modus operandi*.

The record, too, belies the trial court's claim that it relied on Denham's experience only for knowledge purposes. In its oral ruling, the court emphasized Denham "knows how to drill safes" and "knows how to bypass alarms." RP 1144-45. The court found, based on this experience, the Mallinak burglary "couldn't have just been done by anyone." RP 1145. Then, in its written ruling, the court found Denham's "specialized knowledge," along with his possession of stolen jewelry, established "Mr. Denham was the burglar." CP 322-23 (Finding 34). Thus, the court clearly

relied on Denham’s “knowledge” as evidence of his identity as the burglar—
an improper and excluded basis for the evidence.

The trial court therefore erred in admitting the ER 404(b) evidence,
ostensibly for purposes of Denham’s knowledge, where it really went to
establish Denham’s identity.

c. Defense counsel was deficient to the extent he
acquiesced or agreed to admission of the evidence.

Every accused person enjoys the right to effective assistance of
counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v.
Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674
(1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That
right is violated when (1) the attorney’s performance was deficient and (2)
the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas,
109 Wn.2d at 225-26.

Counsel’s performance is deficient when it falls below an objective
standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate
trial strategy or tactics constitute reasonable performance. Strickland, 466
U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029
(2009). “The relevant question is not whether counsel’s choices were
strategic, but whether they were reasonable.” Roe v. Flores-Ortega, 528
U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). “Review is not precluded where invited error is the result of ineffectiveness of counsel.” State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

The State may argue defense counsel invited the error by agreeing the evidence was admissible for purposes of Denham’s knowledge. However, there can be no reasonable strategy in defense counsel agreeing to admission of harmful evidence against his client, where there is a legal basis for exclusion of that evidence. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (defense counsel deficient for failing to object to defendant’s prior drug convictions); State v. Saunders, 91 Wn. App. 575, 580, 958 P.2d 364 (1998) (defense counsel ineffective for introducing otherwise inadmissible prior drug conviction).

Defense counsel clearly wanted the evidence excluded, objecting to admission for modus operandi. RP 199-207. This is not a circumstance where defense counsel agreed to admission of some less harmful evidence to avoid admission of more harmful evidence, like stipulating to a prior conviction. The knowledge evidence was either in or out. Had counsel

properly objected to the evidence, the trial court would—or should—have excluded it, as established above in section 2.b.

Moreover, defense counsel has a duty to research the relevant law and object accordingly. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009). Research reveals ER 404(b) evidence of knowledge is relevant and admissible only when knowledge is an element of the charged crime. Knowledge is not an element of burglary and no one argued it was. Yet the so-called knowledge evidence ultimately formed part of the trial court's basis for finding Denham committed the burglary. CP 322-23 (Findings 31-34). Defense counsel performed deficiently to the extent he agreed or acquiesced to the evidence.

- d. The erroneously admitted evidence prejudiced Denham, where the trial court relied on it in finding him guilty.

In determining whether improper admission of ER 404(b) evidence requires reversal, the inquiry is not whether there is sufficient evidence to convict without the inadmissible evidence. State v. Grower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). Rather, the question is whether there is a reasonable probability the outcome of the trial would have been different without the inadmissible evidence. Id.

Similarly, in analyzing ineffective assistance of counsel, prejudice exists if there is a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). A "reasonable probability" is one "sufficient to undermine confidence in the outcome," lower than a preponderance of the evidence. Id.

The trial court relied on Denham's "specific knowledge of how to commit burglaries without being detected, as well as his knowledge of electronics, alarm systems, and safes" in finding him guilty of second degree burglary. CP 322 (Findings 32); RP 1144-45. The court expressly found Denham's "specialized knowledge" was circumstantial evidence establishing "Mr. Denham was the burglar, in violation of RCW 9A.52.030." CP 322-23 (Finding 34). In turn, then, the court found Denham guilty of trafficking in stolen property based in large part on his identity as the burglar: "Mr. Denham knew that the [5.29 carat diamond] was stolen as he was the one who stole it." CP 323. The trial court's reliance on inadmissible evidence, by itself, establishes prejudice. See State v. Gower, 179 Wn.2d 851, 855-56, 321 P.3d 1178 (2014) (presumption that judges in bench trials do not consider inadmissible evidence is inapplicable where "the trial court relied on the inadmissible evidence to make essential findings that it otherwise

would not have made” (quoting State v. Read, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002)).

In addition, however, there was only thin circumstantial evidence, at best, that Denham was the burglar. No DNA or fingerprints linked Denham to the burglary. RP 947-54. The cell phone associated with Denham pinged off the tower near Mallinak’s shop, yet the State did not establish Denham was the one actually in possession of the phone at that time. RP 633-36. Furthermore, cell towers have a range of two and a half miles, and there are several main streets as well as I-405 near Mallinak’s shop. RP 658-62, 866-67. Not long after the burglary, Denham sold the 5.29 carat diamond along with some other jewelry that ultimately belonged to Mallinak. But Denham never tried to conceal his identity during those transactions. He readily presented his identification and contact information, consistent with his good faith claim of title. RP 467-68, 489-90, 713, 725-27.

The trial court relied heavily on Denham’s specialized knowledge to find him guilty of burglary, which the court then relied on to find Denham guilty of trafficking. There is a reasonable probability the trial court would have reached a different conclusion had it properly excluded the “knowledge” evidence. This Court should reverse both of Denham’s convictions and remand for a new trial.

3. CUMULATIVE ERROR DEPRIVED DENHAM OF HIS RIGHT TO A FAIR TRIAL.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. State v. Coe, 101 Wn2.d 772, 789, 684 P.2d 668 (1984). Evidence from Denham's house, his cell phone records, and his specialized burglary knowledge should have been excluded, for the reasons described above. Without all this evidence, very little remains except for Denham's sale of some of the stolen jewelry and his inconsistent statements about how he came into possession of it. CP 322-23. As established, possession of stolen property is insufficient as a matter of law to prove burglary. Mace, 97 Wn.2d at 843. The combined prejudicial effect of the inadmissible evidence denied Denham a fair trial, where there is scant evidence remaining to uphold his convictions.

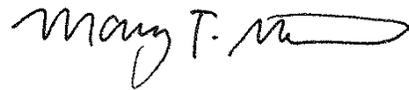
D. CONCLUSION

For the reasons discussed above, this Court should reverse Denham's convictions and remand for a new trial.

DATED this 1st day of April, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Mary T. Swift", with a horizontal line extending to the right from the end of the signature.

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