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

STATE OF WASHINGTON,

Respondent,

v.

JAMES LEE MILLER,
Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, James Miller, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Miller seeks review of the unpublished opinion of the Court of Appeals in cause number 54494-6-II, 2021 WL 3737167, filed August 24, 2021. A copy of the decision is in the Appendix A at pages A-1 through A-9.

C. ISSUE PRESENTED FOR REVIEW

Should this Court grant review where the trial court erred in denying Miller's CrR 3.6 motion to suppress illegally obtained evidence after Jennifer Miller acted as a state agent by conducting a warrantless search of the GPS function of Miller's phone and providing location information to police, in violation of Miller's rights under the Fourth Amendment and article I, section 7 of the Washington Constitution.

D. STATEMENT OF THE CASE

1. Procedural history:

James Miller was charged by information in Grays Harbor County Superior Court with first degree rape of a child and first-degree child molestation on June 23, 2019. Clerk's Papers (CP) at 1-3.

a. Suppression motion

Defense counsel moved to suppress custodial statements made to law enforcement pursuant to CrR 3.5. Detective Steve Beck testified that he was initially assigned to the case following an allegation that Mr. Miller committed a sex offense involving M.R., the daughter of Jennifer Miller. RP (11/19/19) at 17. Detective Beck had previously spoken with Mr. Miller's estranged wife, Jennifer Miller, and learned that she knew where Mr. Miller was located by using the GPS application on their shared cell phone plan. RP at (11/19/19) at 18.

Using the information he obtained from Ms. Miller, Detective Beck went to a location in Puyallup, Washington, where

he found Mr. Miller's GMC pickup truck. RP (11/19/19) at 19-20. Ms. Miller provided several different locations for Mr. Miller to Detective Beck, and on July 19, 2019, she continued to update the detective in real time with Mr. Miller's location as he drove to Puyallup. RP (11/19/19) at 33. One of the locations she provided to Detective Beck was a dentist's office and the other was the house next door to the office, where Mr. Miller was eventually located by Detective Beck. RP (11/19/19) at 19, 20, 33. Detective Beck saw Mr. Miller sitting on the front porch of a house located next to the address provided by Ms. Miller. RP (11/19/19) at 20. After seeing him sitting on the front porch of the house, Detective Beck arrested Mr. Miller. RP (11/19/19) at 20.

Detective Beck read Mr. Miller his constitutional warnings. RP (11/19/19) at 20. While driving back to Montesano from Puyallup, Detective Beck questioned Mr. Miller about the allegation that he failed to register as a sex offender. RP (11/19/19) at 25.

At the police station, Detective Beck talked with Mr. Miller for about half an hour and Mr. Miller agreed to provide a recorded

statement. RP (11/19/19) at 26. Detective Beck testified that he read constitutional warnings to Mr. Miller a second time. RP (11/19/19) at 26. Detective Beck stated that Mr. Miller was willing to continue talking to the detective. RP (11/19/19) at 29.

Mr. Miller testified that he was at a dentist appointment on July 19 and was given a medication by the dentist that made him feel lightheaded and nauseated. RP (11/19/19) at 41. He remembered that Detective Beck read his *Miranda* warnings the first time but did not remember him reading him rights a second time at the police station. RP (11/19/19) at 42. He was that he “wasn’t quite sure” if he knew that had the right to stop police questioning and ask for an attorney, that it seemed to be “just kind of like a buddy-buddy type thing instead of actually like an interrogation type thing.” RP (11/19/19) at 42.

Following the testimony, the court requested additional briefing from counsel. RP at (11/19/19) at 47-49. Defense counsel filed a memorandum regarding suppression of statements obtained following the location and arrest of Mr. Miller through use of the GPS app tracking his cell phone provided to police by

Ms. Miller. CP at 46.

The trial court found that the recording of Mr. Miller's statements made in the police car was obtained in violation of the Privacy Act. RP (11/22/19) at 60. The court found the interview recording itself was inadmissible but would allow testimony by Detective Beck about the interview in the patrol car. RP (11/22/19) at 61. The court found that statements made during the questioning at the police station regarding the allegation of rape and molestation were admissible. RP (11/22/19) at 60.

The court also found that the location and subsequent arrest of Mr. Miller using the GPS information was lawful. RP (11/22/19) at 61-63. The court found that this was not an instance where police placed a tracking device on Mr. Miller's car to track him, and that

[t]his wasn't a GPS device that Detective Beck had or — there wasn't any kind of tracking device placed on Mr. Miller's vehicle that allowed the police to track his—his whereabouts at all times. This was something that Mrs. Miller had. And in order for a warrant to be required in any type of situation, it has to be premised upon State action. It has to be premised upon the police taking action that requires a warrant. And Detective Beck wasn't—wasn't employing the use of a GPS device, he was simply using information provided to him voluntarily by Mrs.

Miller.

RP (11/22/19) at 63.

The court found there was no requirement for a warrant and no State action involved and denied the motion to suppress the arrest and subsequently obtained evidence. RP (11/22/19) at 63.

b. Trial testimony

Jennifer Miller is the mother of three children, including her middle child, M.R. RP (12/17/19) at 78. Mr. Miller married Jennifer Miller and they moved to Aberdeen, Washington in a four-bedroom house. RP (12/17/19) at 83. Ms. Miller said that Mr. Miller did not spend much time alone with the children. RP (12/17/19) at 86. M.R. is ten years old and lives with her mother and stepfather and her siblings. RP (12/17/19) at 105. Mr. Miller was married to Jennifer Miller when they lived in Kirkland, Washington, and later moved to Aberdeen. RP (12/17/19) at 106. They separated in May 2019. RP (12/17/19) at 87. After they separated, Ms. Miller obtained a restraining order against Mr. Miller. RP (12/17/19) at 89, 91.

Ms. Miller said that she noticed behavioral changes in M.R.

such as not being able to sleep and then not being able to get up for school the next morning. RP (12/17/19) at 89. After the school year started, Ms. Miller noted that M.R. could not get up in the morning and was crying all the time, and Ms. Miller “pulled her out” of school. RP (12/17/19) at 90.

Ms. Miller described an incident where Mr. Miller came down the stairs from the children’s rooms at 1:30 or 2:00 a.m. and that the next morning Mr. Miller said that he thought M.R. might have fallen out of bed and that he had gone upstairs to check on her. RP (12/17/19) at 85. Ms. Miller said that later she could not get it out her head “because it just didn’t make sense.” RP (12/17/19) at 89. After talking with M.R., she contacted the police. RP (12/17/19) at 92. Ms. Miller made a statement to police. RP at 93.

After they separated, Mr. Miller moved to Mrs. Miller’s mother’s nearby property in Aberdeen. RP (12/17/19) at 94.

M.R. testified that when she was about nine years old, Mr. Miller came into her bedroom and leaned closer to her and touched her in places that she did not like. RP (12/17/19) at 114.

M.R. said that he would touch her vagina and move his fingers and it was usually “under [her] clothes.” RP (12/17/19) at 116. She said that Mr. Miller would say that “I do this to your mom” and that “this is normal.” RP (12/17/19) at 116. M.R. said that that Mr. Miller would also touch her breast area, sometime over her clothing and sometimes under her clothing. RP (12/17/19) at 116. She said that this happened “very often, like five times a week” for a period of ten months. RP (12/17/19) at 118. M.R. said that he put his finger inside her vagina “a few times.” RP (12/17/19) at 119. M.R. said that she felt weird around him, but that she would act normal around him because she did not want anyone to know in case it was not normal. RP (12/17/19) at 118. She said that she finally told her mother that he was touching her a few weeks after Mr. Miller moved out of the house. RP (12/17/19) at 120, 121.

Kathryn Smith, who is M.R.’s maternal grandmother, lives on property located about a mile from Ms. Miller’s house. RP (12/17/19) at 128. Ms. Smith, at the request of the police, initiated a recorded “confrontation call” to Mr. Miller. RP

(12/17/19) at 133, 134. Detective Beck obtained an order authorizing the recording of the confrontation call on July 18, 2019. RP (12/17/19) at 149. Ms. Smith initially asked Mr. Miller about mail that he was not receiving, and then moved to the allegations of sexual abuse. RP (12/17/19) at 136. She stated that Mr. Miller denied touching M.R. and said that that was M.R.'s version of the story. RP (12/17/19) at 137. Detective Beck said that during the call, Mr. Miller denied the allegations of sexual contact with M.R. RP (12/17/19) at 151.

Detective Beck stated that he obtained a statement from Jennifer Miller about the allegations and then set up an interview of M.R. and the confrontation call to Mr. Miller by Ms. Smith. RP (12/17/19) at 147, 148.

After the confrontation call to Mr. Miller, Detective Beck learned on July 17, 2019 from Jennifer Miller that Mr. Miller was in Puyallup. RP (12/17/19) at 153. She obtained this information from a GPS tracking app on Mr. Miller's phone. RP (12/17/19) at 153. On July 19, 2019, Detective Beck went to Puyallup and located Mr. Miller using location information provided by Ms.

Miller and placed him under arrest. RP (12/17/19) at 153.

Detective Beck read Mr. Miller his rights and put him the back of the car and transported him to Grays Harbor and questioned him a second time at the Sheriff's Office. RP (12/17/19) at 154. Detective Beck stated that before making a recorded statement, Mr. Miller initially denied the allegations, and then admitted to touching M.R., and that after the recording started, he admitted to touching M.R. three times in the bedroom. RP (12/17/19) at 157. Detective Beck stated that Mr. Miller initially said that M.R. was jumping around on him and that he "may have accidentally touched her vagina" with his fingers and that it was not intentional, and then said that had had touched her, and that the touching was outside of her vagina, and that the second time he penetrated her vagina with his index finger, and the third time he also touched her vagina. RP (12/17/19) at 158.

During his testimony, Mr. Miller denied that he touched M.R. inappropriately, and said that he was tucking her into bed and "swooped her up to put her on back on the pillow." RP (12/17/19) at 168. He said he tucked her into bed every time night

that he was upstairs and that M.R. was a bouncy, happy child and wanted him to pick her up quote often, and that that was what he was trying to explain to the detective during his statement. RP (12/17/19) at 169. He stated that he repeatedly told the detective that he did not touch her with sexual intent and that “[i]t was all accidental.” RP (12/17/19) at 175. Mr. Miller denied that there were times when his finger accidentally went into M.R.’s vagina, denied that he moved M.R.’s panties aside and testified that any touching was not intentional. RP (12/17/19) at 171-72.

The court found that Mr. Miller committed first degree rape of a child and first-degree child molestation. RP (12/17/19) at 184.

Miller appealed his convictions on the basis that the trial court erred when it denied his CrR 3.6 motion to suppress evidence because law enforcement conducted a warrantless search by Jennifer Miller who was acting as an agent of the State. By unpublished opinion filed August 24, 2021, the Court of Appeals, Division II, affirmed the conviction. See unpublished opinion.

Miller now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

- 1. This court should grant review where the State illegally used Jennifer Miller to obtain location data from James Miller's cell phone and did so without his consent.**

Under the Washington Constitution “[n]o person shall be disturbed in his [or her] private affairs, or his [or her] home invaded, without authority of law.” Wash. Const. art. I, § 7. Article I, section 7 “is grounded in a broad right to privacy” and protects citizens from governmental intrusion into their private affairs without the authority of law. *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012). Both article I, section 7 and the Fourth Amendment to the United States Constitution “were intended as a restraint upon

sovereign authority; in the absence of state action, they have no application regardless of the scope of protection which would otherwise be afforded under either provision.” *State v. Ludvik*, 40 Wn. App. 257, 262, 698 P.2d 1064 (1985). “It is well-established that article I, section 7 provides greater protection of privacy rights than the Fourth Amendment.” *State v. Winterstein*, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009). The requisite “authority of law” is generally a warrant, which may issue only on probable cause. *Id.* at 628; *State v. Youngs*, 199 Wn. App. 472, 475, 400 P.3d 1265 (2017). Warrantless searches and seizures are therefore “per se unreasonable unless justified by a recognized exception.” *Winterstein*, 167 Wn.2d at 628.

“Under the Fourth Amendment, a search occurs if the government intrudes on a subjective and reasonable expectation of privacy.” *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). But article I, section 7 “is qualitatively different from the Fourth Amendment and provides greater protections.” *Id.* Standing analysis under article I, section 7 therefore turns on whether the government has invaded an individual's “private affairs.” *Id.* at 869 and n.2.

“The exclusionary rule does not apply to the acts of private individuals.” *State v. Smith*, 110 Wn.2d 658, 666, 756 P.2d 722 (1988). But evidence discovered by a private citizen while acting as a government agent is subject to the rule. *Id.* To prove a private citizen was acting as a government agent, the defendant must show “ ‘that the State in some way instigated, encouraged, counseled, directed, or controlled the conduct of the private person.’ ” *Id.* (internal quotation marks omitted) (quoting *State v. Wolken*, 103 Wn.2d 823, 830, 700 P.2d 319 (1985)).

a. Mr. Miller retained a reasonable expectation of privacy in his location and movement

The Washington Supreme Court has recognized privacy interests in telephonic and other electronic communications. See, e.g., *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Washington has a “long history of extending strong protections to telephonic and other electronic communications.” *State v. Hinton*, 179 Wn.2d 862, 871, 319 P.3d 9 (2014) (citing *Gunwall*, 106 Wn.2d at 66). A cell phone is a “private affair” within the

meaning of article 1, section 7, and intrusion into its contents or a search of the data it supplies must be done under authority of law. *Hinton*, 179 Wn.2d at 873-74.

The Fourth Amendment protects individuals against unreasonable searches and seizures of their “persons, houses, papers, and effects.” Law enforcement officers conduct a “search” when they seek to obtain information in either of two ways: (1) by physically trespassing upon an individual’s person, house, papers, or effects, see *United States v. Jones*, 565 U.S. 400, 406–07, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (holding GPS tracking of a vehicle for twenty-eight days was a search when agents physically trespassed upon the vehicle to install the tracking device), or (2) by intruding upon an individual’s reasonable expectation of privacy. See *Katz v. United States*, 389 U.S. 347, 360–62, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring) (holding eavesdropping on a payphone conversation by means of an electronic listening and recording device, when the payphone door was closed, was a search; noting “reasonable expectations of privacy may be defeated by electronic as well as

physical invasion”).

Searches “inside a home without a warrant are presumptively unreasonable.” *United States v. Karo*, 468 U.S. 705, 715, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984); see also *Silverman v. United States*, 365 U.S. 505, 511, 121 S.Ct. 2038, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961) (holding that the right to privacy at home is “[a]t the very core” of what the Fourth Amendment seeks to protect). The Supreme Court has made very clear, for example, that “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search.” *Kyllo v. United States*, 533 U.S. 27, 35, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (citation omitted) (quoting *Silverman v. United States*, 365 U.S. 505, 512, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)) (holding government use of thermal-imaging devices to monitor the heat being produced inside a home as part of a strategy to detect indoor marijuana growing was a search where the devices were unavailable to the general public, even though the devices were

used only from outside the home without effecting a physical trespass).

Most “smart” phones include GPS applications that can identify a phone's location by using a built-in GPS device. See, e.g., *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 963, 181 L.Ed.2d 911 (2012) (Alito, J., concurring) (noting that newer “smart phones” equipped with GPS devices permit more precise tracking than older devices); *United States v. Maynard*, 615 F.3d 544, 562–64 (D.C.Cir.2010) (discussing how prolonged GPS surveillance can provide a detailed record of a person's movements).

The Global Positioning System or “GPS” is a space-based radio navigation utility owned and operated by the United States that provides highly accurate positioning, navigation, and timing services worldwide to any device equipped with a GPS satellite receiver. To determine the location of a cellular telephone using GPS, special hardware in the user's handset calculates the

longitude and latitude of the cellular telephone in real time based upon the relative strength of signals from multiple satellites. See GPS.GOV, THE GLOBAL POSITIONING SYSTEM.¹

In this case, the Court notes that Ms. Miller “assisted law enforcement,” but that “merely aiding the government is not enough to turn an otherwise private search into a government search.” *State v. Miller*, 2021 WL 3737167, at *8. The involvement by Ms. Miller is more extensive than “merely aiding” the government; the assistance provided by Ms. Miller of Mr. Miller’s real-time location data implicates two distinct privacy interests: his right to privacy in his location and his right to privacy in his movements. Not only did she provide the information, but gave the detective real time updates on Miller’s location as Detective Beck was travelling to Puyallup in order to arrest Mr. Miller. Detective Beck used GPS location information

¹<http://www.gps.gov/systems/gps> (last visited September 21, 2021.)

provided by Ms. Miller that Mr. Miller was in Puyallup and received a GPS location from her on July 17, 2019. RP (12/17/19) at 152, 153. Ms. Miller obtained the information from a cell phone account on Google shared with Mr. Miller. RP (11/19/19) at 18, RP (12/17/19) at 153. During the suppression hearing, the detective stated that he spoke with Ms. Miller the day before the arrest, and that she provided information that he was at a specific location in Puyallup to the detective, RP (11/19/19) at 33. On July 19, 2019 the detective drove to Puyallup, and as he drove, Ms. Miller was “updating me as I was on my way to Puyallup,” and that one of the locations she provided was a dentist’s office. RP (11/19/19) at 33. After arriving at the dentist’s office, he saw Mr. Miller’s parked truck and then saw Mr. Miller sitting the porch of a house located next to the location provided by Ms. Miller. RP (11/19/19) at 20

Using the GPS location data to determine an individual’s location (or a cell phone’s location), presumably also reveals

movement of the cell phone use within his or her residence, and therefore constitutes a Fourth Amendment search. The GPS location information tracked Mr. Miller (or more accurately, his cell phone) until he was ultimately located on the front porch of a house next to the dental office. RP (11/17/19) at 33. During the two- or three-day period that Ms. Miller was tracking his movements and providing the information to Detective Beck, Mr. Miller was presumably inside the dentist office and more saliently for the purpose of Fourth Amendment analysis, was inside the house where he was located by Detective Beck on July 19.

Mr. Miller has a reasonable expectation of privacy in the GPS information generated by his phone, which information may be used to determine his specific location. “Cell phones, including the information that they contain, are ‘private affairs’ under article 1, section 7. As a private affair, the police may not search a cell phone without a warrant or applicable warrant exception.” *State v. Samalia*, 185 Wn.2d 262, 268, 272, 375 P.3d 1082 (2016).

b. Jennifer Miller was acting as a state agent when she obtained Mr. Miller's GPS location information from his phone and provided the information to law enforcement

In this case, Jennifer Miller used a GPS tracking app Mr. Miller's phone to surreptitiously track Mr. Miller's movements and location over the course of several days and provided the information to Detective Beck. The detective initially received information from Jennifer Miller about the location of Mr. Miller through GPS tracking on July 17, 2019 and continued to provide location information on July 19, 2019. RP (11/19/19) at 18, 19. Mere knowledge by the State that a private citizen might conduct a private search without the government taking any deterrent action is insufficient to turn the private search into a government one. *State v. Swenson*, 104 Wn.App. 744, 755, 9 P.3d 933 (2000). However, in this case, Ms. Miller remained in contact with the detective, updating him with information about his location and ultimately providing real-time updates about his location as the

detective was traveling to Puyallup on July 19, 2019. RP (11/19/19) at 32.

Unlike the facts of *State v. Samalia*, 186 Wn.2d 262, 375 P.3d 1082 (2016), the phone being tracked by Ms. Miller (and by extension tracked by law enforcement) was not lost or otherwise abandoned by Mr. Miller. (Law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution. *Samalia*, 186 Wn.2d at 273).

Detective Beck's testimony demonstrates that he requested information from Ms. Miller, which he used to locate Mr. Miller and arrest him. At the suppression hearing, Detective Beck answered in the affirmative when asked if the location information was provided by Ms. Miller upon his request. RP (11/19/19) at 32.

The testimony evidences a high level of police

involvement in obtaining the GPS location information; Ms. Miller remained in contact with Detective Beck, who presumably would not have traveled to Puyallup to arrest Mr. Miller without the information obtained from Ms. Miller.

There are two critical factors for courts to consider when determining whether a private individual is acting as a government agent: “(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends.” *State v. Krajeski*, 104 Wn. App. 377, 383, 16 P.3d 69 (2001). In this case, Ms. Miller was acting as a State agent; she provided the location GPS app information to Detective Beck and continued to do so at the detective’s request as he was travelling to Puyallup. It is hard to envision Ms. Miller’s actions of updating the detective with location information in real time as he drove to the location provided by Ms. Miller as anything other than working in the capacity as a

State agent. Ms. Miller's action of providing location informant meets the two criteria delineated in *Krajeski* because Detective Beck knew of and acquiesced by using the information obtained from Mr. Miller's phone and provided by Ms. Miller. Ms. Miller clearly intended to assist law enforcement when she told Detective Beck that she had the ability to track Mr. Miller, and when she provided updated location information to Detective Beck.

Ms. Miller's action of tracking Mr. Miller using GPS and subsequent reporting of its contents to the detective constitutes an unreasonable warrantless search by a State agent in which police obtained information they would not otherwise be allowed to collect and act upon without a warrant. Therefore, the exclusionary rules of the Fourth Amendment and article I, section 7 apply. *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 600, 694 P.2d 1078 (1985); *United States v. Reed*, 15 F.3d 928, 933 (9th Cir. 1994).

The action of Ms. Miller of providing updated and ongoing information to law enforcement constitutes State action. The GPS location information was exploited by the State; it is inseparable from the arrest and subsequent questioning of Mr. Miller. Without the information it would not have been possible for Detective Beck to conduct a physical surveillance of Mr. Miller's movements and which allowed him to learn of Mr. Miller's whereabouts over the course of the investigation.

Because the interviews took place so quickly after the arrest, it is not realistic to say that his statements to police "h[ave] been come at . . . by means sufficiently distinguishable to be purged of the primary taint" of the warrantless GPS tracking. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The statements obtained from Mr. Miller following his arrest were the fruit of the illegal search and resulting arrest, which was only possible because of the illegal use of the GPS location information. Therefore, the statements

must be suppressed as derivative evidence. All evidence flowing from the illegality is fruit of the poisonous tree and “must be suppressed” under article 1, section 7, regardless of any attenuation. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Accordingly, the evidence obtained as a result of the location and questioning of Mr. Miller should be suppressed.

This Court should grant review, reverse and remand with direction that the evidence obtained as a result of Ms. Miller’s actions should be excluded.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

Certification of Compliance with RAP 18.17:

This petition contains 4660 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

September 22, 2021



PETER B. TILLER

Dated: September 22, 2021

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on September 22, 2021, that the Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 909 A St., Ste. 200, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the petitioner at the following address:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 22, 2021.



PETER B. TILLER

APPENDIX A

August 24, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES LEE MILLER,

Appellant.

No. 54494-6-II

UNPUBLISHED OPINION

LEE, C.J. — James L. Miller appeals his convictions for first degree rape of a child and first degree child molestation. Miller argues that the trial court erred when it denied his CrR 3.6 motion to suppress evidence because law enforcement conducted a warrantless search.

We hold that the trial court did not err in denying Miller’s CrR 3.6 suppression motion because the State did not conduct a warrantless search. Accordingly, we affirm Miller’s convictions for first degree rape of a child and first degree child molestation.

FACTS¹

On June 23, 2019, Jennifer Miller² made a report to law enforcement that Miller had been sexually abusing her daughter, M.R. Detective Steve Beck of the Grays Harbor County Sheriff’s Office was assigned to investigate the case. During the course of his investigation, Detective Beck

¹ The following facts rely in part on the trial court’s CrR 3.6 findings of fact, which are, with the exception of finding of fact 15 and 16, unchallenged and, therefore, are verities on appeal. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

² Because Jennifer Miller has the same last name as the appellant, we will refer to her by her first name and appellant by his last name for clarity. No disrespect is intended.

learned that Miller was also being investigated for failing to register as a sex offender for a previous conviction and had a warrant issued for his arrest.

On July 18, Jennifer contacted Detective Beck and advised that she had a current GPS location on Miller. Jennifer had Miller's GPS location from the shared cellphone plan she had with Miller, which allowed her to see where Miller was in real-time through her cellphone. Detective Beck advised that he would contact Jennifer the next day for an updated location.

On July 19, Detective Beck contacted Jennifer. Jennifer advised that she believed Miller was at a dentist's office in Puyallup, Washington; Jennifer kept Detective Beck updated as to Miller's location. Detective Beck drove from Montesano, Washington, to Miller's location in Puyallup.

Detective Beck found Miller in Puyallup and took Miller into custody. Detective Beck read Miller his *Miranda*³ rights, which Miller stated that he understood. Miller was then transported from Puyallup to the Grays Harbor County Sheriff's Office.

Back at the sheriff's office in Grays Harbor, Detective Beck re-read Miller his *Miranda* rights, and Miller again stated that he understood. Detective Beck testified that Miller admitted to touching M.R. three separate times:

- Q. Okay. And what—what specific admissions does he make about what kind of touching?
- A. To my best recollection he told me that he touched her three times, the first one was touching just on the outside of her vagina, the second time he said he penetrated her with his index finger, and the third time he touched her vagina as well.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Verbatim Report of Proceedings (VRP) (Dec. 17, 2019) at 158.

A. CrR 3.6 SUPPRESSION HEARING

Miller moved to suppress evidence of his arrest and his subsequent statements to Detective Beck pursuant to CrR 3.5 and 3.6. Miller argued that Detective Beck's reliance on Jennifer's updates regarding his GPS location constituted an unlawful search. The State argued that Jennifer's sharing Miller's GPS location with Detective Beck did not constitute State action, and therefore, no unlawful search occurred and no warrant was required.

Detective Beck was the only witness to testify at the suppression hearing. Detective Beck testified that he asked Jennifer if she knew where Miller was. Detective Beck also testified that "[Jennifer] had GPS location on [Miller], since she explained to me they shared the same cell phone plan still. It was on Google. I guess that she was able to track him." VRP (Nov. 19, 2019) at 18. Jennifer's information allowed Detective Beck to locate Miller in Puyallup.

The trial court agreed with the State and denied Miller's motion to suppress. The trial court entered the following relevant findings:

14.

With regard to the illegal search issue, the facts are undisputed that after Detective Beck had sufficient information and probable cause to arrest the Defendant, he went looking to arrest the Defendant. The Defendant's wife, Ms. Miller, told Detective Beck that she always knew where he was because of the GPS access on her phone. The Defendant's wife gave Detective Beck information that the Defendant was at the dentist in Puyallup and updated him on the Defendant's movements.

15.

In both U.S. and Washington courts, the use of a GPS device is a search and requires a warrant. However, this was not a GPS device that Detective Beck had

and there was no tracking [device] placed on the Defendant's vehicle. The GPS information was on Ms. Miller's device.

16.

In order for a warrant to be required, there must be state action. Detective Beck was not employing the GPS device, but rather using information voluntarily provided by Ms. Miller.

Clerk's Papers (CP) at 61-62. The trial court also entered the following relevant conclusion of law:

12.

With regard to the use of GPS information, there was no state action. Therefore, there was no warrant requirement. The Defendant's motion to suppress the Defendant's statements under CrR 3.6 is denied.

CP at 63.

B. TRIAL, VERDICT, & SENTENCING

Miller waived his right to a jury, and the trial court held a bench trial. Witnesses testified consistent with the facts above. The trial court found Miller guilty of first degree rape of a child and first degree child molestation.

At the sentencing hearing, the parties agreed that Miller faced a sentence of life without the possibility of parole because he is a persistent offender. The State presented a certified copy of Miller's judgment and sentence for a 1995 conviction of second degree rape of a child. The trial court sentenced Miller to life in prison without the possibility of parole.

Miller appeals.

ANALYSIS

Miller argues that the trial court erred in denying his CrR 3.6 suppression motion because his cellphone location data was obtained without a warrant “in violation of [his] rights under the Fourth Amendment and article I, section 7 of the Washington Constitution.” Br. of Appellant at 1. Miller further argues that the statements he made following his arrest must also be suppressed because they were obtained after he was located using cellphone location data that was obtained without a warrant. Because Miller’s location information was obtained by a private actor, which does not trigger warrant requirements under either the state or federal constitutions, we disagree.

A. LEGAL PRINCIPLES

We review a trial court’s decision on a CrR 3.6 motion to suppress to determine whether the court’s findings of fact are supported by substantial evidence and whether those findings support the conclusions of law. *State v. Russell*, 180 Wn.2d 860, 866, 330 P.3d 151 (2014). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding’s truth.” *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). We review conclusions of law de novo. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Warrantless searches and seizures are per se unreasonable and in violation of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Generally, “neither state nor federal constitutional protections against unreasonable searches and seizures are implicated[] without state action.” *State v. Carter*, 151 Wn.2d 118, 124, 85 P.3d 887 (2004). Thus, the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington

Constitution only apply to searches by state actors, not those of private actors. *See Id.* However, state and federal constitutional protections may apply “if the private person functions as an agent or instrumentality of the State.” *State v. Clark*, 48 Wn. App. 850, 855-56, 743 P.2d 822, *review denied*, 109 Wn.2d 1015 (1987). In other words, “law enforcement officers cannot use private citizens to obtain evidence without a search warrant where a search warrant would otherwise be required.” *State v. Swenson*, 104 Wn. App. 744, 754, 9 P.3d 933 (2000), *cert. denied*, 546 U.S. 983 (2005). The defendant bears the burden to show that a private citizen was acting as a government agent. *Id.*

Whether a person is acting as a State agent depends on the particular facts. *Clark*, 48 Wn. App. at 856. The government must be directly involved in the search or indirectly involved as an encourager or instigator of the private person’s actions. *Id.* A private citizen acts as an agent of the State where the State has in some way “instigated, encouraged, counseled, directed, or controlled” the actions of that individual. *State v. Agee*, 15 Wn. App. 709, 713-14, 552 P.2d 1084 (1976), *aff’d*, 89 Wn.2d 416 (1977).

Two key considerations in the “State agent” analysis are (1) whether the government was aware of and acquiesced in the intrusive conduct and (2) whether the private citizen intended to assist law enforcement or further the private citizen’s own ends. *Clark*, 48 Wn. App. at 856. However, “a mere purpose to aid the government does not transform an otherwise private search into a governmental search.” *State v. Ludvik*, 40 Wn. App. 257, 263, 698 P.2d 1064 (1985). And “[m]ere knowledge by the government that a private citizen might conduct an illegal private search without the government taking any deterrent action [is] insufficient to turn the private search

into a governmental one.” *Swenson*, 104 Wn. App. at 755 (quoting *State v. Smith*, 110 Wn.2d 658, 666, 756 P.2d 722 (1988)).

The exclusionary rule requires suppression of all evidence obtained pursuant to a person’s unlawful search or seizure. *State v. Winterstein*, 167 Wn.2d 620, 632-33, 220 P.3d 1226 (2009). But the “[c]onstitutional guaranties against unreasonable searches and seizures protect only against governmental actions and do not require the application of the exclusionary rule to evidence obtained from private citizens acting on their own initiative.” *Ludvik*, 40 Wn. App. at 262.

B. THE TRIAL COURT DID NOT ERR IN DENYING MILLER’S SUPPRESSION MOTION

Miller argues that the trial court erred in its finding of fact 15 that “this was not a GPS device that Detective Beck had” and its finding of fact 16 that “Detective Beck was not employing the GPS device.” Br. of Appellant at 1 (quoting CP at 62). We disagree.

Here, Detective Beck testified that “[Jennifer] had GPS location on [Miller], since she explained to me they shared the same cell phone plan.” VRP (Nov. 19, 2019) at 18. Detective Beck also testified that the cellphone plan that Miller shared with Jennifer allowed Jennifer to see Miller’s GPS location data through Google, which explained how “she was able to track him.” VRP (Nov. 19, 2019) at 18. Thus, Jennifer located Miller on her phone based on the shared cell phone plan she had with Miller. The evidence is sufficient to persuade a fair-minded, rational person that the GPS locator was on Jennifer’s cellphone and not a device that Detective Beck had in his possession. Therefore, substantial evidence supports the trial court’s findings of fact 15 and 16.

Next, Miller argues that “[t]he trial court erred entering Conclusion of Law 12 that the use of GPS information did not constitute a State action and that there was therefore no requirement for the State to obtain a warrant.” Br. of Appellant at 1. We disagree.

Here, unchallenged finding of fact 14 shows that Jennifer, on her own initiative, provided the information on Miller’s location to Detective Beck. Detective Beck did not instigate, encourage, counsel, or direct Jennifer to turn over Miller’s GPS coordinates from her cellphone. Although Jennifer assisted law enforcement, merely aiding the government is not enough to turn an otherwise private search into a government search. *See Clark*, 48 Wn. App. at 856; *Ludvik*, 40 Wn. App. at 263. Under the facts of this case, the trial court did not err in concluding that Detective Beck’s use of Jennifer’s GPS information did not constitute State action. Because there was no State action involved, no warrant was required.

Also, because there was no State action, neither the state nor federal constitutional protections against unreasonable searches are implicated here. *See Carter*, 151 Wn.2d at 124. Therefore, Miller’s GPS location data and statements obtained following his arrest are not subject to suppression under the exclusionary rule. *See Ludvik*, 40 Wn. App. at 262. Accordingly, we affirm the trial court’s denial of Miller’s CrR 3.6 suppression motion and his convictions for first degree rape of a child and child molestation.

No. 54494-6-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Le, C.J.
Le, C.J.

We concur:

Maxa, J.
Maxa, J.

Sutton, J.
Sutton, J.

THE TILLER LAW FIRM

September 22, 2021 - 2:34 PM

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