

NO. 94636-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RYAN BRETT JOHNSON,

Petitioner.

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ANSWER TO PETITION FOR REVIEW

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## **I. IDENTITY OF RESPONDENT**

The State of Washington, respondent, asks the Court to deny the petition for review.

## **II. STATEMENT OF THE CASE**

Tashina Kona and Anthony Williams lived in a house owned by Mr. Williams's father. The house was located on the Tulalip Indian reservation. Mr. Williams's bedroom was on the first floor off the living room. Ms. Kona lived in a bedroom downstairs. Mr. Williams did not get along with Ms. Kona because he objected to her associating with people who were involved in the drug culture and because she failed to regularly pay the rent that she owed Mr. Williams's father. 10/26/15 RP 52-53, 56-57; 10/27/15 RP 97-98, 193-194.

On New Year's Eve 2014 Mr. Williams went to the casino and won \$2,500. He got home about 2:30 a.m. and went to bed about 30 minutes later. Mr. Williams shut the door to his room when he retired. 10/26/15 RP 53-56; 10/27/15 RP 195-196.

Ms. Kona had taken Mr. Williams's father's truck while he was away on vacation. Ms. Kona was angry with Mr. Williams when he went looking for the truck by making inquiries on Facebook. On New Year's Eve 2014 Ms. Kona decided to get back at Mr. Williams

when she learned that Mr. Williams had won a jackpot at the casino. She called Billy Joe Arnold and told him about the money. Mr. Arnold told Ms. Kona that he was on his way. 10/27/15 RP 194-198.

Mr. Arnold left with his girlfriend Danielle Garner, the defendant, Ryan Johnson, and the defendant's girlfriend Amy Lyon and headed for Mr. Williams' home. When they arrived Ms. Kona greeted them. She told the defendant and Mr. Arnold that the front door was unlocked. She told them where Mr. Williams's room was in the house, and proved that he won money that night. The defendant and Mr. Arnold then went into the house to commit the robbery. 10/27/15 RP 200-201; 10/28/15 RP 266-270.

On the way in the house the defendant picked up a 2 X 2 and handed it to Mr. Arnold. The two men then entered the house and burst in Mr. Williams's room, demanding money. Mr. Williams did not know the defendant and had not given anyone permission to enter his bedroom. Mr. Williams was afraid because Mr. Arnold was holding the stick so he handed the defendant his wallet. The defendant took the money and Mr. Williams's cell phone. Mr. Arnold hit Mr. Williams on the head with the stick and then the two men fled with the money and cell phone. As a result of the assault Mr.

Williams required 11 staples to close the 3-4" gash on his head. 10/26/15 RP 61-63, 66; 10/27/15 RP 100-103, 195; 10/28/15 RP 272-274.

After the robbery Ms. Kona called Mr. Arnold on a cell phone and spoke to him about the robbery. The defendant and Mr. Arnold went to the Angel of the Winds casino and spent the proceeds from the robbery. The defendant and Mr. Arnold were photographed at the casino shortly after the robbery. 10/27/15 RP 187-188, 203-204; 10/28/15 RP 276-277.

As part of his investigation Detective Sallee obtained a search warrant for Ms. Kona's cell records. He saw two numbers had been called near the time of the robbery. He recognized one number as belonging to Mr. Arnold. The second number had a (509) prefix that he did not recognize. The detective inputted the (509) number into Google and LexisNexis search engines and learned it belonged to the defendant. Detective Sallee then got a search warrant for the (509) number held by AT&T. The records did not include the subscriber's name. They did match up with records from Ms. Kona's phone showing calls made before and after the robbery. 10/27/15 RP 133-140, 151-156; 1 CP 386-391; Ex. 11, 72.

The defendant was charged with first degree robbery (count I), first degree burglary (count II), and second degree assault with a deadly weapon allegation (count III). 1 CP 313. He was convicted of all counts at jury trial. The jury found the defendant was armed with a deadly weapon. 1 CP 120-124.

The defendant appealed challenging the sufficiency of the evidence for the burglary charge and the jurisdiction of the tribal court to issue a search warrant for his cell phone records. He also challenged several evidentiary rulings and the sentences for robbery and assault charges. In an unpublished opinion the Court of Appeals affirmed finding there was sufficient evidence to support the burglary charge. Slip Op. 13-16. It did not address the trial court's jurisdiction to issue the search warrant, but instead found error had been committed the error was harmless. Slip Op. 8-10. The convictions were affirmed but the court found the robbery and assault charges violated double jeopardy. It remanded to the trial court for resentencing. Slip Op. at 19.

The defendant now seeks review of two issues. First, whether there was sufficient evidence to support the burglary charge. Second, whether the search warrant for his cell records was invalid.

### III. ARGUMENT

#### A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE BURGLARY CHARGE.

RAP 13.4(b) governs the circumstances in which this Court will accept review of a decision of the Court of Appeals. The defendant contends that review should be accepted because the lower court's decision that there was sufficient evidence to support the burglary charge conflicts with a decision of a published decision of the Court of Appeals. RAP 13.4(b)(2). Specifically he argues that the decision is in conflict with State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007) and State v. Thomson, 71 Wn. App. 634, 861 P.2d 492 (1993).

These cases deal with whether one "enters or remains unlawfully" in a building. Each case differs factually from the present case. For that reason the lower court's decision here does not conflict with either Court of Appeals decision.

In Wilson the evidence showed the defendant lived with his girlfriend in a home they co-leased. The girlfriend had a no contact order against the defendant, but the order did not exclude him from their residence. Thus the defendant did not commit a burglary by entering or remaining unlawfully in the home when he went inside and assaulted his girlfriend. Wilson 136 Wn. App. at 111.



In Thompson the Court construed the definition of "building" that provided "each unit of a building consisting of two or more units separately secured or occupied is a separate building..." RCW 9A.04.110(5); Thompson, 71 Wn. App. at 642. The Court concluded that this definition applied to separate rooms within a single structure only when each tenant had a separate privacy interest in his or her room, and that interest was separate from the interests of other tenants. Id. at 645.

Here the defendant was not a tenant of the Williams's home. He therefore had no possessory interest in the home to justify his presence there. Instead he relied on Ms. Kona's permission to enter the home to argue that his entry was not unlawful. The defendant lawfully entered Mr. Williams's room only if Ms. Kona had authority to grant him permission to enter that room. State v. J.P., 130 Wn. App. 887, 882, 125 P.3d 215 (2005).

The evidence showed that she did not have that authority. Ms. Kona had her "own space in the basement" and she had access to common areas such as the kitchen, living room, bathroom, and upstairs. 10/27/15 RP 206-207. She also testified that when Mr. Williams was in his room sleeping the door was closed. 10/26/15 RP at 195-196. No one testified that she had

authority to allow anyone in Mr. Williams's room. Mr. Williams testified that no one had permission to be in his room when the defendant and Mr. Arnold "barged in." 10/26/15 RP 66.

The defendant asserts that the State made an unsupported claim that Mr. Williams's door was closed when the robbers entered his room. Petition at 7. Mr. Williams testified that after coming home he eventually went to his room and fell asleep around 5:00 a.m. 10/26/15 RP 56. Ms. Kona did testify that usually when Mr. Williams was in his room the door was closed. When she got home his door was closed. 10/26/15 RP 195-196. Mr. Arnold testified that the door was open, but did not clarify whether that meant it was physically open or simply unlocked. 10/28/15 RP 273. Although there was arguably conflicting evidence regarding whether Mr. Williams's door was open or closed, the jury was free to conclude that Mr. Williams's door was closed when the defendant and Mr. Arnold barged in. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The reasonable inference from this evidence is that Mr. Williams had a separate privacy interest in his bedroom, that Ms. Kona did not have authority over the entire premise, and that she did not have authority to give the defendant or Mr. Arnold

permission to enter Mr. Williams's room. The Court of Appeals decision does not conflict with either Wilson or Thompson.

**B. THE COURT SHOULD NOT REVIEW AN ISSUE THAT THE COURT OF APPEALS DID NOT DECIDE. THE HARMLESS ERROR BASIS FOR THE COURT OF APPEALS DECISION DOES NOT JUSTIFY REVIEW.**

The defendant also asks the Court to review whether the Tulalip Tribal Court had authority to issue a search warrant for his cell phone records on the basis that it involved a significant question of constitutional law. He also seek review of that issue on the basis that it is a question of substantial public interest. RAP 13.4(b)(3), (4). The Court of Appeals did not decide this question. Instead it found that if the search warrant was invalid because the Tulalip Tribal Court did not have authority to issue it, the failure to suppress evidence obtained from the warrant was harmless beyond a reasonable doubt. Slip Op. at 8.

This case involved an offense committed on tribal land by a non-Indian. The warrant was issued for cell records maintained in another state. 1 CP 389. The defendant does not claim that this scenario is common, that it is likely to be repeated in the future, or that it will affect a large number of people. It is not a "significant"

question constitutional law. Nor is it involve an issue of substantial public interest that should be determined by this Court.

Instead the defendant largely relies on the argument that the Court of Appeals wrongly decided that the admission of evidence from the warrant was harmless. He argues that the only witness tying the defendant to the robbery was Mr. Arnold. Because Mr. Arnold had been "incentivized," his testimony was suspect.

Admission of evidence obtained from an invalid search warrant is an error of constitutional magnitude. State v. Kedoara, 191 Wn. App. 305, 317, 364 P.3d 777 (2015), review denied, 185 Wn.2d 1028 (2016). Constitutional error is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *Id.* The court will look to the untainted evidence to determine if that evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The untainted evidence tying the defendant to the robbery included much more than Mr. Arnold's testimony. The jury also had Ms. Kona's and Mr. Arnold's phone records that also showed the calls between their phones and the phone associated with the (509)

number. Ex. 11, Ex. 72 (pages 3-5). 10/28/15 RP 249-259. Evidence from Facebook and LexisNexus tied the defendant to the (509) number. 10/27/15 RP 140, 151, 153. The defendant does not seek review of the Court of Appeals decisions regarding the admissibility of that evidence. Mr. Arnold identified the defendant as Ms. Lyons's boyfriend. 10/28/15 RP 265-266, 272-276. Mr. Arnold's girlfriend, Ms. Gardner, corroborated his testimony saying that Ms. Lyons and her boyfriend were with them on New Year's Eve, and that Ms. Lyons, her boyfriend, and Mr. Arnold left in a red SUV when Mr. Arnold got a call from Ms. Kona to do a robbery. 10/29/15 RP 314-316. Ms. Kona corroborated Mr. Arnold's identification when she stated that the defendant looked like the guy that accompanied Mr. Arnold to her house to commit the robbery. 10/27/15 RP 200. Video surveillance photographs corroborated Mr. Arnold's testimony that he and the defendant went to the Angel of the Winds casino right after the robbery. 10/27/15 RP 183-184, 187-188; 10/28/15 RP 277.

The evidence obtained as a result of the search warrant was minimal. The defendant's cell records were not introduced into evidence. The only evidence introduced that was derived from the challenged search warrant was that records for the (509) phone

number did not indicate who the subscriber was, but that the call activity between that number and the records for Ms. Kona's number was the same. 10/27/15 RP 153-156. The jury was informed that Mr. Arnold had been offered a plea bargain in exchange for his testimony. 1028.15 RP 277-278. They were entitled to judge his credibility in light of all the evidence. Camarillo, 115 Wn.2d at 71. When compared with all the other direct and circumstantial evidence tying the defendant to the robbery, if it was error to introduce that evidence, it was harmless beyond a reasonable doubt.


#### **IV. CONCLUSION**

The Court of Appeals decision finding there was sufficient evidence to support the burglary charge does not conflict with decisions from the Court of Appeals. The defendant has not shown that the whether the search warrant for his cell records issued by a tribal court is a significant question of constitutional law. Nor has he shown that the validity of the search warrant is an issue that involves an issue of substantial public interest. The evidence obtained from the challenged search warrant was minimal. The overwhelming untainted evidence leads to the conclusion that if admission of the evidence from the challenged search warrant was

error, it was harmless. For those reasons the State asks the Court to deny review.

Respectfully submitted on July 6, 2017.

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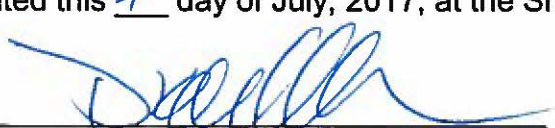
The undersigned certifies that on the 7<sup>th</sup> day of July, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

ANSWER TO PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Travis Stearns, Washington Appellate Project; [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org); [travis@washapp.org](mailto:travis@washapp.org)

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

Dated this 7<sup>th</sup> day of July, 2017, at the Snohomish County Office.

  
\_\_\_\_\_  
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**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

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