SUPREME COURT NO. 97393-8

NO. 78045-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC THOMAS,

Petitioner.

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

The Honorable Samuel Chung, Judge

PETITION FOR REVIEW

JENNIFER WINKLER
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (cont'd)

Page

FEDERAL CASES

TABLE OF AUTHORITIES (cont'd)

Page

TABLE OF AUTHORITIES (cont'd)

Page

RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Eric Thomas asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Eric Thomas, 78045-0-I, filed May 28, 2019 ("Opinion"), which is appended to this petition. Appendix A. The court denied the State's motion to publish on June 27, 2019. Appendix B.

C. ISSUE PRESENTED FOR REVIEW

Does a search warrant application addressing a crime occurring on a specific date permit a search of evidence covering a much broader date range simply because such a search might produce rebuttal evidence trial, where the warrant does not explain that such evidence is likely to be found or explain the relevance of such evidence?

D. STATEMENT OF THE CASE

1. Charges

The State charged Eric Thomas with two counts of voyeurism. CP 1-6, 10-11; former RCW 9A.44.115 (2003). As to count 1, the State alleged Thomas viewed K.H. and D.C. having sex in K.H.'s bedroom on May 1, 2017. As to count 2, the State alleged that 27 days earlier, Thomas filmed C.W. (a resident of the same apartment building) with his phone

while she was in her bedroom. The video was discovered after police seized Thomas's phone following the count 1 incident. CP 10-11; RP 24.

In May of 2017, after speaking with the count 1 complainants, who had confronted Thomas outside K.H.'s apartment, police sought a warrant to search Thomas's phone.[1] RP 176-77; Pretrial Ex. 13.

While reviewing a cell phone extraction report, a detective watched a video that ultimately led to the count 2 charge. RP 187-88. Police obtained a second warrant in August 2017, but only after watching the video in question and perusing other files well outside the time frame for the crime under investigation. RP 188-89; Pretrial Ex. 14 (application for search warrant – amended, pages 2-4 of 9).

2. Denial of motion to suppress

Thomas moved to suppress the video, arguing in part that the initial search warrant was overbroad. CP 65-66; RP 215-16. At the suppression hearing, lead detective Scott Hatzenbuehler testified he originally applied for a search warrant for the phone based on the count 1 complainants' report that they saw Thomas with a phone in his outside the apartment. RP 177. The search warrant application indicates D.C.

[1] The original warrant application did *not* contain information K.H. may have seen someone looking in her window about a month earlier. CP 202. This information was available to police before police sought the warrant. E.g. RP 468, 532.

believed he was being recorded or photographed while having sex. Pretrial Ex. 13 (application for search warrant, page 2 of 6).

Seeking evidence of "voyeurism" under RCW 9A.44.115, the application seeks a variety of information from May 1, 2018, including photos and videos "created, accessed, read, modified, received, stored, sent, moved, deleted, or otherwise manipulated" on that date. Pretrial Ex. 13 (application for search warrant, page 4 of 6). However, the application also seeks "*[p]hotographs of [K.H. or D.C.], or any parts of a male or female that could be [K.H. or D.C.], or of [K.H.'s] apartment building, whether the interior or exterior of that building*," without date limitation. Pretrial Ex. 13 (application for search warrant, pages 4-5 of 6) (emphasis added). The warrant application does not set forth any basis for the lack of date limitation: Another paragraph full of generic information about the habits of cell phone owners, and cell phones' storage and location-revealing capabilities, does not tie its assertions to the specific crime under investigation or to the relevant time frame. Pretrial Ex. 13 (application for search warrant, page 3 of 6).

A judge approved the initial search warrant, including a provision mirroring the language in the application, italicized above. RP 177; Pretrial Exh. 13 (search warrant, page 2 of 3). Detective Hatzenbuehler took a copy of the warrant to Detective Darin Sugai, one of a handful of

Seattle detectives handling cell phone "extractions" using Cellebrite software. RP 177, 179, 196. Sugai performed an extraction and provided the report to Hatzenbuehler. Sugai did not limit the date range for the *extraction*. RP 208. Sugai was able to limit the date range on data provided in the report. At the time, however, the police department did not have a policy to limit the date range for such reports. That policy was changed soon after, and since then, Sugai provided reports with limited date ranges. RP 203-04.

Hatzenbuehler, in contrast, has training only on how to read extraction reports. RP 180. Using the Cellebrite program's "reader" software, Hatzenbuehler searched the extraction for video images located on the phone by clicking on the "videos" tab. RP 184. Hatzenbuehler was looking for evidence of voyeurism from May 1, 2017. But, he was also looking for evidence related to other dates based on the search warrant provision that lacked a date limit, italicized above. RP 187, 191.

Using the software, Hatzenbuehler scrolled down a list of videos and their corresponding "thumbnail" images. RP 185-86. Hatzenbuehler testified that a file's "created" date will display if a user single-clicks on the thumbnail corresponding to the file. RP 186, 192. A user need not open a file to display the dates associated with the file. RP 208; Pretrial Ex. 12 (substituted as Trial Ex. 1).

The thumbnail image for video "19" showed what appeared to be window blinds. RP 187. Hatzenbuehler suspected, therefore, that the corresponding video might be "voyeuristic."[2] RP 187-88; Pretrial Ex. 14 (application for search warrant – amended, page 4 of 9). He played the complete video, which lasted 20 seconds.[3] RP 187-88. After the video ended, Hatzenbuehler noticed the video was created on April 4, 2017. RP 188. Hatzenbuehler believed the video was likely within the scope of the warrant, but he was not certain. So, he decided to submit an addendum to the original search warrant application to seek a broader warrant. RP 189-90; Pretrial Ex. 14. The "amended" search warrant application indicates that Hatzenbuehler did not locate any images from May 1, 2017. Pretrial

---

[2] In the Court of Appeals, the State claimed that Detective Hatzenbuehler only discovered the video of count 2 complainant C.W. because the blinds in the thumbnail appeared to be the blinds from K.H.'s apartment. Brief of Respondent at 19 and 19 n. 6 (citing RP 186, 188). The record does not support this claim. Detective Hatzenbuehler never said the blinds appeared to correspond to K.H.'s apartment, nor did he offer this as a reason for looking at the file. Rather, Hatzenbuehler testified he opened the file (without first checking the date, although he could have done so) simply because the file's "thumbnail" showed blinds and "it looks like that can be voyeuristic activity." RP 186. Further, "what I recall is just scrolling to see what I had, and since I'm specifically looking for evidence of voyeurism, I scrolled down and saw video with blinds." RP 188.

[3] But see CP 165 (Finding of Fact "aa" ("Hatzenbuehler observed a small portion of the video as it began to play"); Finding of Fact "cc" ("Hatzenbuehler stopped viewing the video and did not pursue further investigation into the content, location, or metadata")). These findings are erroneous to the extent that the conflict with the testimony, which the court found credible.

Ex. 14 (application for search warrant – amended, page 4 of 9). The second warrant was issued in August of 2017. Pretrial Ex. 14.

The trial court, finding Hatzenbuehler and Sugai's testimony credible, denied the motion to suppress. RP 220-23 (oral ruling); CP 161-66 (written findings and conclusions). Specifically, the court concluded that "the [original] search warrant is supported by probable cause and is not overbroad. It contained particularized facts and specific requests related to the crime of voyeurism." CP 165 (conclusion of law "b.1."); RP 222 (clarifying that court's ruling refers to the initial May 2017 warrant).

3. Appeal

Thomas appealed the denial of his suppression motion, arguing in part that the search violated the state and federal constitutions based on overbreadth. Brief of Appellant (BOA) at 17-32. He argued count 2 should be reversed and dismissed (because the video constituted the only evidence of the charged crime) and that count 1 should also be reversed, because admission of the video was prejudicial as to that count. BOA at 33.

The Court of Appeals rejected Thomas's argument, indicating that the undated catchall provision, listed above, was not overbroad despite not being date-limited in any way. Opinion at 10-12.

E. REASONS REVIEW SHOULD BE ACCEPTED

THE CELL PHONE SEARCH WARRANT WAS OVERBROAD BECAUSE ITS DATE RANGE WAS NOT APPROPRIATELY LIMITED. BECAUSE THIS CASE INVOLVES A SIGNIFICANT CONSTITUTIONAL QUESTION NOT PREVIOUSLY ADDRESSED BY WASHINGTON COURTS, THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(3) AND (b)(4).

This Court should accept review under RAP 13.4(b)(3) and (4) because the Court of Appeals' opinion errs on a significant constitutional question—warrant overbreadth in the context of cell phone searches. Police investigated a crime that occurred on a single date. Nothing in the warrant application suggested or supported that evidence beyond that time frame would serve as evidence of the crime. Because, under the circumstances, the unlimited time frame of the challenged search warrant rendered it overbroad, the resulting evidence should have been suppressed. This Court should grant review and reverse the Court of Appeals.

1. Standard of review

In reviewing a decision on a motion to suppress evidence, this Court determines whether substantial evidence supports challenged findings of fact, and whether the findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). This Court reviews de novo conclusions of law relating to the suppression of evidence. Id. Specifically, this Court reviews de novo questions of

warrant particularity and breadth. State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992); United States v. Wong, 334 F.3d 831, 836 (9th Cir. 2003).

2. To satisfy the Fourth Amendment, a search warrant must be sufficiently specific: It must clearly state what is sought, and it must be limited by the probable cause on which the warrant is based. This warrant did not satisfy the Fourth Amendment.

A warrant is unconstitutionally overbroad where it exceeds the probable cause on which the warrant is based. Police were investigating a crime that occurred on a single date. The warrant application fails to assert evidence beyond that time frame would serve as evidence of the crime. Pursuant to the overbroad provision listed above, the lead detective viewed a video in its entirety. Suppression was, therefore, required.

The Fourth Amendment protects privacy interests against an unreasonable search and seizure as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Thus, a search warrant may only issue upon a determination of probable cause. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "Probable cause exists if the affidavit in support of the

warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." Id.

The Fourth Amendment was adopted in response to "indiscriminate searches and seizures conducted under the authority of 'general warrants.'" Payton v. New York, 445 U.S. 573, 583, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (quoting Boyd v. United States, 116 U.S. 616, 625, 6 S. Ct. 524, 29 L. Ed. 746 (1886)). "'[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings . . . . [The Fourth Amendment addresses the problem] by requiring a "particular description" of the things to be seized.'" Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)).

The Fourth Amendment, as applied to the states through the Fourteenth Amendment, imposes two express requirements. Kentucky v. King, 563 U.S. 452, 459, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011). "First, all searches and seizures must be reasonable. Second, a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." Id.

To determine whether a warrant lacks the required specificity, this Court examines particularity and breadth. United States v. Kow, 58 F.3d 423, 426 (9th Cir. 1995). "Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based." United States v. Towne, 997 F.2d 537, 544 (9th Cir. 1993) (quoting In re Grand Jury Subpoenas Dated Dec. 10, 1987, 926 F.2d 847, 856-57 (9th Cir. 1991)). The scope of the warrant, and the search, is limited by the extent of probable cause. United States v. Whitney, 633 F.2d 902, 907 (9th Cir.1980) ("The command to search can never include more than is covered by the showing of probable cause to search."), cert. denied, 450 U.S. 1004 (1981).

When analyzing warrant overbreadth, Washington courts have found the following three factors are relevant:

> "(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued."

State v. Higgins, 136 Wn. App. 87, 91-92, 147 P.3d 649 (2006) (quoting United States v. Mann, 389 F.3d 869, 878 (9th Cir. 2004)).

As to the third Higgins factor, if there is information available to place a time frame on a search, a warrant will be found overbroad if it lacks such limits. United States v. Cardwell, 680 F.2d 75, 78-79 (9th Cir.1982); see also United States v. Abboud, 438 F.3d 554, 576 (6th Cir. 2006) (warrant covering a six-year period was invalid because probable cause only supported the seizure of evidence pertaining to a three-month period). Crucially, "[f]ailure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." United States v. Ford, 184 F.3d 566, 576 (6th Cir.1999) (citations omitted).

Search of computers or other electronic storage devices gives rise to heightened particularity concerns. A properly issued warrant "'distinguishes those items the State has probable cause to seize from those it does not,' particularly for a search of computers or digital storage devices." State v. Keodara, 191 Wn. App. 305, 314, 364 P.3d 777 (2015) (quoting State v. Askham, 120 Wn. App. 872, 879, 86 P.3d 1224 (2004)). As the Supreme Court recently made clear, vigilance against overly general and overbroad warrants is especially crucial when it comes to cell phones. Riley v. California, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

Contrary to these principles, the State argued the warrant was not overbroad because there was probable cause to look for evidence of not only the crime under investigation, but also photos taken on *any* date, because such photos might produce useful rebuttal evidence. Brief of Respondent (BOR) at 8-9, 16-17. The State seemed to argue that, as a matter of course, probable cause for a crime constitutes probable cause for any ER 404(b)[4] evidence that might be admissible at trial. BOR at 9.

While the State cited no authority for such a proposition, the Court of Appeals appears to have accepted it. Opinion at 11. Relying on Abboud, and a recent federal district court case citing Abboud,[5] the court indicates that, in searching for evidence of the May 1 crime, "a degree of flexibility [was] required." Opinion at 11 (citing Abboud, 438 F.3d at 576 n. 7). Why such "flexibility" would allow police to look for files outside the single-day charging period, even though nothing in the affidavit explains why it would be necessary or desirable to do so, is unclear.

---

[4] ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[5] Opinion at 11 (quoting United States v. Manafort, 313 F.Supp.3d 213, 235 (D.D.C. 2018)).

The Court of Appeals' reliance on Abboud, moreover, does not withstand scrutiny. In Abboud, businessman defendants were suspected of "systematic[ally]" kiting a series of checks between June and August of 1999, thereby stealing millions of dollars. Abboud, 438 F.3d at 571, 573.

The federal appellate court held the government's search warrant overbroad. First, the court noted, "'Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." Id. at 576 (quoting Ford, 184 F.3d at 576). "Here, law enforcement knew that the evidence in support of probable cause in the affidavit revolved only around a three-month period in 1999; the authorization to search for evidence irrelevant to that time frame could well be described as 'rummaging.'" Abboud, 438 F.3d at 576.

But—in the portion of the opinion relied on by the Court of Appeals—the court held that evidence dating just beyond of the June-August 1999 period was conceivably relevant to the activity within the time period. "For example, evidence of continued check kiting in September and October in 1999 after warnings from bank officials would be evidence of bad faith; however, evidence from 1996 or 2002 is clearly irrelevant." Id. at 576 n. 7. In Abboud, however, it was clear the defendants had met with bank officials during those months, making evidence of check kiting during those months relevant to the charged

crime. Although not entirely clear from the opinion whether such information appeared in the warrant, it is likely that it did; the government's supporting affidavit was incorporated by reference. Id. at 569. Thus, it appears likely the FRE 404(b)-type evidence was supported by the foundational affidavit.

Despite its purported reliance on Abboud, the Court of Appeals opinion thus fails in both a specific sense and in a global sense.

First, in the present case, the original search warrant application draws no connection between (1) evidence of the May 1 crime under investigation and (2) evidence originating from an unlimited date range. Pretrial Ex. 13 (application for search warrant at pages 4-5 of 6).

Ford, quoted with approval in Abboud, is instructive. There, the federal appellate court found a warrant overbroad based on a similar deficiency. Don and Sandra Ford were charged with several crimes related to a purportedly charitable bingo operation. A search led to an additional charge, a tax crime. Ford, 184 F.3d at 571-73. The court reversed the tax conviction:

> The government argues that it was necessary to seize documents antedating the bingo operation to establish what money Ford had before the bingo business started. This would help the government to identify which of his present assets could be bingo proceeds. This argument would allow virtually unlimited seizure of a lifetime's worth of documentation, which is extremely intrusive. . . . *At any*

> *rate, this rationale was not articulated in the affidavit, and therefore we need not decide whether it would have provided a justification for the warrant if it had been presented to the magistrate.*

Id. at 576 (emphasis added). Under Ford, failure to articulate a broadening rationale *in the warrant application itself* vitiates the government's post-hoc explanation of why such evidence would be beneficial to its case.

Second, contrary to Ford, the Court of Appeals appears to be adopting a rule in which probable cause for a crime automatically supports probable cause for any evidence that could later be admitted for rebuttal purposes under ER 404(b). Opinion at 11. The court cites no valid authority for such a rule. While the court cites Andresen, 427 U.S. at 483, it cites a portion of that opinion not dealing with warrant overbreadth, but rather the portion discussing a line of cases querying whether "mere evidence" of a crime may be seized, in addition to "instrumentalities, fruits, or contraband." See Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 310, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). The portion cited is inapposite.

As a final matter, while courts have recognized the difficulty of differentiating electronic files subject to search from those that are not, e.g. United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162,

1176 (9th Cir. 2010), the State cannot fall back on any related justification in this case. Seattle police had the power to limit the date range when producing a cell phone extraction report. RP 203-04. Further, the investigating detective had the ability to click on the thumbnail and discover the file creation date without playing the file. RP 186, 192, 208.

Police investigated crime occurring on a single date. Nothing in the warrant application and resulting warrant supported that evidence beyond that time frame would serve as evidence of the crime. Under the circumstances, the search warrant's unlimited time rendered it overbroad. The resulting evidence should have been suppressed.

3. The warrant also violated the state constitution.

The search also violated the state constitution. This Court need not reach Fourth Amendment analysis when article I, section 7 provides "independent and adequate state grounds" to resolve an issue. State v. Patton, 167 Wn.2d 379, 396 n.9, 219 P.3d 651 (2009).

"No person shall be disturbed in his private affairs . . . without authority of law." CONST. art. I, § 7. Article 1, section 7 differs from the Fourth Amendment and, in some areas, provides greater protections than does the federal constitution. State v. Chenoweth, 160 Wn.2d 454, 462-63, 158 P.3d 595 (2007).

The private affairs inquiry is broader than the Fourth Amendment's "reasonable expectation of privacy" inquiry. State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Under the Fourth Amendment, a search occurs if the government intrudes upon a subjective and reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). "In contrast to the Fourth Amendment, article I, section 7 'recognizes an individual's right to privacy with no express limitations." State v. Betancourth, 190 Wn.2d 357, 366, 413 P.3d 566 (2018) (quoting State v. Winterstein, 167 Wn.2d 620, 631-32, 220 P.3d 1226 (2009)).

Analysis under article I, section 7 consists of a two-step inquiry: first, this Court examines whether there has been a governmental intrusion into an individual's home or private affairs (the "private affairs" prong); and, if so, this Court analyzes whether authority of law justifies the intrusion (the "authority of law" prong). Chenoweth, 160 Wn.2d at 463. "It is now settled that article 1, section 7 is more protective than the Fourth Amendment." State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); cf. State v. Mayfield, 192 Wn.2d 871, 879-80, 434 P.3d 58 (2019) (listing considerations when a new issue arises under article I, section 7).

A government search of a cell phone has the potential to reveal a vast amount of personal information. The United States Supreme Court

described the intimate details that cell phones may contain in Riley, 573 U.S. 373. In State v. Samalia, 186 Wn.2d 262, 270-71, 375 P.3d 1082 (2016), this Court looked to Riley's discussion of the nature and extent of private information that cell phones may contain. "[M]any [cell phones] are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." Riley, 573 U.S. at 393.

Considering the intimate details contained therein, this Court concluded, a search of a cell phone may "may reveal intimate or discrete details of a person's life." Samalia, 186 Wn.2d at 271 (citing Riley, 573 U.S. at 394-95). This Court found independent state constitutional analysis was necessary, considering that several prior cases already addressed the types of information now found in cell phones:

> Cell phones store information that we have previously held to be protected under article I, section 7 as private affairs. Our historical treatment of these types of information supports finding that that cell phones and their contents are private affairs. For example, cell phones track call logs. In State v. Gunwall, 106 Wn.2d 54, 67–69, 720 P.2d 808 (1986), we held that a warrant is required under article I, section 7 before the police may search telephone records of an individual that the police received from the telephone company. Cell phones track GPS (global positioning systems) data. In [Jackson, 150 Wn.2d at 264], we held that a warrant is required under article I, section 7 before the police may attach a GPS device to a citizen's vehicle.

> Cell phones track bank information. In [State v. Miles, 160 Wn.2d 236, 244-45, 156 P.3d 864 (2007)], we held that a warrant is required under article I, section 7 before the police may search banking records[.] Cell phones can even track hotel registry information, which we also held was a private affair under article I, section 7 in [State v. Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007)].
>
> Most recently, we recognized that text messages are private affairs. See [Hinton, 179 Wn.2d at 877-78]. In Hinton, we held that text messages were private affairs because viewing the messages may expose "'a wealth of detail about [a person's] familial, political, professional, religious, and sexual associations.'" Id. at 869 (alteration in original)[.]

Samalia, 186 Wn.2d at 271-72. "Given the intimate information that individuals may keep in cell phones and our prior case law protecting that information as a private affair, we hold that cell phones, including the data that they contain, are 'private affairs' under article I, section 7." Samalia, 186 Wn.2d at 272.

The information found in cell phones, and specifically smartphones, is a person's "private affairs." Thus, a search of a smartphone is subject to independent analysis under the state constitution. See Patton, 167 Wn.2d at 396 (appellate court does not reach Fourth Amendment analysis when article I, section 7 provides "independent and adequate state grounds" to resolve the issue). Unlike its federal counterpart, Washington's exclusionary rule is "nearly categorical." State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). Also in contrast with

the Fourth Amendment, Washington does not allow a "good faith" or "reasonableness" exception to the exclusionary rule. "Under article I, section 7, the requisite 'authority of law' is generally a valid search warrant" Betancourth, 190 Wn.2d at 367. Here, Thomas was charged with a crime occurring on May 1. The application for search warrant did not explain how or why evidence from beyond that date would be relevant. Such information was arguably available to police, but it was not included. The catchall provision upheld by the Court of Appeals cannot be reconciled with Samalia. The search violated Thomas's privacy rights without authority of law, in violation of the state constitution. The remedy is suppression. State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007) (under article I, section 7, "[i]f the evidence was seized without authority of law, it is not admissible").

F. CONCLUSION

This Court should accept review and reverse the Court of Appeals on the issue of warrant overbreadth.

DATED this 8th day of July, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

FILED
5/28/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ERIC SHAWN THOMAS, Appellant.	No. 78045-0-I DIVISION ONE UNPUBLISHED OPINION FILED: May 28, 2019

CHUN, J. — The State originally charged Eric Thomas with one count of voyeurism. After obtaining a search warrant for Thomas's cell phone, police found video showing a separate incident of voyeurism, which gave rise to a second charge. Thomas moved to suppress the video, claiming the warrant was overbroad. The trial court denied the motion. Thomas appeals his conviction on both counts of voyeurism, renewing the warrant issue and claiming ineffective assistance of counsel and prosecutorial misconduct. Thomas also appeals the imposition of certain community custody conditions. Because the warrant provision provided clear parameters to the executing officer, and Thomas fails to establish his other claims, we affirm.

I.
BACKGROUND

On May 1, 2017, K.H. and D.C. were engaging in sexual intercourse inside the bedroom of K.H.'s apartment when K.H. saw someone looking through her partially-closed blinds. K.H. screamed and D.C. pulled on pants and ran out

the door. D.C. ran into the alley behind the apartment. D.C. looked over the seven-foot fence adjacent to the apartment building, and saw Thomas crouching on the other side with a cell phone in hand. Seeing the cell phone, D.C. assumed Thomas had been filming them. D.C. told Thomas to jump over the fence and Thomas complied. Thomas told D.C. he had been urinating behind the building. The two had a verbal altercation.

K.H. came outside and called 911. During the call, D.C. provided a physical description to the police. Thomas walked down the street and into another apartment complex.

Seattle Police Officer Christopher Shoul responded to the call. Officer Shoul took statements from D.C. and K.H., while another police unit patrolled the area looking for Thomas. After Officer Shoul finished investigating at the scene, he located Thomas sitting at a nearby bus stop. Thomas told Officer Shoul he had been watching basketball playoffs and drinking at a bar with some friends. After being told one of the victims would come by to identify him, Thomas eventually told Officer Shoul that he had gone around the building to urinate and heard two people "having sex." Thomas said he looked and said "wow."

Officer Shoul returned to the apartment and took D.C to the bus stop to identify Thomas. D.C. positively identified Thomas. Another officer arrested and transported Thomas to the police station, where his cell phone was placed into evidence.

Seattle Police assigned Detective Scott Hatzenbuehler to the case. Thomas told Detective Hatzenbuehler the following version of events: He had

been drinking beers and watching a playoff game with some friends at a bar in the area. He walked to the bus stop after the game, but missed the bus. While sitting at the bus stop, Thomas had to use the restroom and walked around the back of an apartment building to relieve himself. While relieving himself, Thomas heard "some sex going on." Then Thomas heard someone at the window yelling. Soon after, a man came running out and accused Thomas of watching them. Thomas was not video recording and there was nothing of that nature on the phone.

Detective Hatzenbuehler applied for and obtained a search warrant for Thomas's cell phone. The search warrant permitted a search of Thomas's phone to find evidence related to its use on May 1, 2017 including calls, messages, photographs, videos, and location data. The warrant also allowed for a search for "[p]hotographs of [K.H.] or [D.C.], or any parts of a male or female that could be [K.H.] or [D.C.], or of [K.H.'s] apartment building, whether the interior or exterior of that building," and "any other information that is evidence of the above-listed crime(s)," without date restriction.

A specially-trained detective extracted the data from the cell phone. Upon receiving the data, Detective Hatzenbuehler began looking for video[1] or images pursuant to the warrant. Looking for evidence of voyeurism, Detective Hatzenbuehler first scrolled through the videos and saw a thumbnail image from

[1] Despite the warrant provision's limitation to "photographs," Detective Hatzenbuehler searched for videos. Thomas does not object to the search on this ground. Neither Thomas nor the State distinguishes between photographs and videos in their arguments. Because there is no meaningful difference between photographs and videos in this context, we also do not distinguish between them in our analysis.

video 19 showing window blinds with what looked like a light on inside and darkness outside. Detective Hatzenbuehler played the short, 20-second video. The video, dated April 4, 2017 appeared to show voyeuristic activity on the part of the person recording.

Although Detective Hatzenbuehler believed the evidence was within the scope of the warrant, he decided to obtain an addendum to the warrant in case he found additional evidence.[2] Upon examination, video 19 appeared to be shot through a window and showed a woman sitting at a computer. The woman never looked in the direction of the recording. Detective Hatzenbuehler later determined the woman in the video was C.W., who lived in the same apartment building as, and just next door to, K.H.

The State originally charged Thomas with one count of voyeurism. After discovery of the video of C.W., the State amended the information to include a second count of voyeurism.

In pretrial motions, Thomas attempted to suppress the video of C.W., arguing Detective Hatzenbuehler exceeded the scope of the warrant and obtained the video pursuant to an overbroad warrant. The trial court denied the motion.

During trial, Thomas moved for a mistrial due to admission of an audio recording of the 911 call. The trial court also denied this motion. The jury found Thomas guilty on both counts.[3] Thomas now appeals.

---

[2] Thomas does not raise any claims related to the warrant addendum.

[3] Below, additional pertinent facts are introduced as needed for the individual issues.

II.
ANALYSIS

A. Search Warrant

Thomas argues the trial court erroneously admitted the video of C.W., because police obtained it through an overbroad search warrant.[4] Thomas claims this results in insufficient evidence to convict on Count II and prejudice as to Count I, requiring reversal for both counts. The State contends police found the video of C.W. pursuant to a sufficiently particular search warrant. Because the warrant provided clear parameters to the executing officer, we agree with the State.

Cell phones are "private affairs" under article I, section 7 of the Washington State Constitution, requiring a warrant or an applicable exception for a lawful search. State v. Samalia, 186 Wn.2d 262, 268, 375 P.3d 1082 (2016). The Fourth Amendment to the United States Constitution requires a warrant to describe with particularity the things to be seized. State v. Higgins, 136 Wn. App. 87, 91, 147 P.3d 659 (2006). This requirement exists to "make a general search 'impossible and prevent[ ] the seizure of one thing under a warrant describing another.'" State v. McKee, 3 Wn. App. 2d 11, 22, 413 P.3d 1049 (2018) (quoting Marron v. United States, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927)), rev'd on other grounds, No. 96035-6 (Wash. Apr. 22, 2019), http://www.courts.wa.gov/opinions/pdf/960356.pdf). Particularity also eliminates

---

[4] During oral argument, Thomas's counsel noted that Detective Hatzenbuehler "arguably" did not act outside the warrant. Rather than argue Detective Hatzenbuehler acted outside the warrant, Thomas assigned error to the language of the warrant and argued overbreadth. Wash. Court of Appeals oral argument, State v. Thomas No. 78045-0-I (April 16, 2019), at 2 min., 47 sec. through 2 min., 59 sec. (on file with court).

unlimited discretion in the executing officer's determination of what to seize, and informs the person subject to the search of what items the officer may seize. State v. Besola, 184 Wn.2d 605, 610-11, 359 P.3d 799 (2015). The degree of particularity depends on the nature of the materials sought and the facts of the case. State v. Keodara, 191 Wn. App. 305, 313, 364 P.3d 777 (2015).

"In general, Washington courts have recognized that the search of computers or other electronic storage devices gives rise to heightened particularity concerns." Keodara, 191 Wn. App. at 314. This heightened particularity arises because "advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain." United States v. Galpin, 720 F.3d 436, 446 (2nd Cir. 2013).

"A properly issued warrant 'distinguishes those items the State has probable cause to seize from those it does not,' particularly for a search of computers or digital storage devices." Keodara, 191 Wn. App. at 314 (quoting State v. Askham, 120 Wn. App. 872, 879, 86 P.3d 1224 (2004)). An overbroad warrant lacks the requisite particularity. See Keodara, 191 Wn. App. at 312. Three factors assist in determining whether a warrant suffers from overbreadth:

> "(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued."[5]

[5] This opinion refers to these as the "Higgins factors."

Higgins, 136 Wn. App. at 91-92 (internal quotation marks omitted) (quoting United States v. Mann, 389 F.3d 869, 878 (9th Cir. 2004)).

Courts evaluate search warrants "in a commonsense, practical manner, rather than in a hypertechnical sense." State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992) (citing United States v. Turner, 770 F.2d 1508, 1510 (9th Cir. 1985) cert. denied, 475 U.S. 1026 (1096)). "The underlying measure of adequacy in a description is whether, given the specificity of the warrant, a violation of personal rights is likely." Keodara, 191 Wn. App. at 313. "A search warrant must be definite enough that the executing officer can identify the property sought with reasonable clarity and eliminate the chance that the executing officer will exceed the permissible scope of the search." State v. McKee, 3 Wn. App.2d at 28-29.

Appellate courts review de novo a trial court's probable cause and particularity determinations on a motion to suppress. Keodara, 191 Wn. App. at 312. Admission of evidence obtained in violation of the state or federal constitution amounts to an error of constitutional magnitude. Keodara, 191 Wn. App. at 317.

Here, Thomas alleges overbreadth based on the provision of the original warrant authorizing a search of Thomas's cell phone for "[p]hotographs of [K.H.] or [D.C.], or any parts of a male or female that could be [K.H.] or [D.C.], or of [K.H.'s] apartment building, whether the interior or exterior of that building."[6] This

[6] During oral argument, counsel raised an issue of overbreadth as to an additional warrant provision allowing search of the cell phone for "[a]ny other information that is evidence of the above-listed crimes(s)." Wash. Court of Appeals oral argument, State v. Thomas No. 78045-0-I (April 16, 2019), at 3 min., 1 sec. through 3 min., 29 sec. (on file with court). However,

provision of the warrant did not limit the search to the specific date of the incident. Thomas argues the lack of a date restriction caused the warrant to fail the Higgins factors and allowed for search and seizure of data without regard to its connection to the crime on May 1, 2017.

Thomas likens this case to Keodara, which involved a fatal shooting at a bus stop. 191 Wn. App. at 311. Five weeks after the shooting and based on an unrelated incident, the police obtained a search warrant authorizing search of the defendant's cell phone for a broad range of cell phone data, including all call activity, photographs, videos, documents, and internet activity, based on the police officer's belief that gang members' phones often contain evidence of criminal activity. Keodara, 191 Wn. App. at 309-10. The cell phone contained images of the defendant wearing clothes similar to those of the bus stop shooter and the State charged the defendant with murder. Keodara, 191 Wn. App. at 311.

The defendant moved to suppress all evidence from the phone for lack of probable cause. Keodara, 191 Wn. App. at 311. The supporting affidavit relayed only the officer's knowledge of gang members' use of their phones to document their activities. Keodara, 191 Wn. App. at 310-11. The warrant authorized the search for stored information, and "any and all other evidence suggesting the crimes listed above [assault in the fourth degree, unlawful possession of firearms, possession with intent to deliver or sell narcotics.]" Keodara, 191 Wn.

Thomas's briefing addresses only the specific photograph provision. We do not consider arguments made outside the briefing. RAP 10.3.

App. at 309-10. This court found the warrant overbroad because, "[t]here was no limit on the topics of information for which the police could search. Nor did the warrant limit the search to information generated close in time to the incidents for which the police had probable cause." Keodara, 191 Wn. App. at 316.

Similarly, McKee, 3 Wn. App.2d at 29, involved a warrant authorizing a "physical dump" of the phone's memory. During an investigation of sexual exploitation of a minor and dealing in depictions of a minor engaged in sexually explicit conduct, police obtained a warrant authorizing a search for all images, videos, documents, calendars, call logs, and other data. McKee, 3 Wn. App.2d at 29. "The warrant gives the police the right to search the contents of the cell phone and seize private information with no temporal or other limitations." McKee, 3 Wn. App.2d at 29. This allowed a search of general categories of data without objective standards to guide the police executing the warrant. McKee, 3 Wn. App.2d at 29. As a result, the warrant failed to meet the particularity requirement of the Fourth Amendment. McKee, 3 Wn. App.2d at 29.

In Keodara and McKee, the warrants lacked particularity because they allowed for searches of a broad range of data without a data or date restriction. However, neither Keodara nor McKee hold that a warrant must include both data and date restrictions to satisfy the particularity requirement. Rather, the warrants in the cases lacked either limitation, and therefore suffered from overbreadth. As noted in McKee, the warrant gave police "the right to search the contents of the cell phone and seize private information with no temporal *or* other limitation." 3 Wn. App.2d at 29 (emphasis added).

Unlike the wide-ranging warrants in Keodara and McKee, the warrant in this case provided specific, case-related limits to the search. Most of the warrant provisions limited the search to digital information from May 1, 2017. The provision at issue lacked a date restriction but included a data restriction that limited the search only to images depicting D.C., K.H., K.H.'s apartment building, or "any parts of a male or female that could be" K.H. or D.C. With this data restriction, the warrant resembles the one upheld in Askham. 120 Wn. App. at 879. In Askham, the warrant allowed for seizure of a wide range of digital storage, including computers, drives, disks, and other memory storage. 120 Wn. App. at 879. While the warrant allowed search of a broad category of material, it specified the files and applications for search. Askham, 120 Wn. App. at 879. The warrant listed text files related to the victim, specific internet sites, graphic images and image files, and text files relating to manipulation of digital images. Askham, 120 Wn. App. at 879. With these established parameters, "[t]he warrant's description left no doubt as to which items were to be seized and was 'not a license to rummage for any evidence of any crime.'" Keodara, 191 Wn. App. at 314 (quoting Askham, 120 Wn. App. at 880). As a result of this specification of files subject to search, the warrant satisfied the particularity requirement.

With its limitation to photographs of D.C., K.H., K.H.'s building, and "any parts of a male or female that could be" K.H. or D.C., the warrant provision at issue in this case includes even more restrictive language than in Askham. The warrant allowed Detective Hatzenbuehler to search solely for those particular

images on the cell phone. The search was more akin to the physical search of a box of photographs than an examination of the entire digital contents of a cell phone as found in Keodara and McKee. Rather than allowing law enforcement to rummage through a wide range of private information that Thomas might have had on his phone, the provision focused on the category of images.

In examining these images, "[a] degree of flexibility is required." See United States v. Abboud, 438 F.3d 554, 576 n.7 (6th Cir. 2006). This includes flexibility as to dates as "'evidence that date[s] from outside of the time period' described in the warrant affidavit 'may be relevant to the activity within the time period.'" United States v. Manafort, 313 F.Supp.3d 213, 235, (D.D.C. 2018) (quoting Abboud, 438 F.3d at 576, n.7). The United States Supreme Court has recognized that "proof of similar acts is admissible to show intent or the absence of mistake." Andresen v. Maryland, 427 U.S. 463, 483, 96 S. Ct. 2737, 49 L.Ed.2d 627 (1976). In this case, images of K.H., D.C., and K.H.'s building from prior dates are relevant to the crime charged for this very reason. The State relied on the April video of C.W. to argue that Thomas purposefully went behind to building to look in the windows.[7]

Here, the warrant did not allow for a broad search of files for photographs or videos unrelated to the crime at issue or violate the Higgins factors. The warrant provided clear parameters to the executing officer. Detective Hatzenbuehler could not legally search for images depicting other people in other

[7] The defense did not object to the State's use of this evidence during closing argument and rebuttal.

places; if video 19 depicted C.W. in a different building, the evidence would have been outside the original warrant. Therefore, the warrant was not overbroad.

B. Ineffective Assistance of Counsel

Thomas argues ineffective assistance of trial counsel based on the proposal of an incorrect jury instruction and the inadvertent admission of potentially damaging evidence from a 911 call. While counsel erred in both respects, Thomas cannot demonstrate prejudice as a result of those errors.

Effective assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove both deficient performance and prejudice. State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

Establishing deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness based on all the circumstances. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Prejudice sufficient to support a claim of ineffective assistance of counsel occurs when counsel's errors were so serious as to deprive the defendant of a fair trial. Hendrickson, 129 Wn.2d at 78. The defendant must show a "reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78.

A claim of ineffective assistance of counsel is a mixed question of law and fact that an appellate court reviews de novo. Jones, 183 Wn.2d at 338-39.

1. Jury Instruction

Thomas alleges trial counsel provided ineffective assistance of counsel by proposing inaccurate and incomplete lesser included offense instructions. The State argues Thomas cannot establish the prejudice necessary to support an ineffective assistance claim. We agree with the State.

Jury instructions must not be misleading and must properly inform the trier of fact. State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998). "The jury is presumed to read the court's instructions as a whole, in light of all other instructions." State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). Additionally, the appellate court reviews individual jury instructions in the context of the instructions as a whole. State v. Tyler, 191 Wn.2d 205, 216, 422 P.3d 436 (2018).

Here, the trial court issued instruction 10, defining voyeurism:

> A person commits the crime of *voyeurism* when, for the purposes of arousing or gratifying the sexual desire of any person, the person knowingly views or photographs or films a second person without the second person's knowledge and consent, and while the second person is being viewed or photographed or filmed, the second person is in a place where he or she would have a reasonable expectation of privacy.

(Emphasis added.) The trial court also gave a to-convict instruction for voyeurism as instruction 15.

Defense counsel proposed lesser included offense instructions for attempted voyeurism in the first degree.[8] The trial court subsequently provided

[8] Although counsel proposed the instruction, the invited error doctrine does not bar Thomas's argument for ineffective assistance based on this issue. State v. Kyllo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). "If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review." Kyllo, 166 Wn.2d at 861. In other words, the

the suggested instructions on attempted voyeurism in the first degree. The trial court instructed, "A person commits the crime of attempted *Voyeurism in the first degree* when, with the intent to commit that crime, [they do] any act that is a substantial step toward the commission of that crime." (Emphasis added.) The court also gave the following to-convict instruction:

> To convict the defendant of the crime of attempted *voyeurism in the first degree*, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about May 1, 2017, the defendant did an act that was a substantial step toward the commission of voyeurism in the first degree;
>
> (2) That the act was done with the intent to commit voyeurism in the first degree; and
>
> (3) That the act occurred in the State of Washington.

(Emphasis added.)

However, when Thomas committed the crimes in April and May 2017, voyeurism in the first degree did not exist. Former RCW 9A.44.115 established only the single crime of voyeurism. The legislature amended RCW 9A.44.115 and divided the crime of voyeurism into first and second degree offenses in 2017, effective July 23, 2017. LAWS OF 2017, ch. 292, sec. 1. Thomas's trial occurred in 2018, after the effective date of the statute establishing the crime of voyeurism in the first degree. Therefore, defense counsel successfully proposed jury instructions for a crime that existed at the time of trial but did not pertain to Thomas based on the dates of his offenses. Additionally, the lesser included offense instructions refer to voyeurism in the first degree, while the main offense

---

invited error doctrine does not apply where the error at issue serves as the basis for an ineffective assistance claim.

instructions, instructions 10 and 15, refer to voyeurism rather than voyeurism in the first degree.

Despite the erroneous instructions on attempted voyeurism in the first degree, Thomas cannot demonstrate a "reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. The elements for voyeurism under former RCW 9A.44.115 are identical to those for voyeurism in the first degree under the amended statute RCW 9A.44.115(2)(a). Regardless of the name, the jury received the correct definition and elements for the lesser included offense.

Furthermore, the jury instructions included only the single definition of voyeurism given in instructions 10 and 15. The jury had no other definition of voyeurism before it. Because the only definition provided the correct elements of the law, the likelihood of confusion was minimal. Taking the jury instructions as a whole, the only definition given for voyeurism properly informed the jury of the applicable law. Thomas has not shown that the instructions created any confusion for the jury. As a result, his ineffective assistance claim on this ground fails.

2. 911 Call

Prior to trial, Thomas brought a motion in limine to preclude the witnesses from testifying that he, or anyone else, looked through K.H.'s window on prior occasions. The State did not object, and the trial court granted the motion.

During trial, the State played the entirety of the recorded 911 call placed by K.H. during the incident. On the recording, K.H. states, "I've seen him before

in our window," and "he watches me." D.C. also says, "[H]e's done this before."[9] After the jury heard the audio recording, defense counsel requested a sidebar and moved for a mistrial. The trial court subsequently denied the mistrial and admonished counsel, "I was a little taken aback, because I feel that it was incumbent on the counsels to know the evidence that's being presented before the court." Defense counsel declined a curative instruction for fear it would call attention to the statements. The parties agreed to redact the recording in case the jury requested to listen to it again. The trial court admitted the redacted version into evidence to substitute for the original, but the jury did not ask to hear the call again.

Thomas argues ineffective assistance due to trial counsel's failure to review the 911 call for potentially damaging statements and object to its admission on proper grounds. The State contends Thomas cannot demonstrate the requisite prejudice because the jury may not have heard the statements and the statements were essentially cumulative of the video of C.W. We agree with the State.

Through muffled statements on the 911 call, the jury potentially learned that Thomas had been outside K.H.'s apartment prior to May 1, 2017. However, C.W. and K.H. have neighboring windows in the apartment building. Admission of video of C.W., taken from the same location outside their neighboring apartment windows on April 4, 2017, provided essentially the same information to

[9] The trial court did not hear the statements when the recording was played for the jury. The trial court only discerned the statements after listening again outside of proceedings.

the jury. The State repeatedly referred to the April date of the video. Therefore, admissible evidence placed Thomas outside of C.W. and K.H.'s bedroom windows within the month prior to the incident.

Additionally, the video of C.W. and the erroneous evidence from the 911 call both negated Thomas's defense of happenstance. The video of C.W. demonstrated that Thomas had been behind the building on a prior occasion, making his presence on May 1, 2017 less likely related to his emergent need to find a place to urinate. The statements from the 911 call established that Thomas watched K.H. on prior occasions, allowing for the conclusion that he did not randomly decide to urinate in that location. As a result, the 911 call provided redundant evidence to negate Thomas's claims.

Because the video of C.W. taken from outside their neighboring windows demonstrated Thomas's prior presence outside of K.H.'s window and negated any claim of mistake, the statements in the 911 call amounted to cumulative evidence. Thomas fails to demonstrate "reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. Therefore, Thomas cannot show prejudice to support ineffective assistance of counsel on this ground.

C. Prosecutorial Misconduct

Thomas claims the prosecutor committed misconduct during closing argument by undermining the presumption of innocence. The State argues that an objection and instruction from the court would have cured any prejudice resulting from the prosecutor's comment. While we agree that the prosecutor's

statements amount to an error of law, Thomas fails to demonstrate the prejudice required for a successful claim of prosecutorial misconduct.

To prevail on a claim of prosecutorial misconduct, the defendant must prove that the prosecutor's comments were improper and prejudicial. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). "The burden to establish prejudice requires the defendant to prove that 'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

Failure to object to a prosecuting attorney's improper remark constitutes a waiver of the error unless the remark is so flagrant and ill-intentioned that the resulting prejudice could not have been neutralized by a curative instruction. State v. Elmore, 139 Wn.2d 250, 292, 985 P.2d 289 (1999). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

During closing argument, the prosecutor told the jury, "Now, the defendant carries the presumption of innocence in this case and that presumption continues until you go back to the jury room." Thomas contends the prosecutor's statement denied him a fair trial by suggesting to the jury that the presumption of innocence "evaporates" once deliberation begins.

Indeed, the prosecutor's statement that the presumption of innocence "continues until you go back to the jury room" misstated the law. See State v. Reed, 168 Wn. App. 553, 578, 278 P.3d 203 (2012); State v. Evans, 163 Wn. App. 635, 643, 260 P.3d 934 (2011); State v. Venegas, 155 Wn. App. 507, 524-25, 228 P.3d 813 (2010). Rather than ending at the jury room door, "The presumption of innocence continues throughout the entire trial and may be overcome, if at all, only during deliberations." Evans, 163 Wn. App. at 643. Any statement that invites the jury to disregard the presumption upon deliberation "seriously dilutes the State's burden of proof." Evans, 163 Wn. App. at 644.

To the extent that the prosecutor's comment suggested the presumption of innocence continued only until the jurors began deliberations, it constituted an improper remark. However, because Thomas did not object to this statement during trial, he has waived the error "unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Thomas argues the misconduct incurably prejudiced him because the prosecutor urged the jurors to treat Thomas's out-of-court statements as any other witness statement, requiring temporary coexistence with the presumption of innocence. According to Thomas, the prosecutor's argument suggested the jurors cast aside the presumption of innocence. While the statement suggested that jurors could disregard the presumption of innocence upon deliberation, this

court recently addressed a similar statement and found a curative instruction would have neutralized any resulting prejudice. See Reed, 168 Wn. App. at 579.

In Reed, the prosecutor stated "the presumption of innocence 'does last all the way until you walk into that [jury] room and start deliberating.'" 168 Wn. App. at 578. Reed did not object to this statement during trial. Reed, 168 Wn. App. at 578. There, as here, the statement amounted to an incorrect statement of the law by suggesting the presumption of innocence dissipated at the beginning of deliberations. Reed, 168 Wn. App. at 578. The court concluded the defendant failed to demonstrate enduring prejudice: "We have no doubt that a simple instruction from the trial court indicating that the presumption of innocence may be overcome, if at all, only *during* the jury's deliberations would have been sufficient to overcome any prejudice resulting from the prosecutor's remark." Reed, 168 Wn. App. 579.

Given the similarity of the statements, the Reed court's conclusion holds equally true for the case at hand. Had Thomas objected to the prosecutor's statements, the court could have issued an instruction to correct the misstatement of the law and remind the jury that the presumption of innocence persisted until the State proved the charged crime beyond a reasonable doubt. See Evans, 163 Wn. App. at 642-43. As a result, Thomas fails to establish the prosecutor's error as so flagrant and ill-intentioned that a curative instruction could not neutralize the resulting prejudice and cannot prevail on his claim of prosecutorial misconduct.

D. Community Custody Conditions

Thomas appeals the imposition of certain community custody prohibitions. Specifically, Thomas alleges (1) the community custody condition prohibiting him from entering sex-related businesses is not crime-related; and (2) the conditions prohibiting possession of sexually explicit materials and requiring that he inform the community custody officer (CCO) and treatment provider of any dating relationship are unconstitutionally vague. The State contends the trial court properly exercised its discretion in imposing these conditions. Because State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018) recently upheld these community custody conditions against the same claims, the trial court properly imposed the conditions.

1. Crime-Related Prohibition

Here, the court imposed a community custody condition prohibiting Thomas from "enter[ing] sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material." Thomas contends this prohibition is not crime related and amounts to an abuse of the court's discretion. Nguyen says otherwise.

As a condition of community custody, a sentencing court has the discretion to impose "crime-related prohibitions," proscribing "conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.703(3)(f); RCW 9.94A.030(10). "The prohibited conduct need not be identical to the crime of conviction, but there must be 'some basis for

the connection.'" Nguyen, 191 Wn.2d at 684 (quoting State v. Irwin, 191 Wn. App. 644, 657, 364 P.3d 830 (2015)).

An appellate court reviews community custody conditions for an abuse of discretion. Nguyen, 191 Wn.2d at 678. A court does not abuse its discretion if a reasonable relationship exists between the community custody condition and the crime of conviction. Nguyen, 191 Wn.2d at 684. "So long as it is reasonable to conclude that there is a sufficient connection between the prohibition and the crime of conviction, we will not disturb the sentencing court's community custody conditions." Nguyen, 191 Wn.2d at 685-86.

Thomas was convicted of two counts of voyeurism. Voyeurism is a sex offense involving viewing, photographing, or filming without consent for the purposes of arousal or gratification of sexual desire. Former RCW 9A.44.115(2). Commission of a sex offense establishes an inability to control sexual urges. Nguyen, 191 Wn.2d at 686. Therefore, "[i]t is both logical and reasonable to conclude that a convicted person who cannot suppress sexual urges should be prohibited from accessing 'sexually explicit materials,' the only purpose of which is to invoke sexual stimulation." Nguyen, 191 Wn.2d at 686. As a result, the trial court did not abuse its discretion in limiting Thomas's access to sexually explicit materials by prohibiting entrance to sex-related businesses.

2. Vagueness Challenge

Thomas argues unconstitutional vagueness as to the community custody provisions requiring him to inform the CCO and treatment provider of any dating

relationship and prohibiting him from possessing or viewing sexually explicit material. Based on Nguyen, we disagree.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington State Constitution require fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A community custody provision suffers from vagueness if it does not define the criminal offense with sufficient definiteness such that ordinary people can understand the conduct proscribed, or does not provide ascertainable standards of guilt. Nguyen, 191 Wn.2d at 678. In Nguyen, the Washington State Supreme Court explicitly concluded that the two provisions appealed here—the requirement of informing the CCO and treatment provider of any dating relationship and prohibition against sexually explicit material—were not unconstitutionally vague. 191 Wn.2d at 681-83. Therefore, the sentencing court did not abuse its discretion by imposing these community custody conditions.

We affirm.

Chun, J.

WE CONCUR:

Mann, A.C.J.

Appelwick, C.J.

APPENDIX B

FILED
6/27/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. ERIC SHAWN THOMAS, Appellant.	No. 78045-0-I DIVISION ONE ORDER DENYING MOTION TO PUBLISH IN PART

The appellant, Eric Shawn Thomas, has filed a motion to publish in part. The respondent, State of Washington, has filed a response. A panel of the court has considered its prior determination and has found that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED, that the unpublished opinion filed May 28, 2019 shall remain unpublished.

Chun, J.
Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

July 08, 2019 - 1:13 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78045-0
Appellate Court Case Title:	State of Washington, Respondent v. Eric Shawn Thomas, Appellant
Superior Court Case Number:	17-1-03005-4

The following documents have been uploaded:

- 780450_Petition_for_Review_20190708131322D1770914_9791.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 78045-0-I.pdf

A copy of the uploaded files will be sent to:

- carla.carlstrom@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Client address is unknown at this time

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Jennifer M Winkler - Email: winklerj@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190708131322D1770914