

No. 98591-0

NO. 78704-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

LYNELL DENHAM,

Appellant.

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

The Honorable Helen Halpert, Judge

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CORRECTED REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE WARRANTS FOR DENHAM’S HOME AND CALL  
DETAIL RECORDS LACKED PROBABLE CAUSE,  
NECESSITATING REVERSAL OF DENHAM’S  
CONVICTIONS.

- a. Call detail records are protected by the Fourth  
Amendment and article I, section 7, and are therefore  
subject to the warrant requirement.

In response to Denham’s challenge to the warrant for his call detail records, the State asserts Denham’s “citation to cellphone search cases and computer search cases is misguided.” Br. of Resp’t, 15. The State emphasizes police never seized or searched the contents of Denham’s cellphone; rather, the call detail records “merely showed who the subscriber was, facts regarding the sending and receiving of text messages and phone calls . . . , and the location of the cellphone when calls or texts were sent or received.” Br. of Resp’t, 16.

To the extent the State suggests Denham does not have a privacy interest in his call detail records, the State is wrong. Very recently, this Court addressed whether cell-site location information (CSLI) is protected by the Fourth Amendment and article I, section 7. State v. Phillip, \_\_ Wn. App. 2d \_\_, \_\_ P.3d \_\_, 2019 WL 2723990 (July 1, 2019). CSLI is “highly detailed data, which can create a historical map of where a particular cell phone traveled during a set period of time.” Id. at \*1. It essentially allows

police “to look back in time and find out precisely where anyone was at a given time.” Id.

With regard to the Fourth Amendment, the Phillip court relied on the U.S. Supreme Court’s recent decision in Carpenter v. United States, \_\_ U.S. \_\_, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). The Carpenter Court explained CSLI records “provide[] an intimate window into a person’s life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations.” Id. at 2217. The Court accordingly held that accessing CSLI data from wireless carriers invades an individual’s “reasonable expectation of privacy in the whole of his physical movements.” Id. at 2219. As a result, “[b]efore compelling a wireless carrier to turn over a subscribers CSLI, the Government’s obligation is a familiar one—get a warrant.” Id. at 2221.

In addition to Carpenter’s holding on the Fourth Amendment, the Phillip court emphasized that “even more concerning is that the primary concern of article I, section 7 is to protect privacy.” 2019 WL 2723990, at \*7 (quoting State v. Winterstein, 167 Wn.2d 620, 631-32, 220 P.3d 1226 (2009)). “Article I, section 7 ‘recognizes an individual’s right to privacy with no express limitations[,]’ and ‘the paramount concern of our state’s exclusionary rule is protecting an individual’s right of privacy.’” Id. (citation

omitted) (quoting Winterstein, 167 Wn.2d at 631-32; State v. Betancourth, 190 Wn.2d 357, 367, 413 P.3d 566 (2018)).

The State must therefore obtain a warrant in order to seize and search CSLI records, under both the Fourth Amendment and article I, section 7. Id. at \*7-\*9. The typical warrant requirements apply: “To be constitutionally valid, a warrant must not only be supported by probable cause but it must also specifically tie the facts known to the State to the specific evidence it seeks to obtain.” Id. at \*9.

Just as in Carpenter and Phillip, Denham’s call detail records, which contained CSLI, provided the State an intimate view into Denham’s life. Denham’s cell phone data precisely tracked his movements. Just as in Carpenter and Phillip, the State traveled back in time to retrace Denham’s whereabouts—the State effectively tailed Denham’s every movement. The warrant for that private, detailed information therefore needed to state a sufficient nexus between criminal activity and the item to be seized, as well as a nexus between the item to be seized and the place to be search. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

The State failed to allege such a nexus. The State contends the search warrant affidavits show Denham used his two cell phones “in selling stolen jewelry to Porcello’s Jewelers, Topkick Pawnshop, and to Andy Le at Thien Phuoc Jewelry.” Br. of Resp’t, 16 (citing CP 420-21, 423, 436). This

significantly overstates the warrant affidavit. All the affidavit states is Denham provided Le with his identification, stating his address, as well as his phone number, and then later called Le. CP 421. In other words, Denham simply provided Le his contact information. This did not establish that evidence of trafficking in stolen property would be found in Denham's call detail records.<sup>1</sup>

The State contends these allegations established Denham's call detail records "would provide subscriber information, i.e., that the phones belonged to the defendant." Br. of Resp't, 16-17. But, as the State itself acknowledges, the call detail records contain much more than just subscriber information. Br. of Resp't, 16 (facts regarding sent and received text messages and phone calls, as well as CSLI data). In so arguing, the State implicitly concedes a lack of nexus to Denham's CSLI. Even if there was a sufficient nexus to Denham's subscriber information, the State does attempt to argue there was a sufficient nexus to Denham's CSLI. As Carpenter and Phillip hold, CSLI contains a vast amount of private data, protected by the Fourth Amendment and article I, section 7.

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<sup>1</sup> Perhaps tellingly, the State does not contend that Denham providing his identification with his home address gave the police probable cause to search his home. See Br. of Resp't, 13-15. It is not clear why, then, providing his cell phone number gave the police probable cause to search his call detail records, including CSLI.

Beyond the subscriber information, the State relies solely on generalities, just as Detective O’Neill did. Br. of Resp’t, 17. For instance, the State contends, “as stated in the affidavit and commonly known, most adults in America possess a cellphone, and being mobile devices, people carry their phones with them.” Br. of Resp’t, 17. According, the State asserts, “[i]t is a reasonable inference that the defendant had his cellphone with him and that his phone records would provide proof that he was in the area of the jewelry store at the time of the burglary.” Br. of Resp’t, 17.

This Court should take great caution in considering the State’s argument. Its position is essentially that, because people carry their cell phones everywhere now, police can get a warrant for an individual’s call details records if that person is suspected of committing a crime. This would effectively license search warrants for call detail records in every criminal case.

The Washington Supreme Court in Thein has already denounced such a result for searches of the home. Thein, 138 Wn.2d at 148. And, in Phillip, this Court emphasized it is “obligated—as ‘[s]ubtler and more far-reaching means of invading privacy have become available to the Government’—to ensure that the ‘progress of science’ does not erode Fourth Amendment protections.” 2019 WL 2723990, at \*7 (quoting Carpenter, 138 S. Ct. at 2223). The fact that many Americans carry their cell phones with

them nearly everywhere does not and should not erode their privacy interest in those phones and corresponding CSLI.

- b. *Thein* did not carve out an exception for burglary—there must still be a nexus the individual’s home and the items to be seized.

As anticipated, the State essentially contends that *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999), applies to suspected drug dealers but not to suspected burglars. Br. of Resp’t, 10-15. In particular, the State emphasizes footnote four in *Thein*, 138 Wn.2d at 149 n.4. Br. of Resp’t, 10-11.

In footnote four, the *Thein* court distinguished *State v. Herzog*, 73 Wn. App. 34, 867 P.2d 648 (1994), “on its underlying facts.” *Thein*, 138 Wn.2d at 149 n.4 (emphasis in original). As the *Thein* court explained, *Herzog* involved the rape of six women. *Id.* At least three of the victims described Herzog as wearing a striped polo shirt. *Herzog*, 73 Wn. App. at 38-40. After arresting Herzog, police obtained a warrant to search his room for clothes and towels described by the victims. *Id.* at 56.

In a cursory discussion, the *Herzog* court held clothing would normally “be kept in one’s home,” so a reasonable person would believe “that items of evidential value would be found in Herzog’s room.” *Id.* The *Herzog* court did not engage in any other analysis. *Id.* And, the *Thein* court later overruled the leading case the *Herzog* court relied on to reach this conclusion, *State v. Gross*, 57 Wn. App. 549, 554, 789 P.2d 317 (1990).

The Thein court noted the evidence in Herzog “connected specifically described personal items used repeatedly in the commission of multiple crimes to the defendant.” Thein, 138 Wn.2d at 149 n.4. The court accordingly did not “find it unreasonable to infer these items were in the possession of the defendant at his home,” because they “were personal items of continuing utility and were not inherently incriminating.” Id. The court concluded, “[u]nder specific circumstances it may be reasonable to infer such items will likely be kept where the person lives.” Id. (emphasis added).

Thus, Thein did not establish an exception for burglaries or other non-drug-related crimes. Such an exception would swallow the rule. On the contrary, the Thein court suggested only that there *may* be *specific circumstances* where it is reasonable to infer certain items will be found in the suspect’s home.

Thein’s progeny demonstrates footnote four has not been applied broadly. Specifically, Denham discussed State v. McReynolds, 104 Wn. App. 560, 17 P.3d 608 (2000), and State v. Dunn, 186 Wn. App. 889, 348 P.3d 791 (2015), in his opening brief. Br. of Appellant, 16-18. Both cases required more than just probable cause to believe the defendant committed the burglary. Something additional has to link the defendant’s home to evidence of the crime. In McReynolds, that nexus was lacking, where there was no link between a stolen pry bar and the defendant’s home. 104 Wn.

App. at 570. In Dunn, the defendant was seen driving a stolen truck carrying a stolen ATV on the road where he lived—connecting his home to the stolen property. 186 Wn. App. at 899. Notably, the State does not discuss either McReynolds or Dunn.

Furthermore, Denham respectfully disagrees that 600 pieces of jewelry and loose stones valued around \$300,000 are not inherently incriminating. See Br. of Resp't, 14 (claiming the jewels were “not inherently criminal”). This is especially true when combined with power tools that could obviously be used in a burglary. See Br. of Resp't, 14 (discussing the power drill, power saw, and wire cutters necessary to accomplish the Mallinak burglary). Stolen property and burglary tools are not comparable to the polo shirt in Herzog—a piece of repeatedly worn clothing that one could reasonably assume Herzog kept in his room.

Finally, quoting WAYNE R. LAFAYE, SEARCH AND SEIZURE § 3.7(d), at 381-85 (3d ed. 1996), the McReynolds court noted “the question is whether, assuming a not too long passage of time since the crime, it is proper to infer that the criminal would have the fruits of his crime in his residence, vehicle or place of business.” 104 Wn. App. at 569 (emphasis added). Here, the burglary of Mallinak’s shop likely occurred on November 11 or 12. RP 757-58. Detective O’Neill did not get a search warrant for Denham’s home

until December 22. CP 433. The search was not executed until December 29—nearly seven weeks after the burglary. RP 925-26.

In the unpublished portion of State v. Espey, 184 Wn. App. 360, 336 P.3d 1178 (2014), the court considered six weeks to be a “long period of time.”<sup>2</sup> Following a burglary, six weeks gave Espey “ample time to dispose of the stolen items,” weakening any nexus between the criminal activity and the vehicle where Espey was likely living. The same is true here—seven weeks gave Denham (if the State’s evidence is to be believed) ample time to dispose of the jewelry and burglary tools. Nothing else linked the Denham’s home to the alleged criminal activity.

c. The State tacitly concedes the errors were not harmless beyond a reasonable doubt.

Error in admitting evidence obtained through an unconstitutional search is subject to the constitutional harmless error test. State v. Peele, 10 Wn. App. 58, 66, 516 P.2d 788 (1973). Constitutional error is presumed prejudicial and the State bears the burden of proving the error was harmless. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The State does not offer any harmless error analysis here. See Br. of Resp’t, 8-17. The State has therefore failed to carry its burden and tacitly conceded the errors

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<sup>2</sup> Under GR 14.1, the unpublished portion of Espey has no precedential value, is not binding on any court, and is cited here only for such persuasive value as this Court deems appropriate.

were not harmless beyond a reasonable doubt. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) (“Indeed, by failing to argue this point, respondents appear to concede it.”). If this Court holds that either or both of the warrants lacked probable cause, reversal is required. See Coristine, 177 Wn.2d at 381-83.

2. PRIOR BAD ACTS ARE NOT ADMISSIBLE TO PROVE KNOWLEDGE UNLESS KNOWLEDGE IS AN ESSENTIAL ELEMENT OR INGREDIENT OF THE CHARGED OFFENSE.

In response to Denham’s knowledge argument, the State relies on State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995), to suggest the bar for admitting ER 404(b) evidence is relatively low.<sup>3</sup> Br. of Resp’t, 20-21. The State likens knowledge evidence to motive, which is not an element of murder, but is generally relevant in homicide cases. Br. of Resp’t, 20-21; State v. Stenson, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997). “[M]otive goes beyond gain and can demonstrate an impulse, desire, or any other moving power which causes an individual to act.” Powell, 126 Wn.2d at 259. Motive is different than intent, “which is the purpose or design with which the act is done, the purpose to make the means adopted effective.” Id. at 260 (quoting BLACK’S LAW DICTIONARY 1014 (6th rev. ed. 1990)).

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<sup>3</sup> Notably, the State does not attempt to argue the evidence met the stringent test for modus operandi.

The Powell court held that evidence of Powell's hostile relationship with his wife was relevant and admissible as evidence of motive at his trial for her murder. Id. at 260-61. Significantly, however, the court held the ER 404(b) evidence was not admissible as evidence of intent. Id. at 262. The court explained "prior misconduct evidence is only necessary to prove intent when intent is at issue or when proof of the doing of the charged act does not itself conclusively establish intent." Id. "Otherwise," the court emphasized, "the intent exception would swallow the rule." Id. In Powell's case, the evidence was improperly admitted where intent was not a disputed issue and where it was implicit in the act of strangulation. Id.

Other cases are in line with Powell. In State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008), for instance, the trial court improperly admitted prior assaults as evidence of intent, "where intent is not an element of felony murder." See also State v. Dewey, 93 Wash. App. 50, 58, 966 P.2d 414 (1998), overruled on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003) (same where intent is not an element of third degree rape and "there was no issue of intent"); State v. Saltarelli, 98 Wn.2d 358, 366, 655 P.2d 697 (1982) (same where there was "no issue of intent in the case before [the court]").

Evidence of knowledge is analogous to evidence of intent, rather than motive. Intent and knowledge are both mens reas, i.e., the state of mind

necessary for criminal liability. RCW 9A.08.010. The case law discussed above demonstrates prior misconduct is not admissible to prove intent unless intent is an element of the offense. So, too, with knowledge, as Denham established in his opening brief. Br. of Appellant, 31-33. Where knowledge is not an element of burglary, the only way knowledge would be relevant is if Denham made an issue of it, like if he claimed he lacked the technical skills to undertake such a burglary. Powell and its progeny therefore support Denham's position rather than undermining it.

The State contends, "if evidence showed that the defendant lacked a certain intelligence level, the evidence would have been relevant to show that it was unlikely he possessed the sophisticated knowledge necessary to have committed the charged burglary." Br. of Resp't, 22. The State is correct, but turns the standard on its head. Denham did not make any issue of his intelligence or his capabilities. The knowledge evidence was not necessary to rebut any such defense. Knowledge was neither an essential element nor an essential ingredient of the State's case. Wilson, 144 Wn. App. at 177 (evidence must be "logically relevant to prove an essential element of the crime charged"); Powell, 126 Wn.2d at 258 (evidence must be "relevant and necessary to prove an essential ingredient of the crime charged").

Finally, the State claims any error was harmless because the trial court did not consider the evidence for its improper purpose—propensity. Br. of Resp't, 22-24. But, as established, the so-called knowledge evidence was inadmissible because it really went to Denham's identity. Br. of Appellant, 29-34. The trial court then relied on inadmissible identity evidence in finding Denham guilty of burglary and, in turn, trafficking in stolen property. CP 322-23. The presumption that judges in bench trials do not rely on inadmissible evidence is rebutted by the fact that the trial court very expressly did consider the evidence in finding Denham guilty. State v. Gower, 179 Wn.2d 851, 855-56, 321 P.3d 1178 (2014). Prejudice results from this reliance. The error was not harmless under the circumstances.

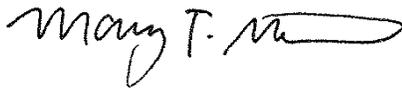
B. CONCLUSION

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

DATED this 12th day of July, 2019.

Respectfully submitted,

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