

FILED
Court of Appeals
Division I
State of Washington
5/27/2020 11:31 AM

FILED
SUPREME COURT
STATE OF WASHINGTON
5/27/2020
BY SUSAN L. CARLSON
CLERK

SUPREME COURT NO. 98591-0
COURT OF APPEALS NO. 78704-7-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LYNELL AVERY DENHAM,

Respondent.

PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>DECISION BELOW AND ISSUES PRESENTED FOR REVIEW</u>	1
C. <u>STATEMENT OF THE CASE</u>	3
D. <u>ARGUMENT</u>	7
E. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Carpenter v. United States, ___ U.S. ___,
138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018)..... 8, 9

Riley v. California, 573 U.S. 373,
134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014)..... 9

Washington State:

State v. Americk, 42 Wn.2d 504,
256 P.2d 278 (1953)..... 16

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 15, 17

State v. Cole, 128 Wn.2d 262,
906 P.2d 925 (1995)..... 9

State v. Denham, 2020 WL 2026799
(Div I. April 27, 2020)..... 1

State v. Gebaroff, 87 Wn. App. 11,
939 P.2d 706 (1997)..... 12

State v. Gentry, 183 Wn.2d 749,
356 P.3d 714 (2015)..... 15

State v. Gresham, 173 Wn.2d 405,
269 P.3d 207 (2012)..... 15

State v. Hughes, 118 Wn. App. 713,
77 P.3d 681 (2003)..... 17

State v. Lough, 125 Wn.2d 847,
889 P.2d 487 (1995)..... 15

<u>State v. Lyons</u> , 174 Wn.2d 354, 275 P.3d 314 (2012).....	10, 11
<u>State v. Maddox</u> , 152 Wn.2d 499, 98 P.3d 1199 (2004).....	10
<u>State v. Muhammad</u> , 194 Wn.2d 577, 451 P.3d 1060 (2019).....	9
<u>State v. Murray</u> , 110 Wn.2d 706, 757 P.2d 487 (1988).....	9
<u>State v. Neslund</u> , 50 Wn. App. 531, 749 P.2d 725, <u>rev. denied</u> , 110 Wn.2d 1025 (1988).....	16
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	16
<u>State v. Ray</u> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	17
<u>State v. Slocum</u> , 183 Wn. App. 438, 333 P.3d 541 (2014).....	15
<u>State v. Thein</u> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	11
<u>State v. Vickers</u> , 148 Wn.2d 91, 59 P.3d 58 (2002).....	9

Rules and Regulations

Washington State:

ER 401	17
ER 404	2, 13, 14, 15, 16, 17, 18

A. IDENTITY OF PETITIONER

The Petitioner, State of Washington, requests this Court grant review of the Court of Appeals decision in State v. Denham, 2020 WL 2026799 (Div I. April 27, 2020) (Appendix A).

B. DECISION BELOW AND ISSUES PRESENTED FOR REVIEW

Denham was convicted of burglary for committing a very sophisticated jewelry store heist, and of trafficking in stolen property for subsequently pawning some of the 600 pieces of stolen jewelry.

Denham possessed two cellphones which he used in trafficking the stolen jewelry, and which he possessed prior to the burglary. A search warrant was issued for Denham's home and cellphones, however his cellphones were never found. A search warrant then issued for his cellphone records -- records that showed Denham hit off the cellphone tower in the very parking lot of the jewelry store at the time the burglary was committed. The Court of Appeals rejected the issuing magistrate's determination that the facts in the search warrant affidavit provided a reasonable inference that evidence of the crime of burglary would be found in the place to be searched -- Denham's cellphone records.

Issue One: Where a suspect possesses a cellphone prior to committing a crime for which probable cause has been found, and

then very shortly thereafter the suspect uses that cellphone in committing a subsequent crime, is it a “reasonable inference” that evidence of the crime may be found in the place to be searched – the suspect’s cellphone records?

Prior to committing the current offenses, Denham gave a recorded statement while under investigation for a series of prior sophisticated burglaries. In the statement Denham boastfully described his knowledge and expertise in committing sophisticated commercial burglaries. Here the trial court admitted the statement under ER 404(b) to show Denham possessed the knowledge to have pulled off the charged burglary. The Court of Appeals held that 404(b) evidence cannot be admitted unless it directly relates to an element of the charged crime, and because knowledge is not an element of burglary, the fact that Denham possessed the knowledge and expertise to have pulled off the jewelry store heist was irrelevant and therefore inadmissible.

Issue Two: Just like motive evidence being admitted in murder cases where motive is not an element of murder, should this Court hold that the relevance of evidence is whether the evidence makes the existence of a fact of consequence more or

less probable than without the evidence, and that it is not limited solely to proving a statutory element of the crime?

C. STATEMENT OF THE CASE

Mallinak Jewelers is located in a shopping mall in Kirkland. The shop has an elaborate security system with motion detectors placed throughout and magnetic contact detectors attached to each door that trip an alarm if a door is opened. 6RP¹ 317-19, 322. At the back of the store is a utility room that contains phone and electrical lines for the mall. 6RP 326, 334. The utility room has two doors; a steel door that exits into the alley and cannot be opened without a key, and a solid wood door that leads from the utility room into the store. 6RP 334-37, 339, 347. Along with a magnetic contact detector, there is a steel bar across the middle of the wood door to prevent anyone from prying the door open from the utility room. 6RP 339.

The safe where the most expensive jewelry is kept is the highest rated safe in the industry -- standing five feet tall and weighing 3000 pounds, the safe has two separate locking

¹ The verbatim report of proceedings is cited as follows: 1RP—2/13/18, 2RP—2/14/18, 3RP—2/20/18, 4RP—3/5/18, 5RP—3/16/18, 6RP—3/22/18, 7RP—3/28/18, 8RP—3/29/18, 9RP—4/2/18, 10RP—4/3/18, 11RP—4/12/18, 12RP—4/16/18, 13RP—6/15/18, and 14RP—7/19/18.

mechanisms, an electromagnetic proximity detector that prevents a person from nearing the safe without triggering an alarm, and a door contact detector that triggers an alarm if opened. 6RP 322, 329-32, 381-82. The entire system is monitored in real time, with a cellular backup system in case the phone lines are cut. 6RP 322.

The shop was burglarized over the Veteran's Day weekend in 2016. 6RP 320; 9RP 787. The burglar did not gain access through any door or window, rather, access was made via the roof. 6RP 359-60. There is a roof access hatch that leads into the utility room that is padlocked on the inside. 6RP 359; 9RP 787-88. The padlock had been removed indicating that someone had gained access to the utility room and removed the lock prior to the holiday weekend. 6RP 359. This likely occurred when the lock to the outer door had to be replaced just prior to the burglary after it was found to have been tampered with. 6RP 336-39, 359.

Prior to making entry via the roof, the burglar had injected superglue into the lock of the outer door to prevent anyone from entering while the burglary was in progress. 6RP 356. From the utility room the burglar took a power saw and cut the wooden door into the store in half just below the steel bar on the inside of the door. 6RP 343-44; 9RP 787. This allowed the burglar to bypass

the steel bar and the magnetic contact detector attached to the top of the door. Id. Once inside, the burglar cut the wires to the alarm system and disabled two alarms attached to the safe. 6RP 341-42, 351, 379-83; 9RP 789. Using a high-powered drill, the burglar drilled two holes into the safe, dislodged the safe's dial, and defeated the safe's two locking mechanisms gaining access to the jewelry inside. Id. The burglar then made off with 600 plus pieces of jewelry valued at over \$300,000. 6RP 320; 9RP 787.

On November 14th, the Monday following the weekend burglary, Denham pawned some gold jewelry clasps taken in the burglary for \$300. 7RP 461; 9RP 838, 842. On November 15th, he sold a 5.29 carat diamond stolen in the burglary to Andy Le of Thien Phuoc Jewelry for \$29,000 in cash and gold. 9RP 701-17; 8RP 569-74; 10RP 954-55. He told Le his father was ill and he needed the money. 9RP 703. Le noticed that Denham was wearing a distinctive aquamarine necklace. 9RP 719-20. A distinctive aquamarine stone on a platinum necklace was stolen in the burglary. 6RP 417. Denham returned to Thien Phuoc Jewelry a second time and tried to sell more jewelry, telling Le that his family was in the jewelry business. 9RP 719.

On November 21, Denham pawned a wedding set taken in the burglary to Porcello's Jewelry for \$2,500. 7RP 481-84; 9RP 831. He claimed the jewelry was from his mother who had recently passed away. 7RP 485. He subsequently called Porcello's to inquire about selling some loose diamonds and sapphires. 7RP 487-88. On November 28, Denham pawned a diamond ring taken in the burglary to Topkick Jewelers. 7RP 462-65; 9RP 838, 842.

In early December Denham reported to his community corrections officer. 9RP 765-66. He was driving a Range Rover and wearing a gold chained necklace with a large stone. 9RP 767-69. Asked where he obtained the necklace and vehicle, Denham told his CCO that his family had come into some money. 9RP 768.

On December 22, police obtained a warrant for Denham's seizure, and search of his person, his Tacoma home, and the seizure of his two cellphones. Appendix B. In Denham's home detectives found two new headlamps, a want ad for a power drill, an empty power drill box, cutting oil used when drilling into metal, a camera tool that allows a person to put a camera lens through a drilled hole, wire crimpers, advertisements for places to obtain money for jewelry, schematics for various safes and locking mechanisms, and a number of books on electrical wiring. 10RP

926-46. Denham had gone into hiding and neither he nor his two cellphones were located. Appendix C.

Detectives then filed an addendum to the original warrant affidavit in order to obtain the phone records for Denham's two cellphones. Appendix C; 8RP 603, 659; 10RP 856-62, 963, 968. The cellphone records showed that while Denham lived in Tacoma, over the weekend of the burglary his cellphone hit off the cell tower in the parking lot of Mallinak Jewelers' Kirkland store three times; once at 11:53 p.m. on Friday November 11th, once at 2:22 p.m. on Saturday November 12, and again at 2:42 p.m. on November 12. 8RP 628-42; 9RP 766.

The day after Denham was charged with burglary and trafficking he sent a letter to Frank Mallinak proclaiming that he had purchased the stolen jewelry in good faith from a Ukrainian vendor. CP 1-9; Trial Exhibit 10. He instructed Mallinak to have the charges dropped whereupon he would recover the stolen jewelry. Id. Denham did not testify at trial.

D. ARGUMENT

This Court may grant review where a decision of the Court of Appeals conflicts with a decision of the Supreme Court or a published decision of the Court of Appeals, or presents a significant

question of law under the Constitution of the State of Washington or of the United States; or involves an issue of substantial public interest that should be determined by this Court. The issues raised herein meet one or more of these criteria.

ISSUE ONE: WHAT ARE THE LEGAL AND FACTUAL PARAMETERS FOR OBTAINING A SEARCH WARRANT FOR A SUSPECT'S CELLPHONE RECORDS

The issue here is a narrow one. The United States Supreme Court and this Court have held that to obtain a suspect's cellphone records the police must generally obtain a warrant. That was done here. The critical unanswered follow-up question is this: Where there is probable cause that a suspect committed a crime, under what factual and legal circumstances may a magistrate issue a warrant to obtain the suspect's cellphone records?

There are 70 million more cellphone accounts in the United States than there are actual people. Carpenter v. United States, ___ U.S. ___, 138 S. Ct. 2206, 2211, 201 L. Ed. 2d 507 (2018). Individuals "compulsively carry cellphones with them all the time," and nearly three-quarters of smartphone users report never being more than five feet away from their phone. Id. at 2218. As the United States Supreme Court stated, modern cellphones "are now such a pervasive and insistent part of daily life that the proverbial

visitor from Mars might conclude they were an important feature of human anatomy.” Riley v. California, 573 U.S. 373, 385, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

In part due to the sheer pervasiveness of cellphones in today’s society, and the information that may be contained in cellphone records, this Court and the United States Supreme Court have said that if police authorities want to obtain a suspect’s cellphone records, they must “get a warrant.” Carpenter, 138 S. Ct. 2206, 2221; State v. Muhammad, 194 Wn.2d 577, 451 P.3d 1060 (2019).

A search warrant must be supported by probable cause. State v. Murray, 110 Wn.2d 706, 711, 757 P.2d 487 (1988). Probable cause is established when the search warrant affidavit provides facts sufficient for a “reasonable person” applying “reasonable inferences” to conclude there is a probability the suspect is probably involved in criminal activity and evidence of the crime can be found at the place to be searched. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). “It is only the probability of criminal activity, not a prima facie showing of it; that governs probable

cause.” State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004).

A warrant affidavit is evaluated “in a common sense manner, rather than hypertechnically.” State v. Lyons, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). The issuing judge’s determination of probable cause is given great deference and is reviewed under an abuse of discretion standard. Maddox, 152 Wn.2d at 509. All doubts must be resolved in favor of the warrant’s validity. Id.

Here the warrant affidavit established that prior to the burglary and trafficking Denham possessed two cellphones and the police had the cellphone numbers. The affidavit also established that within a day of the burglary, Denham used his phones in trafficking the stolen jewelry. From here the Court of Appeals’ analysis went awry.

The issuing magistrate and the trial court found facts sufficient to support the reasonable inference that Denham committed burglary and trafficking. This probable cause determination was not challenged on appeal. Rather, Denham claimed that the facts in the warrant affidavits provided an insufficient nexus between the crime and the place to be searched – his home and his cellphone records.

The Court of Appeals recognized that cellphone and cellphone records may contain a great deal of information and that most people possess a cellphone. At the same time, in an apparent juxtaposition, the Court characterized the finding of the nexus as pure “speculation” and a “general, exploratory,” search, the type of search condemned by State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999). But the probable cause nexus here was not based on the type of frowned-upon language, such as, “the affiant is aware that persons committing this type of crime generally conceal evidence [place to be searched].” See, e.g., Thein, supra, (condemning the premise in the affidavit that all drug dealers keep evidence of the crime in their homes). The affidavits provided probable cause that Denham committed burglary, that he possessed certain cellphones before and after he committed the burglary. A reasonable person could certainly draw a reasonable inference that it was probable, not a given, that Denham’s cellphone records would provide evidence of the burglary, specifically his location.

This is where this Court’s jurisprudence is required. A warrant affidavit is evaluated “in a common sense manner.” State v. Lyons, 174 Wn.2d 354, 360, 275 P.3d 314 (2012). And a “Judge

looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept.” State v. Gebaroff, 87 Wn. App. 11, 16, 939 P.2d 706 (1997). This Court has stated that absent exigent circumstances or some other exception, a search warrant is the method to be used to obtain a suspect’s cellphone records. Thus, search warrants for cellphone records are now a common investigative tool. However, other than general guiding principles applicable to all search warrants, this Court has yet attempted to define the parameters of when such records can be obtained.

The constitutional parameters of when a search warrant for cellphone records can be obtained is a significant question of law under the Constitution of the State of Washington or of the United States. Ensuring the proper use of search warrants is of substantial public interest by protecting privacy rights where appropriate, providing police with an understanding of when and how this investigative tool can be used, and in preventing future cases from potentially being reversed because the parameters have not been defined by this Court. This case provides that opportunity. And finally, the State believes that the Court of Appeals has misinterpreted or misapplied this Court’s general

search warrant guidelines in regards to “speculative” search warrants and reasonable inferences.

ISSUE TWO: SHOULD THIS COURT CLARIFY THAT ER 404(b) EVIDENCE DOES NOT BECOME IRRELEVANT SIMPLY BECAUSE IT DOES NOT GO TO PROVE A SPECIFIC ELEMENT OF A CRIME

The trial court allowed for the admission of evidence that Denham possessed the knowledge and skill necessary to pull off a sophisticated burglary. The Court of Appeals held that this was error because knowledge is not an element of burglary, and thus, the evidence was not relevant under ER 404(b) as to any element of the crime. This Court should accept review because this is an incorrect statement of the law, is contrary to other decisions by this Court and published decisions by the Court of Appeals, and continued adherence to this mistaken premise will result in a multitude of cases being reversed on appeal and incorrect rulings by the trial courts.

Prior to committing the burglary in this case, Denham committed a number of other sophisticated commercial burglaries for which he was ultimately convicted. CP 156-318,² 338. During

² CP 156-318 are court documents showing Denham’s prior burglary convictions. The documents and convictions were *not* admitted at trial. They were admitted

the course of the investigation into those burglaries Denham gave a recorded statement to detectives. CP 396; Trial Exhibits 41 & 42 (CD's of the interview). In the interview Denham discussed the knowledge and skill he possessed in committing commercial burglaries successfully and undetected. Id.

The trial court ruled that the interview was admissible for the purpose of showing that Denham possessed the "sophisticated knowledge" to pull off an elaborate burglary, including the ability to bypass alarm systems and various electronics. 3RP 225-28. The court ruled that the actual prior convictions were not admissible. 3RP 226.

The Court of Appeals held that the trial court ruling was in error. Specifically, the Court held that because knowledge is not an element of burglary, the evidence cannot be relevant for that purpose under ER 404(b).

ER 404(b) provides a nonexclusive list of permissible purposes for admitting evidence of a person's "other crimes, wrongs, or acts" to prove such things as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

for sentencing purposes only. See CP 156. They are cited herein to provide this Court with an understanding of the actions that occurred at trial.

or accident.” ER 404(b); State v. Slocum, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). At the same time, ER 404(b) prohibits the admission of other crimes, wrongs or acts to show that the defendant acted in conformity with his character to commit such crimes, i.e., propensity evidence. State v. Gresham, 173 Wn.2d 405, 427, 269 P.3d 207 (2012).

To admit evidence of a person’s prior bad acts, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to an issue in the case, and (4) weigh the probative value against the prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The decision to admit prior bad act evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). An abuse of discretion is found when a trial judge’s decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State v. Gentry, 183 Wn.2d 749, 761, 356 P.3d 714 (2015).

This Court, as well as other courts, have held that the admissibility of 404(b) evidence is not limited to directly proving an element of the charged crime. The rule simply contemplates that evidence of other misconduct is admissible if (1) the evidence sought to be admitted is relevant and necessary to a material issue, and (2) the probative value of the evidence outweighs its potential for prejudice. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. Id. at 259.

For example, motive is not an element of murder, but courts have historically admitted prior acts of violence in murder cases to prove motive because proof of motive makes it more likely the defendant committed the crime. See State v. Americk, 42 Wn.2d 504, 256 P.2d 278 (1953) (in prosecution for placing a bomb in his ex-wife's car, evidence of prior assaults during the marriage admitted to show intent and motive); State v. Neslund, 50 Wn. App. 531, 545, 559, 749 P.2d 725, rev. denied, 110 Wn.2d 1025 (1988) (prior quarrels was evidence of motive). This Court has held in sex cases that lustful disposition evidence (prior sexual acts perpetrated against the same victim) is admissible even though

lustful disposition is not an element of the crime. State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). And res gestae evidence -- evidence of other bad acts committed near in time to the charged crime, is admissible where the acts constitute a “link in the chain” of events surrounding the charged offense and the admission of the evidence aids in completing the picture depicted to the jury. State v. Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) (citing State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997)).

“Relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Here, Denham’s interview was not admitted to prove knowledge as an element of burglary. Rather, the evidence was relevant because it showed he possessed the sophisticated knowledge or expertise necessary to have pulled off the charged crime, that he knew how to bypass sophisticated electronic alarm systems, enter commercial buildings undetected, break into safes, etc. Thus, like other ER 404(b) evidence, it made it more likely he committed the crime.

A view from a different perspective highlights the Court of Appeals' misunderstanding of the admissibility of the evidence. If there was evidence that showed Denham lacked a certain intelligence level or ability to grasp and hold sophisticated concepts, this clearly would have been admissible evidence by the defense to show it was less likely he committed the charged burglary. As this Court's many decisions demonstrate, the relevance and admissibility of ER 404(b) evidence is not limited to proving (or disproving) a specific element of a charged crime.

There is no case directly on point regarding burglary and ER 404(b) evidence. However, the general proposition of the Court of Appeals in this case is in direct conflict with decisions of this Court and published decisions of the Court of Appeals. This mistaken interpretation of the law, if continued, will result in cases getting reversed improperly and trial court misapplying the law. Thus, for these reasons it is imperative that this Court accept review.

E. **CONCLUSION**

For the reasons cited above, this Court should accept review of the two issues raised herein.

DATED this 27th day of May, 2020.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: *Dennis J. McCurdy*
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,)	No. 78704-7-1 (Consolidated
)	with No. 78830-2-1)
Appellant,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
LYNELL AVERY DENHAM,)	
)	
Respondent.)	

HAZELRIGG, J. — Lynell A. Denham was convicted of burglary in the second degree and trafficking in stolen property in the first degree after a bench trial. Police were granted two separate search warrants pursuant to the investigation of the case; one for Denham’s residence and another for his cell phone records and data. On appeal, Denham challenges the sufficiency of the affidavits in support of both search warrants, the admission of evidence from a recorded interview regarding prior burglaries and argues defense counsel was ineffective. In a Statement of Additional Grounds (SAG), Denham also raises sufficiency challenges and an equal protection claim, alleging selective prosecution. We find cumulative error based on improper admission of evidence under ER 404(b) and the unconstitutional warrant to search Denham’s cell phone records and data. Accordingly, we reverse and remand.

FACTS

In November 2016, Frank Mallinak arrived at his shop, Mallinak Design Jewelers, in Kirkland to find that his complex security system had been bypassed and the safe drilled out. Over six hundred pieces of jewelry and loose stones were stolen; the total value of which was estimated between \$200,000 and \$300,000. One of the stones was a 5.29 carat diamond valued at \$30,000 which had a serial number etched into the stone and an accompanying Gemological Institute of America (GIA) certificate. The GIA certificate described the stone in detail and is used as title to the gem within the industry. It was stolen along with the jewelry and stones.

In the days following the burglary, Lynell Denham sold various pieces of jewelry throughout the region. Several of the pieces involved in these transactions were identified by Mallinak as coming from the burglary of his store and later returned to him by police. Denham sold a 5.29 carat diamond with the same serial number as the one from the burglary to Andy Le at Thien Phuoc Jewelry for \$29,000 and presented the GIA certificate as proof of ownership. He also provided his identification to Le as a part of the transaction. This diamond sale was the sole basis for the trafficking in stolen property in the first degree charge. Le later sold the diamond to another jeweler and it was then sold to three other jewelers before it was recovered pursuant to the criminal investigation. Soon after the diamond sale to Le, Denham bought a Range Rover with a \$9,000 cash down payment. Both Le and the car dealership staff remembered Denham wearing distinctive jewelry during their respective interactions with him.

In early December 2016, Denham reported to his community corrections officer (CCO) pursuant to his Department of Corrections supervision. He drove the Range Rover to the meeting and was observed by his CCO wearing various pieces of jewelry. The CCO inquired about the new vehicle and the jewelry; Denham responded that his family had come into some money. Later that month, police obtained warrants to search Denham's home and obtain records from two cell phones associated with him, including location data. During the search of Denham's home, police found new head-lamps, an empty power drill box, wire clamps, ads for jewelry shops, cutting oil, and schematics for various safes. The cell phone location data obtained pursuant to the search warrants showed that one of Denham's cell phones hit off the cell tower located near Mallinak Design Jewelers once on the night of the burglary and twice again the day after. The cell tower is located near several thoroughfares and Interstate 405, and the record provides that the maximum range of cell towers is 2½ miles.

In October 2017, Denham was charged with burglary in the second degree and trafficking in stolen property in the first degree. Denham's defense to the burglary was identity and good faith claim of title as to the trafficking charge. He wrote a letter to Mallinak after charges were filed and claimed he purchased the stones and jewelry at a swap meet in Tacoma and was unaware that they were stolen.

Denham had previous federal and state convictions for burglarizing banks. Denham participated in a lengthy video-recorded interview with law enforcement pursuant to an earlier criminal investigation that resulted in convictions in 2008. In

that interview, he detailed his unique and highly technical skills with regard to overcoming complex security systems. The State sought admission of the convictions and interview in the instant case for the purpose of “identity, knowledge, as well as MO [modus operandi] or signature evidence.” Defense filed a written motion objecting to their admission and renewed those objections at oral argument on various pretrial motions. The trial judge excluded the prior convictions themselves, but admitted the recorded interview “as to the knowledge” after expressly rejecting admissibility as to modus operandi. Denham was found guilty on both charges after a bench trial. Denham timely appealed.

ANALYSIS

I. Sufficiency Challenges to the Search Warrants

Denham challenges the search of his residence and cell phone information, arguing that each search constituted a violation of both the Fourth Amendment and article I, section 7 of the Washington State Constitution. “When parties allege violation of rights under both the United States and Washington Constitutions, this court will first independently interpret and apply the Washington Constitution in order, among other concerns, to develop a body of independent jurisprudence, and because consideration of the United States Constitution first would be premature.” City of Seattle v. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 755 (1988). The federal constitution provides a minimum protection against unreasonable searches by the government, while greater protection may be available under our state constitution. State v. Young, 123 Wn.2d 173, 178, 867 P.2d 593 (1994).

Therefore, we focus our analysis on the state constitution to determine whether there is a violation.

Though Denham failed to raise these particular arguments in the trial court regarding the sufficiency of the nexus in the warrant applications, he is entitled to present the issue for the first time on appeal under RAP 2.5(a)(3) as manifest constitutional error. Manifest constitutional error analysis first requires an appellant to make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019). Denham challenges the search of both his home and cellular data which implicates both the Fourth Amendment and article I, section 7 of the Washington Constitution. If either warrant was erroneously issued, there would be practical and identifiable consequences at trial since the evidence resulting from the improper search should have been suppressed. Denham has made the requisite preliminary showing and we take up his challenges to each warrant.

The validity of a search warrant is reviewed for abuse of discretion, giving great deference to the issuing judge or magistrate. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). However, the trial court acts in an appellate-like capacity at a suppression hearing where it reviews only the four corners of the affidavit to determine whether probable cause exists. Id. Deference is provided to the issuing magistrate's determination, yet we review de novo the assessment of probable cause determined by the trial court at the suppression hearing as a legal conclusion. State v. Dunn, 186 Wn. App. 889, 896, 348 P.3d 791 (2015). Denham formally challenged the search warrants in the trial court with a pretrial motion to

suppress which was denied, therefore we engage in de novo review of the court's determination of probable cause.

Under a de novo standard, this court is tasked with determining whether the qualifying information as a whole amounts to probable cause. Id. We limit this review to only the information that was provided to the issuing judge. State v. Olson, 73 Wn. App. 348, 354, 869 P.2d 110 (1994). "A search warrant should be issued only if the application shows probable cause that the defendant is involved in criminal activity and that evidence of the criminal activity will be found in the place to be searched." Neth, 165 Wn.2d at 182.

Probable cause may not be based on blanket inferences and generalities. Dunn, 186 Wn. App. at 897. "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." State v. Thien, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." State v. Goble, 88 Wn. App 503, 509, 945 P.2d 263 (1997). "In determining whether there is a nexus between the evidence at issue and the unlawful search, a court must evaluate the facts and circumstances of the particular case." State v. McReynolds, 104 Wn. App 560, 571, 17 P.3d 680 (2000).

A. Search Warrant for Denham's Residence

Denham asserts that the affidavit submitted in support of the application for the search warrant for his home failed to establish a nexus between the criminal activity suspected and the place to be searched, his residence. We review de novo whether a search warrant meets the particularity requirement but we interpret warrants "in a common sense, practical manner, rather than in a hypertechnical sense." State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). The affidavit submitted in support of the application for the search warrant primarily focuses on establishing probable cause for the criminal activity, discussing the burglary techniques and the sale of jewels at various pawn shops including the sale of the 5.29 carat diamond. These all go to probable cause that Denham was engaged in criminal conduct. At the point the warrant was being assessed, Denham had conducted several sales of jewels from Mallinak's business. A sufficient nexus existed to establish that Denham was engaged in trafficking in stolen property.

The following statement in the affidavit was offered as support for the search of his residence:

Mallinak had hundreds of pieces of jewelry stolen and only a small number are known to be recovered. It would be difficult to traffic/sell such a large quantity of jewelry quickly, thus it would be reasonable to suspect that he is storing the jewelry at his residence. Both probation agents informed me that Denham's property contains the main house, a guest house, several structures and numerous vehicles. All of these are great places that Denham could hide the stolen jewelry and tools used.

Additionally, the affidavit provided that multiple shop owners had seen Denham with additional jewels and pieces of jewelry he had hoped to sell to them. This

information provides the requisite nexus between the criminal activity alleged and the items to be seized.

Case law examining search warrants for evidence that is not inherently incriminating, like the jewelry and stones at issue here, suggests that it may be reasonable for the issuing magistrate to reach the determination that such evidence would likely be stored openly at one's home, thus providing the necessary nexus between the item to be seized and the place to be searched. State v. Condon, 72 Wn. App. 638, 643-44, 865 P.2d 521 (1993); State v. Herzog, 73 Wn. App. 34, 55-56, 867 P.2d 648 (1994); Dunn, 186 Wn. App. at 898-99. State v. Condon is an example of such a case, where a warrant was issued for the defendant's home to locate the weapon used in a murder wherein he was identified as a suspect. 72 Wn. App. at 641. In Condon, the evidence recovered under the warrant was a shotgun and twelve-gauge shells located at the defendant's residence. Id. Firearms and ammunition are not inherently criminal and may be possessed for a variety of lawful uses. The court noted the affidavit "established a strong likelihood that Condon, and no one else, committed the crime." Id. at 643. The court went on to explain that "when the object of a search is a weapon used to commit a crime, it is reasonable to infer that the weapon is located at the perpetrator's residence." Id. at 644.

We find this analysis useful. Like the affidavit in Condon, the information provided in the affidavit about the jewelry sales established a likelihood that Denham committed the crime of trafficking in stolen property. Further, Denham's home was searched for the means of the crime, the property being trafficked,

No. 78704-7-1/9

similar to the means of the crime sought in Condon, the murder weapon. The jewelry and stones at issue here, like the shotgun and shells in Condon, are not inherently criminal; they are relatively small, valuable and can be easily concealed. A judge could reasonably infer from any of these facts that Denham would desire to store them in a safe location, such as his residence. See Id.; see also Herzog, 73 Wn. App. at 55-56. There was a reasonable probability that Denham was engaged in trafficking in stolen property and there was a sufficient nexus that evidence of the crime, such as the jewels, would be stored in Denham's residence. As such, we find that there was a sufficient basis for the issuance of the search warrant for Denham's residence.

B. Search Warrant for Denham's Cell Phone Records and Data

In order for a warrant to be constitutionally valid it must not only be supported by probable cause, but also tie the facts known to the State to the specific evidence it seeks to obtain. State v. Phillip, ___ Wn. App.2d ___, 452 P.3d 553, 561 (2019)

Cell phone data "represents a new frontier in police investigative tactics." Phillip, 452 P.3d at 554. The Supreme Court of the United States has acknowledged that cell phones store vast amounts of private data which effectively allows for the ability to track individuals over extended periods of time and collect personal contacts. Riley v. Cal., 573 U.S. 373, 394-96, 134 S. Ct. 2473 (2014). Our state's supreme court has recognized, "[h]istorical and real-time CSLI, like text messages, reveal an intensely intimate picture into our personal lives." State v. Muhammad, 194 Wn.2d 577, 589, 451 P.3d 1060 (2019).

Carpenter v. U.S. delved into the question of privacy interests in cell phone data, specifically cell-site location information (CSLI), when it is arguably shared with the cell phone provider by permission of the owner or user. ___ U.S. ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). The Court in Carpenter held:

We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.

Id. at 2223. Even more directly, the Court explained "before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." Id. at 2221. The Washington Supreme Court also declared an individual's privacy interest in CSLI under the state constitution in State v. Muhammad, though that case focused on law enforcement's real-time cellphone ping, as opposed to obtaining records from a wireless carrier. 194 Wn.2d at 589-90. "The ability of law enforcement to pinpoint any cell phone user's location at any moment would intrude on privacy in the same way as allowing police to listen in on an ongoing phone call or to peruse a text message conversation." Id. As such, the standard nexus requirements for search warrants must be met when the government seeks access to this private cell phone data.

Here, the nexus between the crime and the place or item to be searched is lacking. The affidavit in support of the search warrant for the cell phone records states, "[o]btaining the records from Denham's cellular phone service providers, I believe would assist in providing information on his location during the above listed

crimes.” This broad, speculative language generally seeking “information on his location” conflicts with our supreme court’s holding that “[g]eneral, exploratory searches are unreasonable, unauthorized, and invalid.” Thein, 138 Wn.2d at 149 (citing State v. Helmka, 86 Wn.2d 91, 542 P.2d 115 (1975)). The affidavit for the warrant establishes that the two cell phones for which records were sought belonged to Denham, based on the fact that he provided them to his probation officers and utilized them during the transactions with jewelry and pawn shops. The original affidavit for the warrant for Denham’s residence, which is incorporated by reference in the application for the cell phone warrant, mentioned that Denham had used the cell phones to contact two of the jewelers to whom he sold some of the items from Mallinak’s business.

However, the police sought the records from Denham’s phones, specifically the CSLI, for the crime of burglary. We reject the notion that the CSLI would be necessary to prove the crime of trafficking given the evidence already known to police. Even if it were, the affidavits fail to provide any specific nexus between the CSLI and the trafficking investigation. The affidavits do not establish a sufficient nexus between the crime of burglary and the thing to be searched, Denham’s cell phone records, particularly as the State did not establish identity or even a basic description of the person or persons involved in the burglary.

While the State established that Denham had been selling jewels from Mallinak’s business taken in the burglary, it failed to establish that Denham had either of the cell phones in question in his possession on the night of the burglary. The affidavit prepared by law enforcement relies on general statements indicating

that “the majority of Americans possess and use cellular telephones, and that most of those keep the phones within their reach at all times,” but offers no specific facts as to Denham or the use of cell phones in the burglary at issue here. These are precisely the sort of blanket inferences and generalities that, without additional specific facts, our courts have declared insufficient to establish the requisite nexus for the issuance of constitutionally valid search warrants. Thein, 138 Wn.2d at 147-49.

The Washington case most analogous to Denham’s is State v. Phillip, 452 P.3d at 553. We note that this published opinion focuses on a subpoena for cell phone records, but incorporates significant portions of the previous unpublished opinion in the same case which dealt with a search warrant for cell phone location data. Phillip lived in Portland, Oregon and was suspected of a murder in Auburn, Washington. Id. at 555. The State had identified Phillip as the primary suspect of the murder due to his alleged jealousy of a new relationship between the victim and Phillip’s former girlfriend. Id. at 555-57. The factual bases provided in the affidavit for obtaining the warrant for the defendant’s CSLI were only text messages indicative of possible jealousy and the fact Phillip did not want to discuss whether he had ever traveled to Auburn with police. Id. at 557. This court rejected the assertion that the State had established a sufficient nexus in the affidavit to show that evidence of the crime would be found in Phillip’s cell phone records; in other words, there was no nexus between the suspected crime and place to be searched. Id. at 557 (quoting State v. Phillip, No. 72120-8-I, slip op. at 9-12 (Wash. Ct. App. Aug. 29, 2016) (unpublished), <http://www.courts.wa.gov/opinions/>).

Here, like in Phillip, the State relied on a chain of inferences to support its conclusion that Denham likely committed the burglary and likely possessed one of the cell phones in question at the time of the crime. At oral argument, the State suggested the warrant was valid because the court found probable cause that Denham was engaged in the criminal activity alleged. This is not sufficient under case law. "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 obtain" Id. at 561. The search warrant application at issue here fails in this regard because, while the State demonstrated a connection between Denham and the trafficking allegation, it had scant evidence linking him to the burglary at the time it sought the search warrant.

There was no conclusive fingerprint or DNA evidence found at the scene of the burglary and the specific method of entry differed from those associated with Denham's past burglary convictions. There was no security footage or eyewitness to suggest an approximate physical description of the suspect to compare against Denham. Additionally, there was no evidence to suggest that there were other accomplices or co-conspirators with whom the perpetrator of the burglary would have necessarily been communicating. The application for the search warrant for Denham's cell phone records was insufficient as it failed to provide specific information demonstrating a nexus between Denham, the criminal act, the information to be seized and the item to be searched. We reverse the trial court's ruling on Denham's motion to suppress as to the warrant for his cell phone records.

II. Admission of ER 404(b) Prior Bad Act Evidence

Denham next challenges the admission under ER 404(b) of the video-recorded interview from his earlier criminal investigation. Admissibility rulings based on ER 404(b) are reviewed by this court for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion if the court's decision is unreasonable or based on untenable grounds or reasons, such as a misconstruction of a rule. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).

"Under ER 404(b), evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith." State v. Grant, 83 Wn. App. 98, 105, 920 P.2d 609 (1996). Prior bad acts may be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). "The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). "If [the prior bad act] is admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged." Powell, 126 Wn.2d at 258 (alterations in original).

To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); See also Gunderson, 181 Wn.2d at 923.

In the present case, the evidence admitted was a recording of Denham's statements regarding his skills and how he conducted the burglaries for which he was convicted in 2008. Neither party disputes that the prior bad conduct occurred or that the evidence itself is Denham's admission as to how the prior burglaries were conducted; step one is clearly met.

As to step two, the State argued for the evidence of prior bad acts to be admitted under numerous theories (knowledge or identity/modus operandi). The court rejected the State's claim that Denham's statements about the prior burglary could be allowed in for modus operandi which requires a more stringent test. See Thang, 145 Wn.2d 630. The court ultimately ruled that the statements were admitted for the purpose of knowledge. The second step is satisfied; identification of the purpose for which the evidence is to be admitted.

As to the third step, to determine whether the evidence is relevant to prove an element of the crime charged, the record before us is not as clear. Relevant evidence is defined as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. This evidence was not used to prove the elements of trafficking in stolen property in the first degree, so we focus our analysis on its applicability to the burglary charge. Burglary in the second degree requires 1) unlawfully entering or remaining in a building other than a vehicle or dwelling, 2) with intent to commit a crime against

persons or property therein. RCW 9A.52.030(1). Here, Denham has the more compelling argument; that the evidence was improperly admitted as to intent, which is distinct from motive, since knowledge would not be relevant to the burglary charge. He suggests as an alternative that the evidence was being offered to prove identity (which is inherently intertwined with modus operandi)¹ which the court explicitly rejected.

The court in Powell explained intent in the context of ER 404(b) evidence: "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." 126 Wn.2d at 262. In Powell, the Supreme Court approved of the admission of evidence of prior assaults and quarrels to prove motive as to the second degree murder charge, but rejected its admission to prove intent. Id. at 257, 260, 262. The Supreme Court noted that intent was never disputed and therefore the Court of Appeals properly held that the evidence was not necessary for that purpose and that it had been improperly admitted to prove intent. Id. at 262.

In Denham's case, it is unclear how the evidence of his knowledge is necessary, unless it went to identity, when no evidence as to skill was required to prove the crime. Knowledge is not an element of the burglary charge.² Denham's argument that the court must have then ultimately used it for identity is persuasive,

¹ "Where prior acts are sought to be admitted to show modus operandi, 'the primary purpose . . . is to corroborate the identity of the accused as the person who likely committed the offense charged.'" State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984) (emphasis in original) (quoting State v. Irving, 24 Wn. App. 370, 374, 601 P.2d 954 (1979)).

² The court admitted and relied on the evidence to prove the burglary charge not trafficking.

particularly when considered in light of the oral and written rulings on admissibility and findings of fact and conclusions of law entered after the bench trial. The record indicates that the court improperly relied on his knowledge and skills as evidence of the identity of the perpetrator of the burglary, despite the articulated reason for the limited admission of the prior bad act evidence.

The written findings after the bench trial strongly suggest that the evidence was used for identity. At the conclusion of trial, the judge found “with Mr. Denham’s specialized knowledge and his possession of the stolen property very shortly after the crime occurred, it is satisfied that circumstantial evidence establishes that Mr. Denham was the burglar.” However, in its ruling on pretrial motions, the court expressly rejected the notion that the evidence of prior bad acts was admissible for purposes of establishing modus operandi or identity. Specifically the court said “I don’t want to go into the facts of all the various prior cases as [a modus operandi], because I don’t think we need that.” As to the third step in the test for admissibility, the court did not engage in the analysis necessary to establish that the prior bad act evidence is relevant to an element of burglary in the second degree. Further, the crime does not require knowledge as an element and Denham did not dispute his skill set or raise the issue of intent in his defense against the charge. Both of these facts weigh against relevance. We need not reach the final step in the four-part analysis as our determination as to the third prong of the test is dispositive.

Since we find that the prior bad act evidence was improperly admitted, we must then determine whether it constitutes reversible error. Id. at 780. An error is not grounds for reversal unless it has been deemed prejudicial. Id. The test for

prejudice in this context is whether, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Gresham, 173 Wn.2d 405, 425, 269 P.3d 207 (2012) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). In Denham’s case, the improper admission of this evidence leads to a reasonable probability that it affected the outcome of his trial. It was the primary evidence that the court used to connect him to the burglary, as shown by the findings entered after trial. The error was not harmless.

III. Failure to Object to the ER 404(b) Evidence on Specific Grounds

Denham next argues that his counsel was ineffective for failing to specifically object to the admission of the prior bad act evidence for knowledge. We disagree. Denham’s defense counsel expressly argued against admission of the prior bad act evidence for purposes of proving modus operandi or proof of identity, because those were the primary bases for admission offered by the State. Later when the trial court issued its oral ruling, defense counsel asked for clarification as to the purpose for which the evidence was being admitted.

“Courts engage in a strong presumption counsel’s representation was effective.” State v. McFarland, 127 Wn.2d. 322, 335, 899 P.2d 1251 (1995). In a claim of ineffective assistance of counsel, the performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Wash., 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is considered deficient if “it [falls] below an objective standard of reasonableness based on the consideration of all the circumstances.” McFarland,

No. 78704-7-1/19

127 Wn.2d. 334-35 (alterations in original). A showing of prejudice requires a reasonable probability that but for the deficient performance, the outcome of the proceeding would have been different. State v. Estes, 188 Wn.2d. 450, 458, 395 P.3d 1045 (2017).

Denham's counsel argued against the admission of the prior bad acts evidence both by filing a written motion and engaging in substantive oral argument. The defense was successful on a number of grounds; keeping the convictions themselves out and excluding the evidence as to modus operandi. Counsel did not object once the court clarified its ruling on admitting the prior admissions for knowledge, but this may have been a strategic decision.

Counsel was well aware that not only had the judge just reviewed over three hours of video and heard in-depth argument regarding admissibility, but also that the case was proceeding to a bench trial. This context suggests the decision by Denham's counsel was tactical as the court had repeatedly and emphatically articulated its ability to avoid improper utilization of the evidence for propensity. Further, counsel knew identity was the main defense to the burglary charge and may have felt that the court's assurance that the evidence would not be used to prove identity/modus operandi, which was key to the case, was sufficient to protect his client. Since we find that there was no deficient performance by Denham's counsel, we need not reach the second step of the Strickland test. 466 U.S. at 669. In light of the strong presumption of effectiveness and likelihood that the challenged conduct by defense counsel was strategic, Denham has failed to meet his burden of proof under Strickland.

IV. Cumulative Error

Denham correctly argues that if this court finds error as to at least two of the issues he raises, cumulative error necessitates a new trial. When numerous evidentiary errors occur, a new trial may be required even if the errors construed individually were not sufficient for such a remedy. Coe, 101 Wn.2d at 789. When there is overwhelming evidence of the defendant's guilt, cumulative errors do not require reversal. In re Pers. Restraint of Cross, 180 Wn.2d 664, 691, 327 P.3d 660 (2014) (abrogated in part by State v. Gregory, 192 Wn.2d 1, 427 P.3d. 621 (2018)).

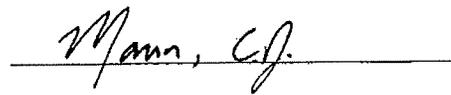
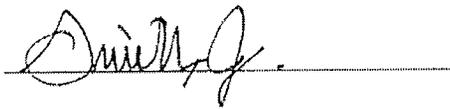
We find error as to both the issuance of the search warrant for Denham's cell phone data and records and the admission of the ER 404(b) evidence which was utilized for identity. We cannot conclude that overwhelming evidence of guilt existed for Denham absent these errors. State v. Mace established that mere possession of stolen property alone is insufficient to prove burglary. 97 Wn.2d 840, 842-43, 650 P.2d 217 (1982). Under Mace, Denham's possession of the high value diamond or other stolen jewelry and stones pursuant to sales transactions is insufficient to prove he committed the burglary. As such, in light of the evidence that existed at the time of trial, particularly as to the burglary charge, the errors rise to the level of necessitating a new trial for Denham.

Finally, Denham raises a number of additional challenges to his convictions in his SAG, including constitutional vagueness arguments as to the statutes under which he was convicted and selective prosecution. However, as we find cumulative error sufficient to warrant a new trial, we decline to reach those issues outlined in his SAG.

No. 78704-7-1/21

Reversed and remanded.

WE CONCUR:



APPENDIX B

- 1 1. 10312 Golden Given RD E, Tacoma, Pierce County, WA 98445, 1.09 acre parcel, to
2 include the primary residence, all outbuildings, and temporary or other structures,
3 on said property;
- 4 2. The person of Lynell A. Denham, DOB 07/18/1964;
- 5 3. Cellular phone belonging to Lynell A. Denham, DOB 07/18/1964 and / or assigned
6 to phone numbers 253.449.6615 and 253.677.0772;
- 7 4. Light colored, 2008 Range Rover vehicle, bearing WA license plate number
8 BCX8267, VIN: SALSF25418A144329.

9 My belief is based upon the following facts and circumstances:

10 **Detective O'Neill Training & Experience:**

11 Your Affiant, I, Detective Allan O'Neill, being first duly sworn on oath, deposes and says: I have
12 been a sworn police officer in the State of Washington since 1997. I have worked as a sworn
13 officer with the Arlington Police Department and I am now employed as a sworn police officer
14 with the City of Kirkland. I am currently assigned to the Investigation Division as a Detective.
15 Through my experience in these positions I have been assigned a variety of investigations to
16 include VUCSA, Child Exploitation, MV Theft, MV Prowl, Burglary, Robbery, Identity Theft,
17 Forgery, Possession of Stolen Property, Trafficking of Stolen Property, Assault, Sexual Assault,
18 Rape, Harassment, etc. I have completed the Washington State Basic Law Enforcement
19 Academy through the Washington State Criminal Justice Training Center (WSCJTC). I have
20 received specialized training in the following fields: police training officer academy (PTO),
21 hostage negotiations (CJTC), auto theft investigations (WATPA/WSATI), interview and
22 interrogation (CJTC), basic investigations training (CJTC), child interviewing and interrogation
23 (CJTC) and RSO coordinator training.

24 **THE INVESTIGATION**

25 On 11/14/16, Frank Mallinak the owner of Mallinak Design Jeweler, 6523 132nd Ave NE,
26 Kirkland, WA called the Kirkland Police Department to report that his store had been burglarized.
27 Mallinak stated that sometime over the weekend someone forced entry into his business and

1 broke into his safe. Mallinak reported that the business closed on Friday (11/11/16) at 1800 hours
2 and was closed over the weekend. He stated he arrived at work at 11/14/16 around 0945 hours
3 and discovered the burglary.

4
5 Mallinak showed me the damage to the store and the safe. The safe was open and the drawers
6 from the safe were laying on the floor. The side of the safe had a large hole drilled in the side of
7 it but the hole did not go through the side wall of the safe. There was another hole which was
8 approximately a ½ inch in diameter and it went through the side of the safe and into one of the
9 locking pegs on the door. The dial on the safe was damaged and pieces of the dial were laying
10 on the floor. There was a proximity alarm on the safe and the alarm wire was cut. The alarm
11 box on the wall which was above the refrigerator was open and several wires were cut.

12 The rear door to the business was cut in half underneath the door lock and the door was pushed
13 open. There was a metal security bar on the inside of the rear door which was still in place to
14 prevent the door from being opened. The rear door was cut laterally below the metal bar and
15 door locks. The door knob and dead bolt locks were still locked.

16 Mallinak Design Jewelers is in a strip mall with several other businesses on the south side of the
17 Bridal Trails Shopping Center. The utility room behind the business is used by the property
18 manager and contractors. The rear door in the utility room leads outside to an alley behind the
19 shopping center. There was glue in the door lock to the utility room. The shopping center
20 maintenance workers stated they noticed the glue in the door lock last Thursday (11/10/16) and
21 they called a lock smith to fix the lock. The roof hatch can be locked on top of the roof with a
22 pad lock but there was no lock on top of the hatch or in the area. In the rear alley there is a gas
23 meter next to the utility room door. There were two pipes which ran up the outside the building
24 toward the roof. There were several scuff marks on the meter and on the side of the building
25 along the pipes towards the roof. It appears the suspect(s) climbed up the building to the roof by
26 using the pipes for support. The suspect(s) then entered the roof access hatch to gain entry into
27 the utility room and then cut the back door to Mallinak's business.

28 SEARCH WARRANT AFFIDAVIT
Page 3 of 13

1 Mallinak provided a list of property taken from the safe. The list included more than 600 pieces
2 of jewelry and loose stones. The estimated wholesale value was approximately \$250,000. Six
3 of the pieces were certified GIA stones. One such GIA stone was a 5.29ct round diamond cert#
4 2185021160. This diamond had just returned from being certified and the original GIA report
5 had been stored in the safe with the diamond. Both the diamond and GIA certified paperwork
6 were stolen from the safe.

7 On 12/01/016 at about 1915 hours, Detective Magan with the Seattle Police Department
8 contacted me with a possible lead on someone trying to sell "loose stones". His informant stated
9 that the stones were taken in the last two weeks. I provided a detailed list of the stolen items to
10 Detective Magan.

11
12 On 12/07/16, Detective Magan called and verified that the 5.29ct diamond with the GIA number
13 2185021160 taken from Mallinak's shop had been sold to Ed's Jewelry located at 4th and Pike in
14 Seattle. The information that Detective Magan had received was that the diamond was bought
15 at the Jewelry store and then sold to another party. I conducted some research and located an
16 Ed's Jeweler's, 1424 4th Ave #203, Seattle, WA 98101. The business license for that store was
17 listed to Edwin Jue (President) and Shawna Wang (Secretary).

18 At about 1425 hours, I took a copy of the GIA paperwork for the 5.29ct diamond to Ed's Jewelers
19 which was now on the 4th floor of the building. I contacted Jue at the store and provided him a
20 copy of the GIA report. He told me that he purchased the diamond on 11/19/16 from Andy Le,
21 who he has conducted business with in the past. Jue provided me with a receipt that listed the
22 date, the name Andy Le and that he paid \$30,000. Jue stated that on 11/20/16, he sold the
23 diamond to Chrey Jewelers that is located in Bremerton. Jue did not have any paperwork for the
24 sale of the diamond.

25 I contacted Andy Le, who is the owner of Thien Phuoc Jewelry, 7101 MLK Jr Way, Seattle, WA.
26 Le stated that on or about November 15th or 16th of this year, a bald, middle-aged, thin African-
27 American man, offered to sell him an expensive diamond that was in his possession for \$50,000.

28 SEARCH WARRANT AFFIDAVIT
Page 4 of 13

1 He stated the male told him that he wanted to sell the diamond because he was in need of
2 emergency money to financially support his father. Le stated that the male showed him a receipt
3 for how he obtained the diamond and also a certified appraisal of the diamond.

4
5 Le said he told the male that he did not have that large amount of money, but he felt badly for him
6 given the story about his father. Le offered to sell the diamond for him to another jewelry dealer
7 who he thought would have the money to purchase the diamond. He stated that the paperwork
8 that he presented, appeared credible.

9 Le stated that the male agreed to his proposal and Le contacted Ed's Jewelry. Ed agreed to
10 purchase the diamond for \$29,000 and Le relayed the information to the male. Le stated that
11 since it was near the close of business on this day, he asked the male to come back with the
12 diamond in a couple days. The male told Le that he would come back and Le asked the male for
13 his identification. The male provided Le with his Washington State Identification Card and Le
14 stated the picture on the ID matched the male. Le made a copy of the ID card and then had the
15 male sign the copy of the ID that the diamond was not stolen. Le emailed me a copy of the WA
16 ID card which listed the male as **Lynell A. Denham, DOB 07/18/1964, address of 10312 Golden
17 Given RD E, Tacoma, WA 98445.**

18 Le stated that on or about November 19th, Denham returned to his store with the diamond to
19 complete the transaction. Le stated that the male was wearing a large aquamarine necklace
20 around his neck. Mallinak had an aquamarine stone taken from his store. Le stated that Denham
21 asked him to increase the offer to \$30,000 so that he could pay him for his time. Le said he then
22 took the diamond over to Ed's Jewelry and Ed provided him with \$30,000 in cash for the
23 diamond. After Ed gave him the money, Le provided \$29,000 in cash to the man.

24 Le stated that he wrote down Denham's phone number when he called him. He said he has caller
25 identification on his phone and Denham's name popped up on his caller identification system
26 when Denham called him. Le stated that Denham approached him again several days after the
27

1 diamond transaction. He said Denham brought a box of jewelry to his store and asked if he wanted
2 to purchase the jewelry. Le told Denham no and he has not spoken to him since that date.

3 I conducted a records check on Denham. Denham had been arrested in Tacoma in 2014 for
4 burglary. In that burglary, Denham cut a hole in the roof of a building using a saw in an attempt
5 to gain access to the safe inside the jewelry store. He also had numerous burglary arrests and
6 federal arrests. Denham is on both Federal and State probation. I called and spoke to Patrick
7 Robinson with the Federal probation. He informed me that Denham was still living at 10312
8 Golden Given RD E, Tacoma, WA 98445 with, James C. Fisher. This is also Denham's address
9 that is listed on his WA State Identification card. Robinson stated that he has monthly face to
10 face meetings with Denham and he has been out to Denham's residence three times. Robinson
11 stated that he last visited Denham at his residence, 10312 Golden Given RD E, Tacoma, WA
12 98445 on 12/05/16.

13 I called Izetta Dillingham with DOC probation and she also stated that Denham lives at 10312
14 Golden Given RD E, Tacoma, WA 98445. Dillingham also stated that she went out to Denham's
15 residence and he had a new Range Rover and was wearing a huge blue stone gem necklace. This
16 is a similar piece of jewelry that was taken from the burglary. I conducted a records check on
17 vehicles registered to Denham's residence, 10312 Golden Given RD E, Tacoma, WA 98445. I
18 located a 2008 Range Rover registered to James C. Fisher. The VIN was listed as
19 SALSF25418A144329 and the license plate number was BCX8267. On 12/15/16, Dillingham
20 sent me photos of the Range Rover and I could see a paper plate with the dealership's name "All
21 Right Auto Sales." I called the owner, Joe, at All Right Auto Sales and he informed me that the
22 Range Rover was sold to James Fisher on 11/17/16. He stated that Fisher had \$9,000 cash and
23 financed the balance of \$12,300.

24 I searched pawning history for Denham using the Leadsonline program. The check showed that
25 on 11/14/16, Denham pawned a woman's 14kt yellow gold necklace to the Topkick Jewelry &
26 Loan, 13014 Pacific Ave S, Parkland, WA. This necklace matched one that was stolen from
27 Mallinak's store. On 11/21/16, Denham pawned a sapphire ring, a diamond band and a wedding
28 set at the Porcellos Jewelers, 10222 NE 8th St Bellevue WA. All of the jewelry items were stolen

SEARCH WARRANT AFFIDAVIT
Page 6 of 13

1 from Mallinak's store. Mallinak had photos of the items and the sapphire ring was a custom
2 design. On 11/28/16, Denham pawned a woman's white gold 14kt, 4.20 grams; 1 blue/8 diamonds
3 ring at the Topkick Jewelry and Loan. This ring matched one that was stolen from Mallinak's
4 store. On 12/08/16, I sent holds to the Topkick Jewelry and Porcellos for the above listed items
5 Denham pawned.

6 On 12/14/16, I went to the Porcellos Jewelry and recovered the items that Denham had pawned.
7 Jason Porcello who was the owner of the business stated that Denham had other pieces of jewelry
8 that he wanted to sell to them and was going to come back in the future. Denham was seen
9 leaving in a light colored Range Rover with a temporary license plate in the window. Employee
10 Joseph Lennon completed the transaction and stated that Denham had called him and told him
11 that he had some loose diamonds and sapphires that he wanted to sell. Mallinak had several loose
12 stones taken from the burglary. Denham presented the same Washington State ID card that he
13 used to sell the diamond to Le. Lennon indicated that the ID matched Denham.

14 On 12/15/16, I called and spoke to Mark Kosin with Topkick Jewelry. Kosin told me that
15 Denham came in a couple of days ago to sell other items. Kosin stated that he told Denham that
16 there was a police hold on the items he pawned and they could not purchase any further items
17 from him. They provided Denham with my name and the police department I worked for. This
18 obviously alerted Denham that he was the subject of an investigation. Since that time, Denham
19 has not been to his scheduled meetings with his Federal and State Probation officers. There is
20 an active DOC warrant for his arrest for the probation violation.

21 Mallinak had hundreds of pieces of jewelry stolen and only a small number are known to be
22 recovered. It would be difficult to traffic/sell such a large quantity of jewelry quickly, thus it
23 would be reasonable to suspect that he is storing the jewelry at his residence. Both probation
24 agents, informed me that Denham's property contains the main house, a guest house, several
25 structures and numerous vehicles. All of these are places that Denham could hide the stolen
26 jewelry and tools used to commit the above listed crimes. Denham has provided the following
27 two cellular numbers to his probation officers: 253.449.6615 and 253.677.0772. Reviewing prior

28 SEARCH WARRANT AFFIDAVIT
Page 7 of 13

1 arrests of Denham, he used two way radios to communicate with other suspects during the
2 commission of his crimes. With cellular phones being easier to obtain and Denham having two
3 cellular phones, I believe evidence of the above listed crimes may be on his cellular phones.

4
5 On 12/19/16, Dillingham informed me that a couple of DOC Officers were at Denham's
6 residence and believed Denham was in the residence.

7 SUPPORTING INFORMATION

8 Courts have recognized that the majority of Americans possess and use cellular telephones, and
9 that most of those keep the phones within their reach at all times. Cellular telephones are used
10 for, among other things, voice, text, email and SMS communications; accessing and posting to
11 social networking websites, surfing the internet, taking and storing photographs, creating and
12 storing documents, notes, music, mapping directions to places, etc. Courts have recognized that
13 these devices are essentially small computers with vast storage capacities. Information deleted
14 by the user can be recovered, years after deletion, upon examination of a cell phone's data.
15 Examples of this stored data include user-created or saved data, such as contact lists, messages
16 sent and received, images, audio and video files, personal calendars, notes, prescriptions, bank
17 statements, videos, documents, and images; as well as device-generated data, such as user
18 identity information, passwords, usage logs and information pertaining to the physical location
19 of the device over time. Examples of data stored in a phone that can reveal a person's location
20 at specific dates and times include metadata and EXIF tags associated with photographs; IP
21 addresses, which are associated with a geographic location; and geographic location associated
22 with the phone sending/receiving signals with cell towers and satellites. As such, a person's use
23 of the phone can reveal where a person has been at dates and times relevant to the crime(s) under
24 investigation; a person's activity at relevant dates and times, and/or places a person frequents at
25 which that person is likely to be found for arrest or at which the suspect stored or inadvertently
26 left evidence behind.

26 Whether some data on the phone is evidence may depend on other information stored on the
27 phone, and the application of an examiner's knowledge about how a cellular telephone operates.

28 SEARCH WARRANT AFFIDAVIT
Page 8 of 13

1 Therefore, the context, location, and data surrounding information in the phone's data may be
 2 necessary to understand whether evidence falls within the scope of the warrant. Due to the
 3 potential for an extremely large volume of data contained within modern cellular telephones, and
 4 that fact that evidence can be stored/located in unanticipated locations or formats, and can be
 5 embedded in other items stored on the phone, investigators typically need to use specialized
 6 equipment to make an exact copy of the device, then conduct a careful and time-consuming
 7 search for the evidence authorized for seizure by a search warrant. For these reasons, I ask for
 8 authority to seize and image the cell phone(s) described herein for later search pursuant to the
 9 warrant issued in this matter.

10 **PLACES TO BE SEARCHED**

11 Based upon the above facts and circumstances I request that a search warrant be issued
 12 directing the search of 10312 Golden Given RD E, Tacoma, Pierce County, WA 98445, 1.09
 13 acre parcel, to include the primary residence, all outbuildings, and temporary or other
 14 structures on said property.

15 The obtainment of this information I believe will assist in identification of the individual(s)
 16 engaged in activities in violation of RCW 9A.52.030 Burglary 2nd Degree; RCW 9A.56.030
 17 Theft 1st Degree; RCW 9A.082.050 Trafficking in Stolen Property 1st Degree.

18 **ITEMS TO BE SEARCHED FOR**

19
 20 From location #1 listed above (10312 Golden Given RD E, Tacoma, Pierce County, WA
 21 98445) I am requesting permission to search for, and seize the following:

22 Evidence in whatever form of the above listed crime(s) including but not limited to:

- 23
- 24 a. Items and/or information that is/are evidence of, fruits of, pertain to, and/or was/is being
- 25 used in the commission of the listed crime(s);
- 26
- 27

- 1 b. Jewelry and precious stones. Such items will be held in safekeeping by the Kirkland
 2 Police Department until such time that they can be reviewed by the victim in this case to
 3 prove or disprove ownership;
- 4 c. Any and all tools that can be used to commit burglaries to include but not limited to:
- 5 > Drills
 - 6 > Saws
 - 7 > Pry bars
 - 8 > Glues/locktight
- 9 d. Items in whatever form evidencing dominion and control of the premises, place(s),
 10 property, item(s), account(s), and/or person(s) searched;
- 11 e. The person of **Lynell A. Denham, DOB 07/18/1964**;
- 12 f. Cellular phones belonging to the person of **Lynell A. Denham, DOB 07/18/1964** and /
 13 or assigned to phone numbers **253.449.6615** and **253.677.0772**;
- 14 g. Light colored 2008 Range Rover vehicle, bearing WA license plate number **BCX8267**,
 15 VIN: **SALSF25418A144329**;
- 16 h. Any records regarding storage facilities/bank deposit boxes indicating other places where
 17 stolen property could be stored off-site;

18 From location #2 listed above (The person of **Lynell A. Denham, DOB 07/18/1964**). I am
 19 requesting permission to search for, seize the following:

20 Items and/or information that is/are evidence of, fruits of, pertain to, and/or was/is being used in
 21 the commission of the listed crime(s);

- 22 a. Jewelry and precious stones. Such items will be held in safekeeping by the Kirkland
 23 Police Department until such time that they can be reviewed by the victim in this case to
 24 prove or disprove;
- 25 b. Cellular phone(s) belonging to **Lynell A. Denham, DOB 07/18/1964** and / or assigned
 26 to phone numbers **253.449.6615** and **253.677.0772**;
- 27 c. Any records regarding storage facilities/bank deposit boxes indicating other places where
 28 stolen property could be stored off-site;

1 From location #3 listed above (Cellular phone belonging to Lynell A. Denham, DOB
2 07/18/1964 and / or assigned to phone numbers 253.449.6615 and 253.677.0772). I am
3 requesting permission to search for, seize and subsequently forensically examine the above
4 described cellular telephones or digital device(s) for evidence of RCW 9A.52.030 Burglary 2nd
5 Degree; RCW 9A.56.030 Theft 1st Degree; and RCW 9A.082.050 Trafficking in Stolen
6 Property 1st Degree to include but not limited to the following;

- 7 ➤ All information revealing the telephone number associated with the seized phone, its
8 service provider and all data used by a service provider to identify the phone, including
9 the phone's IMED, MAC and other unique identifiers;
- 10 ➤ Evidence of use of the device between 11/10/16 to 12/21/16 to communicate with
11 criminal associates or others about or pertaining to the above-listed crime(s), via
12 incoming or outgoing calls, missed calls, chat sessions, instant messages, text messages,
13 voice memo, voice mail, SMS communications, internet usage, and the like;
- 14 ➤ Photographs, images, videos, documents, and related data created, accessed, read,
15 modified, received, stored, sent, moved, deleted or otherwise manipulated between
16 11/10/16 to 12/21/16;
- 17 ➤ Evidence of use of the device to conduct internet searches pertaining to Mallinak
18 Jewelers and or any other stores that buy and sell jewelry and precious stones;
- 19 ➤ Information that can be used to calculate the position of the phone between 11/10/16 to
20 12/21/16, including location data; cell tower usage; GPS satellite data; GPS coordinates
21 for routes and destination queries between the above-listed dates; and images created,
22 accessed or modified between the above-listed dates, together with their metadata and
23 EXIF tags;
- 24 ➤ Evidence tending to identify the subscriber of the device, the user of the device, and/or
25 the possessor of the device, and/or dominion and control of the device between 11/10/16
26 to 12/21/16;
- 27 ➤ Any other information that is evidence of the above-listed crime(s).

1 From location #4 listed above (Light colored 2008 Range Rover vehicle, bearing WA license plate
2 number **BCX8267**, VIN: **SALSF25418A144329**) I am requesting permission to search for, and seize
3 the following:

4 Evidence in whatever form of the above listed crime(s) including but not limited to:

- 5
- 6 a. Items and/or information that is/are evidence of, fruits of, pertain to, and/or was/is being used in
7 the commission of the listed crime(s);
- 8 b. Jewelry and precious stones. Such items will be held in safekeeping by the Kirkland Police
9 Department until such time that they can be reviewed by the victim in this case to prove or
10 disprove ownership;
- 11 c. Any and all tools that can be used to commit burglaries to include but not limited to:
- 12 > Drills
 - 13 > Saws
 - 14 > Pry bars
 - 15 > Glues/locktight
- 16 d. Items in whatever form evidencing dominion and control of the premises, place(s),
17 property, item(s), account(s), and/or person(s) searched;
- 18 e. The person of **Lynell A. Denham, DOB 07/18/1964**;
- 19 f. Cellular phones belonging to the person of **Lynell A. Denham, DOB 07/18/1964** and / or
20 assigned to phone numbers **253.449.6615** and **253.677.0772**;
- 21 g. Any records regarding storage facilities/bank deposit boxes indicating other places where
22 stolen property could be stored off-site.

23 This affidavit is intended to show only that there is sufficient probable cause for the requested
24 warrant and does not set forth all of my knowledge about this matter.

25 [X] (Check if applicable) I also ask that the court find that notice to any person, including the
26 subscriber(s) and customer(s) to which the materials relate, of the existence of this warrant would
27 likely jeopardize the life or physical safety of an individual and/or jeopardize an ongoing criminal
28 investigation. The request for this finding is based on the following facts: My training and
experience has taught me that individuals engaged in stolen property trafficking will destroy or
hide evidence if they are tipped off that the police are investigating them.

SEARCH WARRANT AFFIDAVIT
Page 12 of 13

1 I certify under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct.

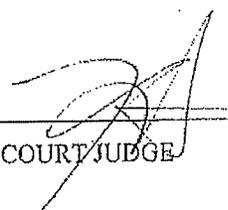


AFFIANT

Kirkland Police Dept., Detective A. O'Neill #337

AGENCY, TITLE, PERSONNEL NUMBER

3
4
5
6
7 Subscribed and sworn to before me this 22 day of Dec., 2016.

8
9
10 Signature: 
11 SUPERIOR COURT JUDGE Ken Schubert

12
13 Printed Judge Name: _____

14 Issuance of Warrant Approved:
15 DANIEL T. SATTERBERG
16 King County Prosecuting Attorney
17 By: Gavriel Jacobs, WSBA #46394
18 Senior Deputy Prosecuting Attorney
19 Criminal Division
20
21
22
23
24
25
26
27

1 From location **A** listed above (**10312 Golden Given RD E, Tacoma, Pierce County, WA 98445**) I am
2 requesting permission to search for, and seize the following:

3 Evidence in whatever form of the above listed crime(s) including but not limited to:

- 4 a. Items and/or information that is/are evidence of, fruits of, pertain to, and/or was/is being used in
- 5 the commission of the listed crime(s);
- 6 b. Jewelry and precious stones. Such items will be held in safekeeping by the Kirkland Police
- 7 Department until such time that they can be reviewed by the victim in this case to prove or
- 8 disprove ownership;
- 9 c. Any and all tools that can be used to commit burglaries to include but not limited to:
- 10 > Drills
- 11 > Saws
- 12 > Pry bars
- 13 > Glues/locktight
- 14 d. Items in whatever form evidencing dominion and control of the premises, place(s),
- 15 property, item(s), account(s), and/or person(s) searched;
- 16 e. The person of **Lynell A. Denham, DOB 07/18/1964;**
- 17 f. Cellular phones belonging to the person of **Lynell A. Denham, DOB 07/18/1964** and /
- 18 or assigned to phone numbers **253.449.6615** and **253.677.0772;**
- 19 g. Light colored 2008 Range Rover vehicle, bearing WA license plate number **BCX8267, VIN:**
- 20 **SALSF25418A144329;**
- 21 h. Any records regarding storage facilities/bank deposit boxes indicating other places where
- 22 stolen property could be stored off-site.

23 From location **B** listed above (**The person of Lynell A. Denham, DOB 07/18/1964**). I am requesting
24 permission to search for, seize the following:

25 Items and/or information that is/are evidence of, fruits of, pertain to, and/or was/is being used in the
26 commission of the listed crime(s);

- 27 a. Jewelry and precious stones. Such items will be held in safekeeping by the Kirkland Police
- 28 Department until such time that they can be reviewed by the victim in this case to prove or
- ownership;

SEARCH WARRANT
Page 2 of 4
06.04.14

- 1 b. Cellular phone(s) belonging to **Lynell A. Denham**, DOB 07/18/1964 and / or assigned to phone
 2 numbers **253.449.6615** and **253.677.0772**;
- 3 c. Any records regarding storage facilities/bank deposit boxes indicating other places where
 4 stolen property could be stored off-site.

5 From location **C** listed above (Cellular phone belonging to **Lynell A. Denham**, DOB 07/18/1964 and /
 6 or assigned to phone numbers **253.449.6615** and **253.677.0772**). I am requesting permission to search
 7 for, seize and subsequently forensically examine the above described cellular telephones or digital
 8 device(s) for evidence of RCW 9A.52.030 Burglary 2nd Degree; RCW 9A.56.030 Theft 1st Degree;
 9 and RCW 9A.082.050 Trafficking in Stolen Property 1st Degree to include but not limited to the
 10 following:

- 11 > All information revealing the telephone number associated with the seized phone, its service
 12 provider and all data used by a service provider to identify the phone, including the phone's
 13 IMED, MAC and other unique identifiers;
- 14 > Evidence of use of the device between 11/10/16 to 12/21/16 to communicate with criminal
 15 associates or others about or pertaining to the above-listed crime(s), via incoming or outgoing
 16 calls, missed calls, chat sessions, instant messages, text messages, voice memo, voice mail, SMS
 17 communications, internet usage, and the like;
- 18 > Photographs, images, videos, documents, and related data created, accessed, read, modified,
 19 received, stored, sent, moved, deleted or otherwise manipulated between 11/10/16 to 12/21/16;
- 20 > Evidence of use of the device to conduct internet searches pertaining to Mallinak Jewelers and or
 21 any other stores that buy and sell jewelry and precious stones;
- 22 > Information that can be used to calculate the position of the phone between 11/10/16 to 12/21/16,
 23 including location data; cell tower usage; GPS satellite data; GPS coordinates for routes and
 24 destination queries between the above-listed dates; and images created, accessed or modified
 25 between the above-listed dates, together with their metadata and EXIF tags;
- 26 > Evidence tending to identify the subscriber of the device, the user of the device, and/or the
 27 possessor of the device, and/or dominion and control of the device between 11/10/16 to 12/21/16;
- 28 > Any other information that is evidence of the above-listed crime(s).

25 From location **D** listed above (Light colored 2008 Range Rover vehicle, bearing WA license plate
 26 number **BCX8267**, VIN: **SALSF25418A144329**) I am requesting permission to search for, and seize the
 27 following:

28 Evidence in whatever form of the above listed crime(s) including but not limited to:

SEARCH WARRANT
 Page 3 of 4
 05.04.14

- 1 a. Items and/or information that is/are evidence of, fruits of, pertain to, and/or was/is being used in
- 2 the commission of the listed crime(s);
- 3 b. Jewelry and precious stones. Such items will be held in safekeeping by the Kirkland Police
- 4 Department until such time that they can be reviewed by the victim in this case to prove or
- 5 disprove ownership;
- 6 c. Any and all tools that can be used to commit burglaries to include but not limited to:
- 7 > Drills
- 8 > Saws
- 9 > Pry bars
- 10 > Glues/locktight
- 11 d. Items in whatever form evidencing dominion and control of the premises, place(s),
- 12 property, item(s), account(s), and/or person(s) searched;
- 13 e. The person of Lynell A. Denham, DOB 07/18/1964;
- 14 f. Cellular phones belonging to the person of Lynell A. Denham, DOB 07/18/1964 and / or
- 15 assigned to phone numbers 253.449.6615 and 253.677.0772;
- 16 g. Any records regarding storage facilities/bank deposit boxes indicating other places where
- 17 stolen property could be stored off-site.

18 This affidavit is intended to show only that there is sufficient probable cause for the requested warrant
 19 and does not set forth all of my knowledge about this matter.

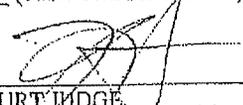
20 Promptly return this warrant to me or the clerk of this court; the return must include an inventory of all
 21 property seized.

22 A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from
 23 whose premises property is taken. If no person is found in possession, a copy and receipt shall be
 24 conspicuously posted at the place where the property is found.

25 Date/Time: 12/22/2016 9:40 am

26 [] (Check if applicable) The Judge/Magistrate's signature, below, was placed by affiant, at the
 27 judge/magistrate's direction given by

- 28 [] telephone (preserve a recording of the authorization),
- [] email (preserve and file the email), or by
- [] _____ (other reliable method).

Signature: 
 SUPERIOR COURT JUDGE
 Printed Judge Name: Ken Schubert

APPENDIX C

SW Adendum

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT, KING COUNTY, WASHINGTON

STATE OF WASHINGTON)	
) ss.	NO: 16-1201 SW
COUNTY OF KING)	AFFIDAVIT FOR SEARCH WARRANT
		ADDENDUM
		KIRKLAND POLICE CASE 16-44500

The undersigned on oath states: I believe that:

Evidence of the crime(s) of:
 RCW 9A.52.030 Burglary 2nd Degree
 RCW 9A.56.030 Theft 1st Degree
 RCW 9A.082.050 Trafficking in Stolen Property 1st Degree

Contraband, the fruits of a crime, or things otherwise criminally possessed, and
 Weapons, or other things by which a crime has been committed or reasonably appears
 about to be committed, and

A person for whose arrest there is probable cause, or who is unlawfully restrained

Is/are located in, on, or about the following premises:

1 1. Light colored, 2008 Range Rover vehicle, bearing WA license plate number
2 BCX8267, VIN: SALSF25418A144329.

3 2. MetroPCS
4 Attention: Subpoena Compliance
5 2250 Lakeside Blvd.
6 Richardson, TX 75082
7 E-Mail: Subpoenas@metropcs.com

8 1. T-Mobile
9 Attn: Legal Compliance
10 4 Sylvan Way
11 Parsippany, New Jersey 07054
12 Email: Lerinbound@T-Mobile.com

13 My belief is based upon the following facts and circumstances:

14 **Detective O'Neill Training & Experience:**

15 Your Affiant, I, Detective Allan O'Neill, being first duly sworn on oath, deposes and says: I have
16 been a sworn police officer in the State of Washington since 1997. I have worked as a sworn
17 officer with the Arlington Police Department and I am now employed as a sworn police officer
18 with the City of Kirkland. I am currently assigned to the Investigation Division as a Detective.
19 Through my experience in these positions I have been assigned a variety of investigations to
20 include VUCSA, Child Exploitation, MV Theft, MV Prowl, Burglary, Robbery, Identity Theft,
21 Forgery, Possession of Stolen Property, Trafficking of Stolen Property, Assault, Sexual Assault,
22 Rape, Harassment, etc. I have completed the Washington State Basic Law Enforcement
23 Academy through the Washington State Criminal Justice Training Center (WSCJTC). I have
24 received specialized training in the following fields: police training officer academy (PTO),
25 hostage negotiations (CJTC), auto theft investigations (WATPA/WSATI), interview and
26 interrogation (CJTC), basic investigations training (CJTC), child interviewing and interrogation
27 (CJTC) and RSO coordinator training.

28 SEARCH WARRANT AFFIDAVIT
Page 2 of 9

1
2 THE INVESTIGATION

3
4 *This affidavit incorporates by reference the previously issued warrant and affidavit No. 16-1201*
5 *drafted and sworn by myself, Detective O'Neill and signed by King County Superior Judge Ken*
6 *Schubert on 12/22/16, attached hereto as Appendix A.*

7 On 12/29/16 at about 0530 hours, Kirkland and Pierce County Officers executed a residential
8 search warrant #16-1201 at 10312 Golden Given RD E, Tacoma, Pierce County, WA 98445 to
9 search for evidence of the above listed crimes. The search warrant also listed to search for and
10 seize a light colored, 2008 Range Rover vehicle, bearing WA license plate number BCX8267,
11 VIN: SALSF25418A144329 and cellular phone belonging to Lynell A. Denham, DOB
12 07/18/1964 and / or assigned to phone numbers 253.449.6615 (Metro PCS) and 253.677.0772
13 (T-Mobile). Denham had provided these phone numbers to his probation officers. He also
14 provided the number 253.449.6615 to the Porcello Jewelers and the number 253.677.0772 to the
15 TopKick pawn store when he pawned the stolen jewelry to the stores.

16 During the search, documentation for the purchase of the Range Rover vehicle was located and
17 confirmed that \$9000 was used as a down payment for the vehicle. The paperwork showed that
18 the vehicle was purchased on 11/17/2016 at the All Right Auto Sales in Federal Way. State Farm
19 insurance paperwork was also located that listed Denham as being insured on the Range Rover.
20 The vehicle (2008 Range Rover vehicle, bearing WA license plate number BCX8267) was
21 located on the listed property and searched for evidence. The vehicle was then seized and towed to
22 the Kirkland Police Department. The vehicle was sealed with evidence tape and stored in a secured
23 pen at the Kirkland Police Department.

24 On 02/16/17, Evidence Technician Karen Olson informed me that the Range Rover needed to be
25 moved from the outside secured pen to the inside secured evidence bay. Olson requested that I drive
26 the vehicle to the inside bay. I then got into the Range Rover vehicle while Technician Olson watched
27 and started the vehicle's engine. I observed that the vehicle was equipped with a GPS system. I did

28 SEARCH WARRANT AFFIDAVIT
Page 3 of 9

1 not access the GPS and parked the Range Rover in the inside secured bay. My training and
2 experience have taught me that some GPS systems keep a memory of addresses that have been
3 searched or driven to. I contacted the service department at the Bellevue Land Rover and they
4 confirmed that at a minimum the GPS system in that year of Range Rover would store the last location
5 searched.

6 Having the GPS location history from the Range Rover, I believe would help to identify and support
7 that Denham used the Range Rover to transport and sell stolen property.

8
9 No cellular phones belonging to Denham were located on the premises. Denham was not on the
10 premises and had gone into hiding. He failed to show for his scheduled probation meetings and an
11 arrest warrant for Escape from Community Custody was issued. On 01/26/17, Denham pawned a
12 gold necklace for \$2000 at the Bellevue Rare Coins in Bellevue. The necklace was not one that
13 was taken from this burglary. This showed that Denham was still in the area and pawning
14 jewelry.

15 On 03/21/17, Denham returned to the Bellevue Rare coins and attempted to pawn 4-5 diamond
16 gold rings. Denham did not like the appraisal and left the shop. The Bellevue Police were
17 notified, but did not arrive in time to locate him.

18
19 On 04/11/17, Denham was arrested by the Shoreline Police Department on his arrest warrant and was
20 booked into the King County Jail.

21
22 Obtaining the records from Denham's cellular phone service providers, I believe would assist in
23 providing information on his location during the above listed crimes.

24
25
26
27
28 SEARCH WARRANT AFFIDAVIT
Page 4 of 9

Denham_L 0143

17-1-06567-2 SEA

SUPPORTING INFORMATION

1
2
3 Through experience and training, I know that cellular service providers, routinely, in the regular
4 course of business, collect and retain information related to their customer/subscriber accounts,
5 for purposes of billing; for diagnostic and maintenance reasons; for managing traffic on their
6 equipment; and for fraud detection and prevention. Telephone service providers also maintain
7 records identifying related accounts or phone numbers, such as when an account uses multiple
8 telephones, or a person uses multiple accounts. The information collected and maintained
9 includes data related to subscriber information, account registration, credit information, billing
10 and airtime records, outbound and inbound call/communication detail, location information for
11 the device (derived from signals to and from the device via cellular phone towers and/or satellite),
12 per call measurement data (PCMD), connection time and dates, Internet routing information
13 (Internet Protocol numbers), and message content, that may assist in the identification of person/s
14 accessing and utilizing the account; and the identification of other persons who are associated
15 with the person accessing the account and who may be witnesses or conspirators, or that may in
16 other ways be evidence of or pertain to the above-listed crime(s). Cellular telephone providers
17 routinely store email and voice mail messages in company servers, at least until the message has
18 been retrieved by its intended recipient. Some cellular telephone service providers also provide
19 "cloud storage" space for customers who want to save SMS, pictures, and the like. Cellular
20 telephone service providers typically retain all records for their customer accounts for the life of
21 the account, and most retain records regarding the account for some time after an account is
22 closed.

23 I know from training and experience that people own cellular telephones and other portable
24 electronic devices for the purpose of being able to use them wherever they are, and as such carry
25 them virtually constantly, or are nearly always within the near vicinity of their cell phones and/or
26 portable devices. Based on my experience, those involved in criminal enterprises sometimes will
27 use multiple phones in the commission of crimes, to facilitate criminal activity, and/or to avoid
28 detection by law enforcement. They also sometimes possess multiple phones to have a secondary
means of communication if a phone is lost or seized by law enforcement. I also know through

SEARCH WARRANT AFFIDAVIT
Page 5 of 9

1 my training and experience that criminals also use cellular phones to document criminal activities
2 through photographs, videos, and digital or voice memos, and that these cellular telephone users
3 share this data with others by sending it via one of the many ways that cellular telephones can be
4 used. For example, communication between suspects and other involved parties or witnesses can
5 occur through typical cellular phone calls, instant messaging, text messages, chat sessions, email,
6 and social networking websites. These communications can reveal evidence and/or facts
7 pertaining to the above-listed crimes.

8 When a cellular telephone or other electronic device is turned on to register its availability to
9 receive communications on the network, or when the device actually sends or receives
10 communications, it will communicate with a cell tower or satellite within its radio frequency
11 range. Cellular service providers maintain data that can be used to generally locate a cellular
12 telephone at a particular point in time. These include cell site maps, per call measurement data,
13 and/or signal testing results for their networks, including round trip signal testing data, that show
14 the geographical location of all cell sites within its service area. Using the cell site geographical
15 information or GPS information, officers would be able to determine the physical location of the
16 individual using a particular cellular telephone. Some cell phones or other electronic
17 communication devices additionally communicate their physical location, in precise terms (such
18 as longitude and latitude), to the provider via global positioning system ("GPS") satellite or
19 multilateration (e.g. triangulated signals off three or more towers) measurements that are shared
20 with or accessible to the provider owing to software settings and terms of service (TOS)
21 agreements. This information is often evidence of or pertaining to criminal activity in that it
22 enables law enforcement to locate a suspect at the time of a crime, either at or away from a crime
23 scene, and can be used to assist and corroborate surveillance officers' observations and anticipate
24 future movements and locations of the suspect and/or his or her criminal associates, by
25 establishing his or her communication and location habit patterns over time. For example, if the
26 telephone consistently signals the same tower both late at night and in the early morning hours,
27 it is reasonable to conclude that the suspect is living, sleeping, hiding or working at a night job
28 in that vicinity.

SEARCH WARRANT AFFIDAVIT
Page 6 of 9

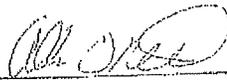
1 All records that include the dates from 11/11/2016 through present for MetroPCS telephone
2 number 253.449.6615 and T-Mobile telephone number 253.677.0772 and associated numbers
3 and accounts, information and records which are or contain evidence of or pertain to the crimes
above-listed crime(s), including;

- 4 A) Subscriber information for the above-identified account and associated accounts, credit,
5 and note/comment (customer contact) information/records, including changes to
6 subscriber information, means and source of payments including any credit, debit or bank
7 account numbers, as well as the type and length of service provided for the above-
8 identified account(s) and for all accounts that are linked to the above-identified
9 account(s);
- 10 B) Billing records.
- 11 C) Inbound and Outbound call detail records, such as calling, communication and billing
12 detail records including cell site and/or location information, inbound and outbound call
13 detail, per call measurement data (PCMD), call origination and termination locations
14 and, to the extent available, interim cell site locations, including the sector orientation or
15 azimuth, sector beam width and range information;
- 16 D) Stored communications such as voicemail, SMS/text messages, instant messages, email,
17 buddy lists, images, together with storage and/or receipt dates;
- 18 E) All dialing, routing, addressing, signaling, timing, ranging, cell-site, and other
19 positioning information such as GPS or multilateration or precision location information
20 tending to reveal the proximate or precise location of the device(s) associated with the
21 above-identified customer/number/account;
- 22 F) Physical address of cellular antenna towers together with RF coverage map(s) and/or
23 satellites contacted or used by the above-identified
24 customer/number/account(s)/device(s), and periods of telephone activation, session
25 times, duration, and the identity of any temporarily assigned network addresses;
- 26 G) Connection logs and records of user activity such as connection and disconnection dates
27 and times, method of connection, any other connection information such as Internet
28 Protocol address of the source of the connection, data transfer volume, user name or
identity associated with the connections, telephone caller/user identification records,
and connection information for the computer to which the user of the above-referenced
accounts connected during the connection period, including the destination IP address,
connection, disconnection date, time, and method for the destination computer or
phone, and any other information related to the connection;

23 This affidavit is intended to show only that there is sufficient probable cause for the requested
24 warrant and does not set forth all of my knowledge about this matter.

1 [] (Check if applicable) I also ask that the court find that notice to any person, including the
 2 subscriber(s) and customer(s) to which the materials relate, of the existence of this warrant would
 3 likely jeopardize the life or physical safety of an individual and/or jeopardize an ongoing criminal
 4 investigation. The request for this finding is based on the following facts: My training and
 5 experience has taught me that individuals engaged in stolen property trafficking will destroy or
 6 hide evidence if they are tipped off that the police are investigating them.

7 I certify under penalty of perjury under the laws of the State of Washington that the foregoing is
 8 true and correct.

9 

10 AFFIANT

11 Kirkland Police Dept., Detective A. O'Neill #337

12 AGENCY, TITLE, PERSONNEL NUMBER

13 Subscribed and sworn to before me this 20th day of April, 2017.

14 Signature: 

15 SUPERIOR COURT JUDGE

16 Printed Judge Name: Susan Amini

17
 18
 19 Issuance of Warrant Approved:
 20 DANIEL T. SATTERBERG
 21 King County Prosecuting Attorney
 22 By: Gavriel Jacobs, WSBA #46394
 23 Senior Deputy Prosecuting Attorney
 24 Criminal Division
 25
 26
 27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT, KING COUNTY, WASHINGTON

STATE OF WASHINGTON)

) ss.
)

NO: 16-1201 SW

COUNTY OF KING)

SEARCH WARRANT ADDENDUM

TO ANY PEACE OFFICER IN THE STATE OF WASHINGTON:

Upon the sworn complaint made before me, there is probable cause to believe that the crime(s) of:

- RCW 9A.52.030 Burglary 2nd Degree
- RCW 9A.56.030 Theft 1st Degree
- RCW 9A.082.050 Trafficking in Stolen Property 1st Degree

have been committed, and/or are about to be committed in King County, and that evidence of those crimes; or contraband, the fruits of crime, or things otherwise criminally possessed; or weapons or other things by means of which a crime has been committed or reasonably appears about to be committed; or a person for whose arrest there is probable cause, or who is unlawfully restrained is/are concealed in or on certain premises, vehicles or persons.

YOU ARE COMMANDED TO:

1. Search, within 10 days of this date, the premises, vehicle or person described as follows:

The service provider records for cellular telephone number 253.677.0772 located with the custodian of records at:

1. T-Mobile
Attn: Legal Compliance
4 Sylvan Way
Parsippany, New Jersey 07054
Fax Number: 866-537-0911

This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply.

SEARCH WARRANT
Page 1 of 3

1 2. Seize, if located, the following property and or person (s): Evidence of the crime of RCW 9A.52.030
 2 Burglary 2nd Degree; RCW 9A.56.030 Theft 1st Degree; RCW 9A.082.050 Trafficking in Stolen
 3 Property 1st Degree.

4
 5 Based on all the foregoing information, there is probable cause to believe that evidence of the
 6 above-listed crimes, exists in the records of the above-described cellular telephone service provider, and
 7 that there is probable cause to search the above identified service provider's records for the following
 8 items:

9 All records that include the dates from 11/11/2016 through present for T-Mobile telephone number
 10 253.677.0772 and associated numbers and accounts, information and records which are or contain
 11 evidence of or pertain to the crimes above-listed crime(s), including;

- 12 A) Subscriber information for the above-identified account and associated accounts, credit, and
 13 note/comment (customer contact) information/records, including changes to subscriber
 14 information, means and source of payments including any credit, debit or bank account numbers,
 15 as well as the type and length of service provided for the above-identified account(s) and for all
 16 accounts that are linked to the above-identified account(s);
- 17 B) Billing records.
- 18 C) Inbound and Outbound call detail records, such as calling, communication and billing detail
 19 records including cell site and/or location information, inbound and outbound call detail, per call
 20 measurement data (PCMD), call origination and termination locations and, to the extent available,
 21 interim cell site locations, including the sector orientation or azimuth, sector beam width and
 22 range information;
- 23 D) Stored communications such as voicemail, SMS/text messages, instant messages, email, buddy
 24 lists, images, together with storage and/or receipt dates;
- 25 E) All dialing, routing, addressing, signaling, timing, ranging, cell-site, and other positioning
 26 information such as GPS or multilateration or precision location information tending to reveal the
 27 proximate or precise location of the device(s) associated with the above-identified
 28 customer/number/account;
- 29 F) Physical address of cellular antenna towers together with RF coverage map(s) and/or satellites
 30 contacted or used by the above-identified customer/number/account(s)/device(s), and periods of
 31 telephone activation, session times, duration, and the identity of any temporarily assigned
 32 network addresses;
- 33 G) Connection logs and records of user activity such as connection and disconnection dates and
 34 times, method of connection, any other connection information such as Internet Protocol address
 35 of the source of the connection, data transfer volume, user name or identity associated with the
 36 connections, telephone caller/user identification records, and connection information for the
 37 computer to which the user of the above-referenced accounts connected during the connection
 38 period, including the destination IP address, connection, disconnection date, time, and method for
 39 the destination computer or phone, and any other information related to the connection;

40 *This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt,*
 41 *unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to*
 42 *comply.*

43 SEARCH WARRANT
 44 Page 2 of 3

1 This warrant may be executed by electronic delivery methods such as faxing or emailing a copy of the warrant
2 to the above-identified business.

3 IT IS FURTHER ORDERED records and information required to be provided pursuant to this warrant are
4 to be provided in a commercially-reasonable electronic format specified or agreed to by the investigative
5 agency and delivered via electronic mail as specified by the law enforcement officer serving this warrant.

6 IT IS FURTHER ORDERED that the service provider shall not notify any person including the
7 subscriber(s) and customer(s) to which the materials relate, of the existence of this warrant. Any such
8 notification would likely jeopardize an ongoing criminal investigation.

9 The Court having reviewed specific and articulable facts showing that there are reasonable grounds to
10 believe that the records or other information sought are relevant and material to an ongoing criminal
11 investigation, the court hereby CONCLUDES:

12 THIS WARRANT IS ISSUED PURSUANT TO AND IN COMPLIANCE WITH 18 U.S.C. 2703(d).
13 Promptly return this warrant to me or the clerk of this court; the return must include an inventory of all property
14 seized.

15 A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from
16 whose premises property is taken. If no person is found in possession, a copy and receipt shall be
17 conspicuously posted at the place where the property is found.

18 Date/Time: 4/20/2017 at 1:35 P.M.

19 [] (Check if applicable) The Judge/Magistrate's signature, below, was placed by affiant, at the
20 judge/magistrate's direction given by

- 21 [] telephone (preserve a recording of the authorization),
- 22 [] email (preserve and file the email), or by
- 23 [] _____ (other reliable method).

24 Signature: 
 25 SUPERIOR COURT JUDGE
 26 Printed Judge Name: Susan Amiri

27 This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt,
28 unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to
comply.

1 **Burglary 2nd Degree; RCW 9A.56.030 Theft 1st Degree; RCW 9A.082.050 Trafficking in Stolen**
2 **Property 1st Degree.**

3 Based on all the foregoing information, there is probable cause to believe that evidence of the
4 above-listed crimes, exists in the records of the above-described cellular telephone service provider, and
5 that there is probable cause to search the above identified service provider's records for the following
6 items:

7 2. All records that include the dates from 11/11/2016 through present for MetroPCS
8 telephone number 253.449.6615 and associated numbers and accounts, information and records which are
9 or contain evidence of or pertain to the crimes above-listed crime(s), including;

- 10 A) Subscriber information for the above-identified account and associated accounts, credit, and
11 note/comment (customer contact) information/records, including changes to subscriber
12 information, means and source of payments including any credit, debit or bank account numbers,
13 as well as the type and length of service provided for the above-identified account(s) and for all
14 accounts that are linked to the above-identified account(s);
- 15 B) Billing records.
- 16 C) Inbound and Outbound call detail records, such as calling, communication and billing detail
17 records including cell site and/or location information, inbound and outbound call detail, per call
18 measurement data (PCMD), call origination and termination locations and, to the extent available,
19 interim cell site locations, including the sector orientation or azimuth, sector beam width and
20 range information;
- 21 D) Stored communications such as voicemail, SMS/text messages, instant messages, email, buddy
22 lists, images, together with storage and/or receipt dates;
- 23 E) All dialing, routing, addressing, signaling, timing, ranging, cell-site, and other positioning
24 information such as GPS or multifilateration or precision location information tending to reveal the
25 proximate or precise location of the device(s) associated with the above-identified
26 customer/number/account;
- 27 F) Physical address of cellular antenna towers together with RF coverage map(s) and/or satellites
28 contacted or used by the above-identified customer/number/account(s)/device(s), and periods of
telephone activation, session times, duration, and the identity of any temporarily assigned
network addresses;
- G) Connection logs and records of user activity such as connection and disconnection dates and
times, method of connection, any other connection information such as Internet Protocol address
of the source of the connection, data transfer volume, user name or identity associated with the
connections, telephone caller/user identification records, and connection information for the
computer to which the user of the above-referenced accounts connected during the connection
period, including the destination IP address, connection, disconnection date, time, and method for
the destination computer or phone, and any other information related to the connection;

24 This warrant may be executed by electronic delivery methods such as faxing or emailing a copy of the warrant
25 to the above-identified business.

26 *This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt,*
27 *unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to*
28 *comply.*

SEARCH WARRANT
Page 2 of 3

1 IT IS FURTHER ORDERED records and information required to be provided pursuant to this warrant are
2 to be provided in a commercially-reasonable electronic format specified or agreed to by the investigative
agency and delivered via electronic mail as specified by the law enforcement officer serving this warrant.

3 IT IS FURTHER ORDERED that the service provider shall not notify any person including the
4 subscriber(s) and customer(s) to which the materials relate, of the existence of this warrant. Any such
notification would likely jeopardize an ongoing criminal investigation.

5 The Court having reviewed specific and articulable facts showing that there are reasonable grounds to
6 believe that the records or other information sought are relevant and material to an ongoing criminal
investigation, the court hereby CONCLUDES:

7 THIS WARRANT IS ISSUED PURSUANT TO AND IN COMPLIANCE WITH 18 U.S.C. 2703(d).
8 Promptly return this warrant to me or the clerk of this court; the return must include an inventory of all property
9 seized.

10 A copy of the warrant and a receipt for the property taken shall be given to the person from whom or from
11 whose premises property is taken. If no person is found in possession, a copy and receipt shall be
conspicuously posted at the place where the property is found.

12 Date/Time: 4/20/2017 at 1:35 P.M.

13 [] (Check if applicable) The Judge/Magistrate's signature, below, was placed by affiant, at the
14 judge/magistrate's direction given by
15 [] telephone (preserve a recording of the authorization),
16 [] email (preserve and file the email), or by
[] _____ (other reliable method).

17
18 Signature: 
19 SUPERIOR COURT JUDGE
Printed Judge Name: Susan Amin

20
21
22
23
24
25
26 *This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt,
27 unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to
28 comply.*

1 From location #A listed above (Light colored 2008 Range Rover vehicle, bearing WA license plate
2 number BCX8267, VIN: SALSF25418A144329) I am requesting permission to search for, and seize the
3 following:

4 Evidence in whatever form of the above listed crime(s) including but not limited to:

5
6 Any and all data that include the dates for 11/17/16 through 12/29/16 from the vehicle's built in GPS
7 system to include but not limited to:

- 8 • Prior travel routes;
- 9 • Dats and times of travel;
- 10 • Destination history;
- 11 • Home address;
- 11 • Recorded addresses and locations.

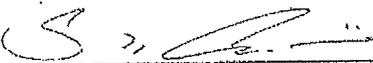
12 Promptly return this warrant to me or the clerk of this court; the return must include an inventory of
13 all property seized.

14 A copy of the warrant and a receipt for the property taken shall be given to the person from whom or
15 from whose premises property is taken. If no person is found in possession, a copy and receipt shall be
conspicuously posted at the place where the property is found.

16 Date/Time: 4/20/2017 @ 1:35 PM.

17 (Check if applicable) The Judge/Magistrate's signature, below, was placed by affiant, at the
18 judge/magistrate's direction given by

- 19 telephone (preserve a recording of the authorization),
- 19 email (preserve and file the email), or by
- 20 _____ (other reliable method).

21 Signature: 
 22 SUPERIOR COURT JUDGE
 23 Printed Judge Name: Susan Amiri

24
25
26 *This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt,
27 unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to
28 comply.*

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

May 27, 2020 - 11:31 AM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 78704-7
Appellate Court Case Title: State of Washington, Respondent v. Lynell Avery Denham, Appellant

The following documents have been uploaded:

- 787047_Petition_for_Review_20200527112950D1578355_2424.pdf
This File Contains:
Petition for Review
The Original File Name was 78704-7 PETITION FOR REVIEW.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- kochd@nwattorney.net
- swiftm@nwattorney.net

Comments:

Sender Name: Bora Ly - Email: bora.ly@kingcounty.gov

Filing on Behalf of: Dennis John Mccurdy - Email: dennis.mccurdy@kingcounty.gov (Alternate Email:)

Address:
King County Prosecutor's Office - Appellate Unit
W554 King County Courthouse, 516 Third Avenue
Seattle, WA, 98104
Phone: (206) 477-9499

Note: The Filing Id is 20200527112950D1578355