STATE OF MINNESOTA

IN SUPREME COURT

A15-2075

Court of Appeals — Chutich, J.

State of Minnesota,

Respondent,

vs.

Filed: January 17, 2018
Office of Appellate Courts

Matthew Vaughn Diamond,

Appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

Mark Metz, Carver County Attorney, Peter A.C. Ivy, Chief Deputy County Attorney, Chaska, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant State Public Defender, Office of the Appellate Public Defender, Saint Paul, Minnesota, for appellant.

Cort C. Holten, Jeffrey D. Bores, Gary K. Luloff, Chestnut Cambronne PA, Minneapolis, Minnesota, for amicus curiae Minnesota Police and Peace Officers Association Legal Defense Fund.

S Y L L A B U S

Ordering appellant to provide a fingerprint to unlock a seized cellphone did not violate his Fifth Amendment privilege against self-incrimination because the compelled act was not a testimonial communication.

Affirmed.

O P I N I O N

CHUTICH, Justice.

This case presents an issue of first impression: whether the Fifth Amendment privilege against self-incrimination protects a person from being ordered to provide a fingerprint to unlock a seized cellphone. Neither the Supreme Court of the United States nor any state supreme court has addressed this issue.

The police lawfully seized a cellphone from appellant Matthew Diamond, a burglary suspect, and attempted to execute a valid warrant to search the cellphone. The cellphone's fingerprint-scanner security lock, however, prevented the search, and Diamond refused to unlock the cellphone with his fingerprint, asserting his Fifth Amendment privilege against self-incrimination. The district court found no Fifth Amendment violation and ordered Diamond to provide his fingerprint to unlock the cellphone so that the police could search its contents. After the court of appeals affirmed, we granted Diamond's petition for review. Because the compelled act here—providing a fingerprint—elicited only physical evidence from Diamond's body and did not reveal the contents of his mind, no violation of the Fifth Amendment privilege occurred. Accordingly, we affirm.

FACTS

A homeowner in Chaska returned home to find that someone had kicked open her attached garage's side-entry door, entered her home, and taken jewelry, electronics, and a safe. When police officers arrived to investigate the burglary, they discovered two key pieces of evidence: shoe tread prints on the side-entry door, and, on the driveway, an envelope with the name "S.W." written on it. A Chaska investigator determined that S.W. had sold jewelry to a pawnshop on the same day as the burglary, and the investigator obtained the license plate number of a car registered in S.W.'s name. Officers then located and stopped S.W.'s car; Diamond was driving the car, and S.W. was a passenger. Police officers arrested Diamond on outstanding warrants and took him to jail, where jail personnel collected and stored his shoes and a Samsung Galaxy 5 cellphone that he was carrying when arrested.

Police officers obtained and executed warrants to seize Diamond's shoes and cellphone. In addition, they obtained a warrant to search the contents of the cellphone. But they could not search its contents because the cellphone required a fingerprint to unlock it.[1] The State then moved to compel Diamond to unlock the seized cellphone with his fingerprint. Diamond objected, asserting his Fifth Amendment privilege against self-incrimination.

[1] The cellphone contained an electronic lock that could be opened using only fingerprint recognition, rather than a password or pin number. To use the fingerprint-recognition feature, a cellphone user can train a cellphone to recognize a specific fingerprint's physical patterns by placing a finger on the phone enough times to "build" the phone's memory of the fingerprint. Once the cellphone recognizes the fingerprint, the user can unlock the cellphone by placing the specific finger on the phone itself.

The district court concluded that compelling Diamond's fingerprint would not violate his Fifth Amendment privilege because "[c]ompelling the production of [Diamond's] fingerprint or thumbprint would not call upon the use of [his] mind. It is more akin to providing a key to a lockbox." Accordingly, it ordered Diamond to "provide a fingerprint or thumbprint as deemed necessary by the Chaska Police Department to unlock his seized cell phone."

Diamond continued to object to providing the necessary fingerprint for unlocking the phone. Nevertheless, he finally unlocked the cellphone with his fingerprint in court after being held in civil contempt and warned of the possibility and consequences of criminal contempt. Police officers used forensic analysis software to search and to extract the cellphone's data, including call records and messages sent and received from the cellphone. The data showed frequent communication between S.W. and Diamond on the day of the burglary.

During the jury trial, the district court admitted the messages and call logs from the search of the cellphone, but to avoid Fifth Amendment concerns, it prohibited the parties from introducing evidence that Diamond had unlocked the phone with his fingerprint. The court also admitted inculpatory evidence unrelated to the contents of the cellphone, which showed that Diamond had committed the burglary. This evidence included an analysis of Diamond's shoes, which matched the shoeprints found at the scene of the crime; cellphone tower records that placed him in the area of the burglary at the relevant time; pawnshop records; and testimony from S.W. The jury found Diamond guilty of second-degree burglary, Minn. Stat. § 609.582, subd. 2(a)(1) (2016), and other offenses.

The court of appeals affirmed, concluding that providing a fingerprint was not privileged under the Fifth Amendment because it was "no more testimonial than furnishing a blood sample, providing handwriting or voice exemplars, standing in a lineup, or wearing particular clothing." *State v. Diamond*, 890 N.W.2d 143, 151 (Minn. App. 2017).

We granted Diamond's petition for review.

ANALYSIS

The question this case poses arises under the Fifth Amendment to the United States Constitution. We review this constitutional question de novo.[2] *See State v. Borg*, 806 N.W.2d 535, 541 (Minn. 2011) (reviewing de novo whether the Fifth Amendment privilege prohibits eliciting certain testimony during the State's case in chief).

The Fifth Amendment, applicable to the states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1, 8 (1964), provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," U.S. Const. amend. V; *see also* Minn.

[2] In *United States v. Doe* (*Doe I*), the Supreme Court used a different, deferential, standard of review in addressing a question under the Fifth Amendment, but that standard does not apply here. 465 U.S. 605, 613–14 (1984) (holding that it would "not overturn" the district court's explicit finding that an act of producing documents "would involve testimonial self-incrimination" "unless it ha[d] no support in the record"). Critically, *Doe I* focused on whether the act of producing documents was *actually* testimonial in that particular case, which depended on "the facts and circumstances," not whether the act *may* be testimonial in general. *Id.* at 613 (quoting *Fisher v. United States*, 425 U.S. 391, 410 (1976)); *see also id.* at 613 nn.11–12 (describing the factual findings of the district court and the court of appeals' review of the findings). In contrast to the factual question presented in *Doe I*, the question here—whether the act of producing a fingerprint to unlock a cellphone is testimonial or nontestimonial—is a question of *law*, which we review de novo.

Const. art. I, § 7.[3] The "constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Schmerber v. California*, 384 U.S. 757, 762 (1966). To maintain a "fair state-individual balance," the privilege ensures that the government "shoulder[s] the entire load" in building a criminal case. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). "[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from [the defendant's] own mouth." *Id.*

The privilege against self-incrimination bars the state from (1) compelling a defendant (2) to make a testimonial communication to the state (3) that is incriminating. *See Fisher v. United States*, 425 U.S. 391, 408 (1976). Because we conclude that the act of providing a fingerprint to the police to unlock a cellphone is not a testimonial communication, we need not consider the other two requirements.

The Fifth Amendment bars a state from compelling oral and physical testimonial communications from a defendant. *Schmerber*, 384 U.S. at 763–64 ("It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers."). A physical act is *testimonial* when the act is a communication that "itself, explicitly or implicitly, relate[s] a factual assertion or disclose[s] information." *Doe v. United States (Doe II)*, 487 U.S. 201, 209–10 (1988).

[3] Diamond's claim is brought under the U.S. Constitution, not the Minnesota Constitution.

For example, complying with a subpoena to produce documents "may implicitly communicate 'statements of fact' " because complying with a court order may communicate the existence of evidence, the possession or control of evidence, or authenticate evidence.[4] *United States v. Hubbell*, 530 U.S. 27, 36 (2000) (subpoena for documents); *Doe II*, 487 U.S. at 203–04 (order compelling a signature to access bank record); *State v. Alexander*, 281 N.W.2d 349, 352 (Minn. 1979) (order to produce films).

But an act is *not* testimonial when the act provides "real or physical evidence" that is "used solely to measure . . . physical properties," *United States v. Dionisio*, 410 U.S. 1, 7 (1973), or to "exhibit . . . physical characteristics," *United States v. Wade*, 388 U.S. 218, 222 (1967). The government can compel a defendant to act when the act presents the "body as evidence when it may be material." *Schmerber*, 384 U.S. at 763 (quoting *Holt v. United States*, 218 U.S. 245, 252–53 (1910)). In other words, the government may compel a defendant to "exhibit himself" and present his "features" so that the police or a jury may "compare his features" with other evidence of the defendant's guilt. *Holt*, 218 U.S. at 253; *State v. Williams*, 239 N.W.2d 222, 225–26 (Minn. 1976) (holding that an order to "put on a hat found at the scene of the crime" was *not* testimonial because the police compelled the physical act for "the sole purpose of attempting to prove [the defendant's] ownership of [an] incriminating article").

[4] In *Fisher*, the Supreme Court noted that the "prevailing justification for the Fifth Amendment's application to documentary subpoenas" is the "implicit authentication" rationale. 425 U.S. at 412 n.12. In other words, a subpoena demanding that an accused present his own records is the same as requiring the accused to take the stand and admit the documents' authenticity and the same as acknowledging that the documents produced are in fact the documents described in the subpoena. *Id.*

The Supreme Court of the United States has therefore drawn a distinction between the *testimonial* act of producing documents as evidence and the *nontestimonial* act of producing the body as evidence. The Court first held that the compelled exhibition of the body's characteristics was not testimonial under the Fifth Amendment in *Holt*, 218 U.S. at 252. The Court explained that it would be an "extravagant extension of the 5th Amendment" to prevent a jury from hearing a witness testify that a prisoner, who was compelled to put on clothes, did so and that the clothes fit him. *Id.* It reasoned that barring the testimony would, in essence, "forbid a jury" from looking "at a prisoner and compar[ing] his features with a photograph in proof." *Id.* at 253; *see also State ex rel. Ford v. Tahash*, 154 N.W.2d 689, 691 (Minn. 1967) ("[T]here is a distinction between bodily view and requiring the accused to testify against himself."); *State v. Garrity*, 151 N.W.2d 773, 776 (Minn. 1967) ("The Constitution confers no right on an accused to be immune from the eyes of his accusers. The privilege is against testimonial compulsion, whereas exposure to view, like fingerprinting and photographing, is not proscribed.").

In *Schmerber*, the Supreme Court relied on *Holt* to hold that providing a blood sample to the police for an alcohol-content analysis was a nontestimonial act. 384 U.S. at 765. The Court reasoned that neither the extraction of the blood sample nor the later chemical analysis of the blood sample showed "even a shadow of testimonial compulsion" or "communication by the accused." *Id.* It emphasized that the defendant's "testimonial capacities" were not involved and "his participation, except as a donor, was irrelevant to the results of the test, which depend[ed] on [the] chemical analysis and on that alone." *Id.* Accordingly, the Court adopted the reasoning of the federal and state courts that

distinguished between compelled acts that make a "suspect or an accused the source of real or physical evidence" and compelled acts that elicit testimonial responses. *Id.* at 764 (internal quotation marks omitted). Courts applying this distinction, it noted, had held that the Fifth Amendment "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.* at 764.

Although the Supreme Court's distinction between the *testimonial* act of producing documents as evidence and the *nontestimonial* act of producing the body as evidence is helpful to our analysis, the act here—providing the police a fingerprint to unlock a cellphone—does not fit neatly into either category. Unlike the acts of standing in a lineup or providing a blood, voice, or handwriting sample, providing a fingerprint to unlock a cellphone both exhibits the body (the fingerprint) *and* produces documents (the contents of the cellphone). Providing a fingerprint gives the government *access* to the phone's contents that it did not already have, and the act of unlocking the cellphone communicates some degree of possession, control, and authentication of the cellphone's contents. *See Hubbell*, 530 U.S. at 36. But producing a fingerprint to unlock a phone, unlike the act of producing documents, is a display of the physical characteristics of the *body*, not of the mind, to the police. *See Schmerber*, 384 U.S. at 763.

Because we conclude that producing a fingerprint is more like exhibiting the body than producing documents, we hold that providing a fingerprint to unlock a cellphone is *not* a testimonial communication under the Fifth Amendment. The police compelled Diamond's fingerprint for the fingerprint's physical characteristics and not for any implicit

testimony from the act of providing the fingerprint. *See Dionisio*, 410 U.S. at 7. Moreover, the fingerprint was physical evidence from Diamond's body, not evidence of his mind's thought processes. *See Hubbell*, 530 U.S. at 43. We reach this conclusion for two reasons.

First, the State compelled Diamond to provide his fingerprint only for the physical, identifying characteristics of Diamond's fingerprint, not any communicative testimony inherent in providing the fingerprint. The State's use of Diamond's fingerprint was therefore like a "test" to gather physical characteristics, akin to a blood sample, a voice exemplar, trying on clothing, or standing in a lineup, in an effort to unlock the cellphone. *See Wade*, 388 U.S. at 222–23 (testing whether participation in a lineup would lead to a witness identifying the suspect); *Schmerber*, 384 U.S. at 765 (testing whether a blood sample contained alcohol and in what amount); *Holt*, 218 U.S. at 252 (testing whether a piece of clothing fit a suspect).

The characterization of the act throughout this case's proceedings supports this conclusion. The district court's order compelled Diamond to "provide a fingerprint or thumbprint as deemed necessary by the Chaska Police Department"—a part of his body—to the police so that the police could unlock the cellphone. At the contempt hearing, the district court instructed the State to "take whatever *samples* it needed" to unlock the cellphone. Moreover, the State did not present evidence at trial that Diamond unlocked the cellphone with his fingerprint.

Second, Diamond's act of providing a fingerprint to the police was not testimonial because the act did not reveal the contents of Diamond's mind. *See* 3 Wayne R. LaFave et al., *Criminal Procedure* § 8.12(d) (4th ed. 2016) ("*Schmerber* limited any 'private inner

sanctum' protected by the privilege to that of the contents of the mind, which a compelled communication forces the individual to reveal."); *see also Hubbell*, 530 U.S. at 42–43 (citing *Curcio v. United States*, 354 U.S. 118, 128 (1957)) (holding that the act of producing documents in response to a subpoena was testimonial because the act required the accused to take "the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena"); *Doe II*, 487 U.S. at 213 (stating that the Fifth Amendment is intended "to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government").

Although the Supreme Court has not considered whether compelling a defendant to provide a fingerprint—or a password[5]—to unlock a cellphone elicits a testimonial communication, other courts considering the question have focused on whether the act revealed the contents of the mind.[6] *See Sec. & Exch. Comm'n v. Huang*, No. 15-269, 2015

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[5] We do not decide whether providing a password is a testimonial communication.

[6] These cases often cite authorities analyzing whether a court may compel a defendant to decrypt a computer to unlock it for the government. *See In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1346 (11th Cir. 2012) (holding that compelled decryption of a computer hard drive's contents was testimonial because using a decryption password demands "the use of the contents of the mind"); *United States v. Kirschner*, 823 F. Supp. 2d 665, 668–69 (E.D. Mich. 2010) (holding that compelling the suspect to provide passwords associated with the suspect's computer was testimonial because the act revealed the contents of the suspect's mind); *Commonwealth v. Gelfgatt*, 11 N.E.3d 605, 615–16 (Mass. 2014) (concluding that the act of computer decryption was testimonial because a defendant cannot be compelled to reveal the contents of his mind, but holding that the testimony was not protected because the testimony was a "foregone conclusion").

WL 5611644, at *2 (E.D. Penn. Sept. 23, 2015) (concluding that the privilege protected the production of a password because the government sought the "Defendants' personal thought processes" and intruded "into the knowledge" of the defendants); *Commonwealth v. Baust*, 89 Va. Cir. 267, 2014 WL 10355635, at *4 (Va. Cir. Ct. Oct. 28, 2014) (holding that providing a passcode was testimonial, but providing a fingerprint was not, because "[u]nlike the production of physical characteristic evidence, such as a fingerprint, the production of a password force[d] the Defendant to disclose the contents of his own mind" (internal quotation marks omitted)). *But see In re Application for a Search Warrant*, 236 F. Supp. 3d 1066, 1073–74 (N.D. Ill. 2017) (concluding that the privilege barred the compelled production of a fingerprint to unlock a phone because the act *produced* the contents of the phone).

Here, Diamond merely provided his fingerprint so that the police could use the physical characteristics of the fingerprint to unlock the cellphone. The compelled act did not require Diamond to "submit to testing in which an effort [was] made to determine his guilt or innocence on the basis of physiological responses, whether willed or not."[7] *See*

[7] In *Doe II*, the Court clarified that in *Schmerber* it had "distinguished between the suspect's being *compelled himself to serve as evidence* and the suspect's being *compelled to disclose or communicate information* or facts that might serve as or lead to incriminating evidence." 487 U.S. at 211 n.10 (emphasis added). In *Schmerber*, the Court explained that when the government compels a defendant to act in a manner in which the defendant's physiological responses reveal the contents of the defendant's mind, then the act *is* testimonial even though the government is only looking at physical characteristics. *See* 384 U.S. at 764 ("[Compelling a] person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment."). Relying on the example of the lie detector test, the *Schmerber* Court explained that "lie detector tests

Schmerber, 384 U.S. at 764. To the extent that providing a fingerprint to unlock a cellphone might require a mental process to unlock the phone,[8] the police did not need to rely on that mental process here. *See Hubbell*, 530 U.S. at 43. Diamond did not need to self-select the finger that unlocked the phone. He did not even need to be conscious. Diamond could have provided all of his fingerprints to the police by making his hands available to them, and the police could have used each finger to try to unlock the cellphone.

Like in *Schmerber*, Diamond's participation in providing his fingerprint to the government "was irrelevant" to whether Diamond's fingerprint actually unlocked the cellphone. *See* 384 U.S. at 765 (concluding that the results of the blood sample depended on the chemical analysis of the blood, not the act of providing the blood sample). Whether Diamond's fingerprint actually unlocked the phone depended on whether the cellphone's fingerprint-scanner analyzed the physical characteristics of Diamond's fingerprint and matched the characteristics of the fingerprint programmed to unlock the cellphone.

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measuring changes in body function during interrogation[] may actually be directed to eliciting responses which are essentially testimonial." *Id.* The *Schmerber* Court, therefore, distinguished between a lie detector test, which could reveal the contents of a suspect's mind, and the exhibition of the defendant's bodily blood sample. *See id.*

[8] Even if providing a fingerprint *did* reveal the contents of the mind, because the act of providing evidence of physical characteristics has no testimonial significance, as discussed above, Diamond's act would still be nontestimonial. The *Doe II* Court clarified that the focus of the inquiry is not only whether the content comes from the mind, but also whether the content from the mind has "testimonial significance." 487 U.S. at 211 n.10 (stating that "it is not enough that the compelled communication is sought for its content. The content itself must have testimonial significance" (citing *Fisher*, 425 U.S. at 408; *Gilbert v. California*, 388 U.S. 263, 267 (1967); *Wade*, 388 U.S. at 222)).

Because the compelled act merely demonstrated Diamond's physical characteristics and did not communicate assertions of fact from Diamond's mind, we hold that Diamond's act of providing a fingerprint to the police to unlock a cellphone was not a testimonial communication protected by the Fifth Amendment.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.