IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
MARCELLUS RAMON ALLEN,
aka Marcellus Allen Allen,
Defendant-Appellant.

Multnomah County Circuit Court
120532225; A156388

Cheryl A. Albrecht, Judge.

Argued and submitted February 8, 2016.

Bronson D. James argued the cause for appellant. With him on the brief was Bronson James, LLC.

Peenesh H. Shah, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Egan, Judge, and Shorr, Judge.

ARMSTRONG, P. J.

Conviction for murder reversed and remanded; otherwise affirmed.

ARMSTRONG, P. J.

Defendant appeals a judgment of conviction, entered after a combined trial with codefendants Riley and Lomax, for one count of murder, ORS 163.115.[1] *See State v. Riley*, 288 Or App 264, ___ P3d ___ (2017); *State v. Lomax*, 288 Or App 253, ___ P3d ___ (2017). The state's theory at trial was that the killing was gang-related because the victim was selling marijuana at a price "considerably below" that offered by gang-affiliated dealers and the rest of the illegal marijuana market. In support of that theory, the state offered gang-related evidence that had been obtained from defendant's cell phone under the authority of a search warrant. On appeal, defendant challenges the trial court's denial of his motion to suppress that evidence, contending that the search warrant was invalid because it was based on an affidavit that failed to establish a factual nexus between defendant's phone and the crimes under investigation, and because it was too broad to satisfy the particularity requirements of ORS 133.565(2)(c); Article I, section 9, of the Oregon Constitution; and the Fourth Amendment to the United States Constitution. Defendant also assigns error to the trial court's refusal to give a jury concurrence instruction on principal or accomplice liability.

For the reasons discussed in *Lomax*, 288 Or App at ___, also decided this day, we conclude that the trial court erred in denying defendant's request for a jury concurrence instruction. We conclude further that the warrant authorizing the police to search the content of defendant's cell phone was impermissibly overbroad, and thus the trial court erred in denying defendant's motion to suppress. Accordingly, we reverse and remand defendant's conviction for murder.[2]

The facts, which are undisputed, are taken from the search warrant and from Detective Kammerer's affidavits

[1] Defendant was also indicted on one count of unlawful use of a vehicle; however, that count was dismissed before trial on the state's motion. We affirm that aspect of the judgment.

[2] Defendant also assigns error to the trial court's ruling admitting evidence of his gang affiliation as character evidence under OEC 404. Because we remand for a new trial, and the evidentiary record and legal arguments may develop differently on remand, we decline to address that assignment of error.

supporting his application for the search warrant.[3] In those affidavits, Kammerer alleged that he had been assigned to investigate a murder committed in Northeast Portland on May 9, 2012. The investigation led police to an apartment, which belonged to Fair and Watson, and where the suspected shooters were believed to be hiding. The police set up a perimeter around the apartment and, after a few hours, Fair and Watson came out and spoke with the police. Fair told Kammerer that she had been in the apartment with Riley when she heard a knock on the door. Fair saw two males she did not recognize. She did not open the door, but Riley said the men were his "homies" and he let them into the apartment; the men were later identified as defendant and Lomax. At one point, defendant and Watson attempted to leave the apartment, but they went back inside the apartment when they were confronted by the police outside it. Fair told Kammerer that defendant and Lomax began to panic, that Lomax turned off the lights, and that defendant began calling people on his cell phone to arrange for a ride.

After another hour or so, all three codefendants came out of the apartment and were arrested. Upon Fair's and Watson's consent, the police searched the apartment and found three handguns and three cartridges; two of the handguns were loaded, and the bullets found in those guns matched casings and a bullet that had been recovered at the scene of the murder. Police also seized three cell phones from Lomax; Lomax told police that one of the phones was his, and that the other two phones belonged to defendant and Riley.[4] Kammerer averred:

> "That I know from my training, education and experience that the internal memory of cellular telephones as well as the cell phone service provider/carrier can contain/

[3] Kammerer's search warrant application included an affidavit that incorporated, as an attachment, a second affidavit that he had signed in support of a previous search warrant application.

[4] The police later learned that two of the cell phones belonged to defendant, and one belonged to Lomax. However, at the time of the search warrant application, only one phone was thought to have been linked to defendant. The number of phones associated with defendant does not alter our analysis of the validity of the search warrant, and we therefore refer to defendant's phone in the singular, as the parties do on appeal.

> maintain/store electronic address books, text messages, photographs, voice mail, email, video and similar items which can contain valuable identifying information including, but not limited to, phone numbers, photographs taken before, during and after a criminal act and text messages containing incriminating statements as well as GPS coordinate information and cell tower information that can track a position and movement of a cell phone;
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> "That furthermore, I am aware that cellular telephones, their electronic address books, text messages, voice mail, email, video, photographs, cell tower information, GPS coordinates and similar items can assist in determining the location of the cellular phone and/or caller at a particular date and time. I also know that cellular phones can be analyzed to recover data including, but not limited to, the owner's or operator's name, the owner or operator's associated names, phone numbers, addresses, text messages, photographs, voice mail, email, video, which may further this investigation;
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> "That I know phone books stored electronically *** often contain the names, phone numbers and addresses of associates to the owner or possessor of cellular telephones ***. I know based on my training and experience that these persons often have information relevant to the investigation of the suspect's crimes to include, but not limited to, the location of suspects, the whereabouts of suspects during the times crimes are committed and the possible location of additional evidence related to the crime being investigated[.]"

Based on Kammerer's affidavits, a magistrate judge issued a search warrant authorizing the police to "[s]earch for and seize any item which is evidence of the crime of Murder," including, among other items, cellular phones. The warrant authorized the police to "process, test, and/or search for the above evidence."

Before trial, defendant moved to suppress the evidence seized from his cell phone, arguing that the search warrant was overbroad, in violation of ORS 133.565(2)(c); Article I, section 9; and the Fourth Amendment. Defendant argued that Kammerer's affidavits failed to establish the requisite nexus between the place searched, *i.e.* the cell phone, and his investigation of the murder, and, thus, the

warrant failed to satisfy the statutory and constitutional requirement for particularity: "The affidavit in this case is silent regarding any connection between the accused's cell phone [or cell phone use] and the offenses for which probable cause may have been shown." (Brackets in original.) Defendant also asserted that the search warrant was unconstitutionally overbroad because it did not limit the files to be searched, but rather "authorized a general rummaging into a very large area of defendant's private things and resulted in an invasion of privacy interests that was not intended by the magistrate to be invaded."

The trial court denied defendant's motion to suppress. Although the court acknowledged that there was no "direct evidence in the affidavits that the phones were used during the homicide or that evidence would be found in the phones," the court credited Kammerer's assertion that "people who commit crimes such as Murder often attempt to conceal evidence of their involvement in such crimes" and that evidence can be concealed in a person's cell phone. The court found that, from the facts available to the magistrate judge—including that Lomax was in possession of three cell phones at the time of his arrest, at least one of which belonged to defendant, and that defendant had used a phone to call people for a ride—the magistrate could infer that (1) the codefendants were in possession of their phones before and after the shooting, (2) they used those phones to arrange the time and place of their meeting before the shooting and then returned to the apartment immediately after the shooting, (3) defendant was talking to people who would be witnesses or even accomplices when he was calling and asking for a ride, (4) the shooting was planned, and (5) there would be evidence in the phones that would confirm or explain the plan and that would place the codefendants' geographic location in relation to the shooting. Thus, the court ruled that there was a sufficient nexus between the crimes alleged and the request to search the data on defendant's cell phone. The court also determined that there was probable cause to search the communication contents of defendant's cell phone and that the search warrant was limited to evidence of the crime of murder, and was thus sufficiently limited in scope.

Defendant proceeded to a joint jury trial with Lomax and Riley. At trial, the state presented evidence that had been seized from the three cell phones. That evidence included contacts for known gang members, call and message logs between the co-defendants' phones and the phones of known gang members, text messages from the night of the shooting, and photographs of the codefendants displaying gang hand signals. For instance, one of the photographs depicted defendant and Lomax standing at a gravesite "throwing a Crip killer" hand signal; another showed defendant, Riley, and an individual who was wearing clothing associated with members of the Hoover gang and "throwing up the Hoover gang sign"; another showed defendant with a tattoo that spelled "HMF," which a detective in the gang unit explained stood for the "Haight Mafia Family" gang. Defendant and his codefendants were each convicted of one count of murder.

On appeal, defendant challenges the validity of the warrant authorizing the search of his cell phone. He renews his arguments that the warrant was based on an affidavit that failed to establish a nexus between the cell phone and the crime of murder, and was statutorily and unconstitutionally overbroad. The state contends that Kammerer's affidavits established probable cause to believe that evidence of the murder would be found on defendant's cell phone, and thus the warrant was sufficiently particular. The state argues further that the warrant was not overbroad because it authorized a search only for evidence of the murder under investigation, and was thus limited in scope.

We agree with defendant that the warrant was overbroad, in violation of ORS 133.565(2)(c) and Article I, section 9.[5] The state constitution requires search warrants to describe with particularity, under oath or by affirmation, the place to be searched, and the person or thing to be seized. Likewise, "ORS 133.565(2) implements a constitutional right to be free from searches conducted pursuant to warrants that do not particularly describe the persons or

[5] Because we conclude that the warrant was overbroad under state law, which requires suppression of the evidence obtained under it, we do not reach the question whether the warrant violated the Fourth Amendment.

places to be searched." *State v. Ingram*, 313 Or 139, 147, 831 P2d 674 (1992). The Supreme Court has noted that the statutory requirement for particularity is "at least as restrictive as the constitutional prohibitions against general warrants." *Id.* at 143. Thus, we apply the same analysis for the statute and the constitutional provision in this case.

We recently analyzed that constitutional provision in *State v. Mansor*, 279 Or App 778, 792-93, 381 P3d 930 (2016), *rev allowed*, 360 Or 752 (2017), specifically as it relates to the search of electronic data. We observed that the particularity requirement

> "implicates two analytically distinct, but frequently practically intertwined, concepts. First, the warrant, as supplemented by any attached or incorporated supporting documents, must so clearly describe the place to be searched and the items to be seized and examined that officers can, with reasonable effort, ascertain that place and those items to a reasonable degree of certainty. Second, the warrant must, to the extent reasonably possible, be drawn in such a way as to preclude seizures and searches not supported by probable cause."

Id. (internal quotation marks and citations omitted). We also acknowledged the "unique functionality and capacity of computers and similar electronic devices" and concluded that, for purposes of the particularity requirement, "personal electronic devices are more akin to the 'place' to be searched than to the 'thing' to be seized and examined. Concomitantly, that requires that the search of that 'place' be limited to the 'thing(s)'—the digital data—for which there is probable cause to search." *Id.* at 793-94, 801 (citing *United States v. Galpin*, 720 F3d 436, 446 (2d Cir 2013) ("[A]dvances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain.")).

In applying that framework to the facts in *Mansor*, we concluded that the search warrant was unconstitutionally overbroad. There, the defendant was under suspicion of child abuse after he made a 9-1-1 call to police to report that his 11-week-old son had stopped breathing. The defendant admitted during an interview with a detective that he

had not called the police immediately but had instead gone on the internet to conduct research about what he should do. Based on the defendant's unusual behavior in waiting to call 9-1-1 or his wife, as well as his demeanor during the interview, the detective developed probable cause to believe that the defendant had abused his child and applied for a search warrant to seize the defendant's home computers. *Id.* at 779-81. The search warrant placed no temporal limit to the search of the defendant's computers and, as a result, the search "disclosed at least ostensibly inculpatory material antedating" the date of the incident, including multiple internet searches for information about infant abuse and signs of infant abuse. *Id.* at 783.

In concluding that the warrant was overbroad, we observed that nothing in the detective's affidavit "established probable cause that a temporally unlimited examination of the contents of [the defendant's] computers, including of files and functions unrelated to internet searches and emails, would yield other evidence of the events [on the date at issue] or of any other crime." *Id.* at 802. Thus, "[t]he warrant *** was so unbounded as to sanction the sort of 'undue rummaging' that the particularity requirement was enacted to preclude." *Id.* at 803 (quoting *State v. Massey*, 40 Or App 211, 214, 594 P2d 1274, *rev den*, 287 Or 409 (1979)).

We arrive at the same conclusion here. Kammerer's affidavit placed no limitation on the types of files to be seized and examined, nor did it limit the time frame for the data that could be seized and examined. Although he alleged that, based on his training and experience, cellular phones are capable of storing vast amounts of information and that they can contain evidence of criminal activity, Kammerer failed to specify what kind of data—such as photographs, text or voice messages, or GPS location data—that he believed would be relevant to his investigation into the shooting. Rather, he asked for authorization to search the entire contents of defendant's phone to look for evidence of the crime of murder. As a consequence, the search warrant authorized a search of all of the data on defendant's phone, permitting the police to examine content that bore no relation to the criminal activity for which there was probable

cause. *See, e.g.*, *State v. Keodara*, 191 Wash App 305, 316, 364 P3d 777 (2015), *rev den*, 185 Wash 2d 1028 (2016) (warrant authorizing search of cell phone was impermissibly overbroad where it placed "no limit on the topics of information for which police could search" and did not limit "the search to information generated close in time to incidents for which the police had probable cause").

We therefore conclude that the warrant authorizing the search of defendant's cell phone was impermissibly overbroad in violation of the state statutory and constitutional particularity requirement for search warrants. Thus, the trial court erred in denying defendant's motion to suppress. We conclude further that the error was not harmless. The unlimited search of defendant's phone yielded evidence of all three co-defendants' association with gang activity—including defendant's text messages to known gang members and photographs of defendant standing by the gravesite of a member of a rival gang—which the prosecutor used to support the state's theory that the shooting was gang related. In light of that evidence, we conclude that there was not little likelihood that the error affected the verdict. *See, e.g.*, *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003).

Conviction for murder reversed and remanded; otherwise affirmed.