Affirmed and Plurality, Concurring, and Dissenting Opinions filed August 10, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01005-CR
NO. 14-15-01006-CR

NATHAN RAY FOREMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause Nos. 1374837 & 1374838

DISSENTING OPINION

In what appears to be a case of first impression, we are asked to decide whether a magistrate can infer that a video surveillance system is present in the interior of an auto body shop and would have recorded any crime that took place inside the shop without any facts indicating as such in the affidavit in support of a search warrant. The opinion by Justice Jamison concludes that a magistrate could

have inferred that valuable property (vehicles) along with other "expensive custom auto equipment" is in the building and that a business owner could have had a security system in place, including video surveillance equipment. If this holding stands, a magistrate could make those same inferences for any business. And in this day and age, where a security system is cheaply available for personal use, a magistrate could make those same inferences for any home too. I think the inference in this case goes too far and is contrary to our cases requiring specific facts before a search warrant is issued.

Standing

Before reaching Justice Jamison's plurality opinion on the sufficiency of the affidavit, I briefly address Justice Donovan's concurring opinion on standing, with which I respectfully disagree.

A defendant has standing to contest a search if he has a legitimate expectation of privacy in the place invaded. *See Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). To prove that he had a legitimate expectation of privacy, the defendant must show (1) that by his conduct, he exhibited an actual subjective expectation of privacy; and (2) that circumstances existed under which society was prepared to recognize his subjective expectation as objectively reasonable. *Id.*

The State did not challenge appellant's standing in the trial court. Appellant asserted in his motion to suppress that the body shop was his, and at the hearing on the motion, the State even referred to the seized computer as "his computer." The trial court also granted appellant's motion in part, which suggests that the trial court believed that there were facts establishing appellant's standing.

Justice Donovan appears to conclude that appellant lacked standing because there is evidence that appellant's wife was the record owner of the body shop where he conducted his business. Even if true, this evidence is not dispositive. A person can have standing to contest a search even if record title in the place searched is in the name of a third party. *Cf. Parker v. State*, 182 S.W.3d 923 (Tex. Crim. App. 2006) (boyfriend had standing to contest the search of a rental car that he borrowed from his girlfriend, even though the girlfriend was the only authorized driver under the rental agreement).

I would conclude that appellant established that he at least had a possessory interest in the body shop, and that society would be prepared to recognize as reasonable his expectation of privacy in the body shop. *See Villarreal*, 935 S.W.2d at 138 (holding that the accused may have standing whether he had a property or possessory interest in the place invaded).

General Law

Article 18.02 of the Code of Criminal Procedure enumerates the types of items that be searched for and seized pursuant to a search warrant. A video surveillance system falls under the general scope of Article 18.02(a)(10): "property or items . . . constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense." *See* Tex. Code Crim. Proc. art. 18.02(a)(10).

To obtain a search warrant under Article 18.02(a)(10), there must be a sworn affidavit setting forth sufficient facts to establish probable cause that (1) a specific offense has been committed, (2) the specifically described property or items that are to be search for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) the property or items constituting

evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched. *Id.* art. 18.01(c).

This case involves the third requirement—were there facts in the affidavit from which a magistrate could reasonably infer that a video surveillance system was located at the body shop? The answer to that question is clearly no. The affidavit did not mention any facts to support the conclusion that a video surveillance system existed at the body shop. For example, there was no mention that surveillance cameras were visible on the exterior of the body shop, nor was there a mention that cameras had been spotted inside the building. Lacking that information, Justice Jamison still infers that such a system existed.

Reasonable Inferences

Magistrates are permitted to draw reasonable inferences from the facts and circumstances alleged in the affidavit. The following are a few of the more common themes that have developed in our case law:

- **Instrumentalities of the crime.** In *Ramos v. State*, 934 S.W.2d 358, 363 (Tex. Crim. App. 1996), the court explained that in a murder case, a magistrate could reasonably infer that a weapon could be found at the residence where the murder took place. (Of course, a surveillance video is not an instrumentality of the crime.)

- **Possession of contraband.** In *Rodriguez v. State*, 232 S.W.3d 55, 62–63 (Tex. Crim. App. 2007), the court held that a magistrate could reasonably infer that a garage contained drugs based on information that a man went to the garage, walked out with a package, threw the package in his car, and was later stopped with a package containing drugs. *See also Moreno v. State*, 415 S.W.3d 284, 288 (Tex. Crim.

App. 2013) (involving similar inference based on information from a confidential informant).

- **Skills and training.** In *Davis v. State*, 202 S.W.3d 149, 155–57 (Tex. Crim. App. 2006), the court held that a magistrate could reasonably infer that an officer was qualified to recognize the odor of methamphetamine, even though the affidavit was silent as to the officer's skills and training.

- **Time.** In *State v. Jordan*, 342 S.W.3d 565, 571 (Tex. Crim. App. 2011), a case involving a warrant to seize blood in connection with a suspected DWI, the officer did not indicate the precise time of his observations, but the court held that a magistrate could reasonably infer that the officer's observations occurred on the same date that the offense was alleged to have occurred, and that this information was not stale because the affidavit was presented shortly after midnight. *See also Crider v. State*, 352 S.W.3d 704, 710–11 (Tex. Crim. App. 2011) (reaching a different conclusion where the window of time was much greater); *State v. McLain*, 337 S.W.3d 268, 273 (Tex. Crim. App. 2011) (holding that the trial and appellate courts should have deferred to the magistrate's implied finding that an ambiguous phrase in an affidavit referred to the time that an informant made his observations).

- **Credibility of an anonymous informant.** In *Flores v. State*, 319 S.W.3d 697, 703 (Tex. Crim. App. 2010), the court held that a magistrate could reasonably conclude that an anonymous informant had some familiarity with the defendant based on corroborating evidence and the "doctrine of chances." *See also State v. Duarte*, 389

S.W.3d 349, 359–60 (Tex. Crim. App. 2012) (tip from a first-time confidential informant was not reliable where there was no detail or corroboration).

- **Personal knowledge.** In *Jones v. State*, 568 S.W.2d 847, 855 (Tex. Crim. App. 1978), the court held that a magistrate could reasonably infer that information conveyed in the passive voice was information within the personal knowledge of the affiant.

None of the cases cited above would support the inferential leap made by Justice Jamison. Nor do the cases that are cited in her opinion.

To support my opinion, I look to two different types of cases: computer/camera cases and cellphone cases. Before we allow a search of either of those electronic devices, we have required specific facts to support an inference that those devices probably exist and that the evidence of the crime will be found on those devices.

Computer/camera cases

Generally, to support a search warrant for a computer, there must be some evidence that a computer was directly involved in the crime. *See Ryals v. State*, 470 S.W.3d 141, 143, 146 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (defendant told an undercover officer that he would use a computer to make fake IDs); *Ex parte Jones*, 473 S.W.3d 850, 856 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (defendant subscribed to a commercial child pornography website); *Porath v. State*, 148 S.W.3d 402, 409 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (defendant met the complainant in an internet chat room).

When there is no evidence that a computer was directly involved in the crime, more is generally needed to justify a computer search. An opinion authored

by Justice Jamison illustrates my point. In *Checo v. State*, 402 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd), the defendant kidnapped a little girl and took her to a house, where he showed her adult pornography on a desktop computer. The defendant then took the complainant to another room, where he attempted to assault her. The complainant observed a laptop in that room that was set up to take pictures and videos. The affiant obtained a warrant to search for child pornography (which the complainant had not been shown), and the defendant moved to suppress the results of the search, arguing that there was no information in the officer's affidavits that the defendant photographed or videotaped the complainant, or other information independently linking him to child pornography. We rejected that argument, noting affidavit testimony from the officer that those who engage children in a sexually explicit manner often collect child pornography on their computers. Given this level of factual specificity, we held that the search warrant was valid.

Another illustrative case is *Aguirre v. State*, 490 S.W.3d 102 (Tex. App.—Houston [14th Dist.] 2016, no pet.), which was authored by Justice Donovan, and which I joined. There, a child complainant described how the defendant would photograph her while they had sex. The complainant's mother stated that the defendant had a laptop that he did not allow anyone to use. The police officer affiant testified that based on her training and expertise, child molesters will often use their computers to store and exchange sexually explicit images of children. We held that the affidavit was sufficient to support a search of the defendant's computer.

But in this case, the affiant provided no facts that a computer or camera was involved in the crime, directly or indirectly.[1]

Cellphone cases

Similarly, an affidavit offered in support of a warrant to search a cellphone must usually include facts that a cellphone was used during the crime or shortly before or after. In *Walker v. State*, 494 S.W.3d 905 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd), we concluded that there was probable cause to search a defendant's cellphone when the affidavit stated that the defendant admitted to shooting the complainant, and there was other information that the defendant and the complainant knew each other, communicated by cellphone, and exchanged messages and phone calls around the time of the shooting.

In *Aguirre*, mentioned earlier, we also held that the affidavit was sufficient to search all of the defendant's cellphones when the complainant said that a particular cellphone was used to photograph her and that the defendant had used instant messenger to send a photograph of his penis. Based on the affiant's opinion testimony that pedophiles share pornography through electronic media, we concluded that all of the cellphones could be searched.

In *Humaran v. State*, 478 S.W.3d 887 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd), the defendant made a "disturbance" call to police and there was evidence that she and a codefendant had murdered a person and set the body on

[1] Justice Jamison cites *Eubanks v. State*, 326 S.W.3d 231 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd), a child sex assault case where the First Court of Appeals held that a magistrate could infer that a computer was used in a crime based on the child complainant's testimony that she was photographed. I would note that our court has never gone that far in making such an inference, nor have we ever followed *Eubanks* for that proposition. Cases from our court have certainly had more evidentiary support.

fire. We concluded that the facts were sufficient to support a search of her cellphone.

The conclusion from these cases

Courts allow magistrates to make reasonable inferences that often center on certain types of assumptions, but none of those assumptions has been the existence of a video surveillance system. Precedent from our own court with respect to computers and cellphones requires specific evidence that a computer or cellphone was used in the crime, or that the facts of the type of crime itself lead to the conclusion that a computer or cellphone was used. I see no reason to treat a case involving video surveillance systems any differently.

Justice Jamison's stacking of inferences could lead to all computers and cellphones being searchable for any type of video or picture that could have recorded a crime, even though the affiant provided no facts suggesting that a computer or cellphone even existed. If a crime took place at your home, is it reasonable to assume that you have a security system that links to either your computer or cellphone, subjecting them both to a search?

I would conclude that the affiant provided insufficient facts to support a finding that a video surveillance system was located at the body shop, and that the trial court erred by denying the motion to suppress.

Harm

This error is constitutional, and therefore, this court must reverse the conviction unless we determine "beyond a reasonable doubt that the error did not contribute to the conviction." *See* Tex. R. App. P. 44.2(a); *Taunton v. State*, 465 S.W.3d 816, 823–24 (Tex. App.—Texarkana 2015, pet. ref'd). This standard for determining harmful error "should ultimately serve to vindicate the integrity of the

fact-finding process rather than simply looking to the justifiability of the fact-finder's result." *See Snowden v. State*, 353 S.W.3d 815, 819 (Tex. Crim. App. 2011). Accordingly, we must focus not on whether the jury verdict was supported by legally sufficient evidence, but rather, on whether "the error adversely affected the integrity of the process leading to the conviction," *Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010), or on whether "the error at issue might possibly have prejudiced the jurors' decision-making." *Harris v. State*, 790 S.W.2d 568, 586 (Tex. Crim. App. 1989), *overruled on other grounds by Snowden*, 353 S.W.3d at 821–22.

An error is not harmless "simply because the reviewing court is confident that the result the jury reached was objectively correct." *See Snowden*, 353 S.W.3d at 819. Error is not harmless "if there is a reasonable likelihood that it materially affected the jury's deliberations." *See Neal v. State*, 256 S.W.3d 264, 284 (Tex. Crim. App. 2008). Nor is error harmless if it "disrupted the jury's orderly evaluation of the evidence." *See Walker v. State*, 180 S.W.3d 829, 835 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (citing *Harris*, 790 S.W.2d at 588).

To determine whether constitutional error was harmless, we must "calculate, as nearly as possible, the probable impact of the error on the jury in light of the other evidence." *See Neal*, 256 S.W.3d at 284. Accordingly, the presence of "overwhelming evidence of guilt is a factor to be considered." *See Motilla v. State*, 78 S.W.3d 352, 357 (Tex. Crim. App. 2002). Other factors to consider may include the nature of the error, whether it was emphasized by the State, the probable implications of the error, and the weight the jury would likely have assigned to it in the course of its deliberations. *See Snowden*, 353 S.W.3d at 822. These are not exclusive considerations or even necessary considerations in every case. *Id.* "At bottom, an analysis for whether a particular constitutional error is harmless should

take into account any and every circumstance apparent in the record that logically informs an appellate determination whether 'beyond a reasonable doubt [that particular] error did not contribute to the conviction or punishment.'" *Id.* We examine the entire record "in a neutral, impartial and even-handed manner and do not make our examination in the light most favorable to the prosecution." *See Harris*, 790 S.W.2d at 586; *Daniels v. State*, 25 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Turning now to the evidence, I recognize that the complainants are not the most sympathetic victims. They both had criminal convictions and were allegedly trying to take advantage of appellant in a scam. I also recognize that appellant claimed that he was not the shooter or a party to any kidnapping, but the video was particularly significant in showing that appellant was involved.

The first seven witnesses testified to the scene out on the highway where the two complainants jumped out of the van while tied up. The video had no bearing on this testimony at all. Appellant was not identified as a driver or passenger in the van.

The next witness was Officer Arnold who retrieved the video from the body shop. Officer Arnold testified that the video corroborated the complainants' story about what had happened to them before the scene on the highway.

The next two witnesses explained how the video had been retrieved from the computer and saved to a file.

Officer Hufstedler testified next about the search of the body shop. When he was on the stand, the State played parts of the video and elicited testimony about what the video showed. Officer Hufstedler testified that the video showed that one of the men at the body shop, Darren Franklin, had a gun. He also testified that the

video showed both of the complainants at the body shop, along with appellant. He explained that some of what occurred happened off camera. He testified that the video showed appellant walking in with duct tape in his hand. He also said it showed Darren Franklin walking in with an iron in his hand. That iron was seized in the search of the body shop and tagged into evidence. There was no DNA recovered. The video also showed the complainants' rental van being parked inside the body shop, and the two tied-up complainants being pushed into the back of the van.

On cross-examination, defense counsel focused on the fact that many things happened off camera and that there were a total of six codefendants in the case. He also emphasized that the complainants were initially reluctant to discuss all of the facts with the police.

On redirect, Officer Hufstedler testified that the video corroborated what the complainants told him.

The next witness responded to a vehicle fire and found the burned out rental van with the driver's licenses of the two complainants and fake money.

The next three witnesses were the two complainants and a brief recall of Officer Arnold. The officer testified that the video showed appellant with a gun and that appellant was the one directing the other codefendants to bring the van into the body shop. The video was used extensively during the testimony of the two complainants, both to corroborate what they were saying but also to show what was missing from the video.

Defense counsel emphasized that things took place off the video screen too. But at the same time he relied upon the video to argue that it only shows appellant's mere presence at the scene of the crime.

The video was a central piece of evidence in the case. It was discussed by many witnesses and was certainly used to corroborate the complainants' testimony. While there was independent evidence about the complainants' rolling out of the van and the van being on fire, the video was crucial evidence to support appellant's involvement in the crimes.

On this record, I would hold that the error contributed to the conviction. Because harm is established, I would reverse the trial court's judgment and remand for a new trial. I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Jamison, and Donovan. (Jamison, J., plurality). (Donovan, J., concurring).

Publish — Tex. R. App. P. 47.2(b).