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

STATE OF WASHINGTON, Respondent, v. JAY FREDERIC FISCHER, Appellant. _____ STATE OF WASHINGTON, Respondent, v. DOROTHY LORRAINE JONES, Appellant.	)	No. 29738-1-III (consolidated with No. 29802-7-III) UNPUBLISHED OPINION

Siddoway, J. — In these consolidated appeals by two defendants convicted, in part, of charges arising out of their participation in an assault and motor vehicle theft, Dorothy Jones challenges denial of her motion to suppress evidence and Jay Fischer challenges the validity of terms of his suspended sentence. We find no error and affirm

both judgments and sentences.

FACTS AND PROCEDURAL BACKGROUND

On an evening in early October 2010, a bloodied and badly beaten Ron Koehler stumbled into a gas station in Kennewick, said that his car had been stolen, and asked for help. An employee called 911 and Mr. Koehler was taken to the hospital, where he was interviewed by the police.

Mr. Koehler told officers that he had been lured to a home on North Everett Street by an acquaintance, Jay Fischer, who owed him $40 and called to say he had the money to repay. Upon entering the home, which was dark and turned out to be vacant, Mr. Koehler was blindsided with a punch to the side of his face by Ramon Aguilar, from whom Mr. Koehler had recently borrowed $800 to make bail. Another man, unknown to Mr. Koehler, but whom he later identified in a lineup as Fredrico Pulido, joined the attack. Mr. Koehler told officers that over the next hour and a half, he was hogtied, struck and shocked with a cattle prod, and beaten by Mr. Aguilar and Mr. Pulido with a nail- or screw-bearing two by four. He said that Mr. Fischer (who was 55 to 60 years old, homeless, and frail) did not participate in the beating. But in addition to having lured Mr. Koehler to the location, Mr. Fischer fetched telephone wire that Mr. Aguilar asked for to bind Mr. Koehler's feet and wrists and held the flashlight that provided lighting for the assault.

Toward the end of the beating, Mr. Aguilar placed a call on his cell phone, evidently to Dorothy Jones, a friend and occasional methamphetamine-using companion of Mr. Koehler. Ms. Jones had recently interceded to resolve difficulties Mr. Koehler was having with Mr. Aguilar over the $800 bail loan. She agreed to take care of the loan, and Mr. Koehler now owed the $800 to her. Ms. Jones had also entrusted Mr. Koehler two weeks earlier with a couple of ounces of methamphetamine—$2,000 worth. Instead of selling the drugs, Mr. Koehler used them to go on what the State would later call a "two-week bender," but Mr. Koehler did not think Ms. Jones knew that her meth was gone. Br. of Resp't at 1.

Events suggested otherwise, for in Mr. Aguilar's call to Ms. Jones, he told her, "'We got him,'" and asked, "'What do you want me to do with him?'" Report of Proceedings (RP) (Feb. 1, 2011) at 98. Ms. Jones soon arrived at the North Everett house and presented Mr. Koehler with sheets of lined paper, demanding that he sign his name, stating, "'We're gonna take your car, Ron. Sign these papers. Sign your signature here.'" *Id.* at 99. Mr. Aguilar already had the keys to the car, a used Audi coupe for which Mr. Koehler had paid $20,000, having stripped Mr. Koehler's pockets of valuables before Ms. Jones arrived. Mr. Koehler told officers that Ms. Jones forced him to sign his name twice on the sheets of paper. He purposely signed his name poorly and attempted to leave blood smears on the paper.

Upon leaving, Mr. Aguilar threatened to kill Mr. Koehler and his children if he reported the crime. After the others had gone, Mr. Koehler managed to loosen the wire binding his wrists and ran to the gas station where he obtained assistance.

The next day, police set up surveillance at a home on West Entiat where Ms. Jones worked as a caregiver. Officers observed a woman matching Ms. Jones's description arrive at the home in a white Dodge Caravan—the same model that Ms. Jones reportedly owned and that Mr. Koehler had seen leaving the North Everett home the night before, as he was escaping. Officers saw the woman enter the West Entiat home.

Based on this information, the police applied for, and obtained, a search warrant for the West Entiat home and the Dodge Caravan. In the course of searching the home they came across Ms. Jones's purse, in which they found two pieces of blank paper bearing what appeared to be Ron Koehler's signature—although Mr. Koehler would later testify that the two pieces of paper found in the purse were not the pieces of paper he had been forced to sign at the North Everett house, and were not his handwriting.

Ms. Jones was arrested and charged with first degree robbery and theft of a motor vehicle.[1] Mr. Fischer and Mr. Pulido were arrested and charged with the same crimes.

[1] She was also charged with obtaining a signature by deception or duress but the court later dismissed that charge, finding that evidence of obtaining a signed, blank piece of paper could not satisfy the required element of obtaining a signed "written instrument." RP (Feb. 3, 2011) at 556-57.

Police were unable to locate Mr. Aguilar.

Mr. Koehler's car was recovered in Pasco several days after it was stolen. It had been extensively damaged, particularly the leather upholstery and interior panels, which had been slashed or ripped. Possessions of Mr. Koehler that had been in the car at the time it was stolen were missing.

Before trial, Ms. Jones moved to suppress the pieces of paper with Mr. Koehler's handwritten name that were found in her purse during the search of the West Entiat home, challenging probable cause for the search warrant. The court denied the motion, concluding that Ms. Jones lacked standing to challenge the search and, alternatively, that it was supported by probable cause.

The jury found Ms. Jones guilty of theft of a motor vehicle but not guilty of first degree robbery. It found Mr. Fischer guilty of fourth degree assault. It acquitted Mr. Pulido.

The court sentenced Ms. Jones to four months' incarceration and imposed court fees and costs. It imposed a suspended sentence on Mr. Fischer, on condition that Mr. Fischer pay all fees, fines, costs, and restitution within two years, designating the Benton County Clerk's Office to provide supervision.

Ms. Jones and Mr. Fischer appealed.

ANALYSIS

Ms. Jones challenges the trial court's refusal to suppress the papers found in her purse in the search of the West Entiat home. Mr. Fischer argues that the superior court lacked statutory authority to assign his supervision to the county clerk's office and that his suspended sentence is therefore void. We address Ms. Jones's appeal first and thereafter Mr. Fischer's.

I

Ms. Jones assigns error to the denial of her motion to suppress on both grounds relied upon by the trial court. She argues that she had standing to challenge the search warrant and that the application in support of the search warrant was insufficient to establish probable cause. The State disagrees and argues alternatively that any error in admitting the papers was harmless.

A. Standing

We review the first issue—standing—de novo. *State v. Link*, 136 Wn. App. 685, 692, 150 P.3d 610 (2007); *State v. Magneson*, 107 Wn. App. 221, 224, 26 P.3d 986 (2001). Standing is a "party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary 1442 (8th ed. 2004). "A defendant may challenge a search or seizure only if he or she has a personal Fourth Amendment privacy interest in the area searched or the property seized." *State v. Goucher*, 124 Wn.2d 778, 787, 881 P.2d 210 (1994); *State v. Francisco*, 107 Wn. App. 247, 249, 26 P.3d 1008

(2001); *State v. Boot*, 81 Wn. App. 546, 550, 915 P.2d 592 (1996). To demonstrate a legitimate expectation of privacy, the defendant must show (1) a subjective expectation of privacy in the object of the challenged search and (2) that society recognizes the expectation as reasonable. *Link*, 136 Wn. App. at 692.

The search warrant stated that there was probable cause to believe that the crime of first degree robbery had been committed and that evidence of the crime or the fruits of the crime would be located at the West Entiat address or in Ms. Jones's Dodge Caravan parked at that address. It more particularly described the evidence or fruits of the crime as including:

> Black wallet with dominion for Ronald Koehler, keys to 2001 Audi TT Coupe, #451 WCX, paper with blood and Koehler's signature, cattle prod, bloody clothing, black prepaid cell phone w/ #628-6570.

Ex. 42.

Significantly for purposes of Ms. Jones's standing, the officers did not request the warrant because they were interested in the owner of the home, Ms. Jones's employer. Rather, they were interested in evidence of the crime or fruits of the crime that Ms. Jones might have taken with her to her place of work—including in a purse or a billfold, which the trial court observed, in deciding the motion to suppress, were places where signed pieces of paper "typically would be found." RP (Jan. 27, 2011) at 20. Ms. Jones's purse was where the papers were, in fact, found. In analyzing Ms. Jones's reasonable

expectation of privacy, then, we are examining her expectation of privacy in her purse, when located in her place of employment.

Ms. Jones was working in a private home, where her responsibilities as a caregiver included cooking the homeowner's meals, paying his bills, and driving him to appointments. There was no evidence that it was a policy or practice of the gentleman for whom Ms. Jones worked that personal belongings she brought to his home were subject to search or inspection. We conclude that Ms. Jones had a subjective expectation of privacy in her purse.

We have little difficulty in further concluding that society would recognize her expectation of privacy in her purse as reasonable. Even within the workplace context, employees may have a reasonable expectation of privacy against intrusions by police. *See Mancusi v. DeForte*, 392 U.S. 364, 367, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968). And the United States Supreme Court has recognized that employees have a heightened expectation of privacy in closed personal property that they reasonably bring into their workplace. In *O'Connor v. Ortega*, 480 U.S. 709, 716, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987), the Court observed:

> Not everything that passes through the confines of the business address can be considered part of the workplace context, however. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's

> expectation of privacy in the *contents* of the luggage is not affected in the same way. The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer's business address.

Washington decisions have observed that "[i]t would be difficult to define an object more inherently private than the contents of a woman's purse." *State v. Johnston*, 31 Wn. App. 889, 892, 645 P.2d 63 (1982). A purse, like luggage, is a "common repository for one's personal effects" and therefore "is inevitably associated with the expectation of privacy." *Arkansas v. Sanders*, 442 U.S. 753, 762, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979), *overruled on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991). Because Ms. Jones had a subjective and reasonable expectation of privacy in the contents of her purse, even at her place of employment, she enjoyed standing to challenge a search warrant of her workplace that extended to her purse.

B. Sufficiency of Application to Support Probable Cause

Turning to Ms. Jones's challenge to probable cause for issuing the warrant, we have an immediate problem: an incomplete record. Our record on appeal does not include a transcript or even a detailed description of the information that was conveyed to the magistrate in making telephonic application for the warrant. *See* RP (Jan. 27, 2011) at 12. When the trial court commented early in the suppression hearing that "I don't have

the search warrant here. I don't have the affidavit," the prosecutor responded, "It was a telephonic affidavit." *Id.* He added that "[defense counsel] and I talked about playing that." *Id.* But no recording of the application was ever played during the course of the hearing.

We must further examine the parties' arguments and consider the information that is available in order to determine whether the incompleteness of the record is fatal to Ms. Jones's request that we review this assignment of error.

A search warrant must be based on a finding of probable cause that the facts and circumstances presented to the magistrate are sufficient to support a reasonable inference that the defendant is involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The issue Ms. Jones raises is whether there was the required nexus between the item to be seized and the place to be searched. *See id.* The nexus must exist at the time the warrant is issued. *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997).

When the challenge to the warrant is that the magistrate was not presented with facts and circumstances sufficient to establish probable cause, no evidentiary hearing is required. "Whether facts set out in an affidavit are sufficient to conclude that probable cause exists is a question of law; thus, our review is de novo." *State v. Nusbaum*, 126 Wn. App. 160, 166-67, 107 P.3d 768 (2005) (citing *In re Det. of Petersen*, 145 Wn.2d

789, 799-800, 42 P.3d 952 (2002)).

The decision to issue a search warrant is highly discretionary. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). Accordingly, we generally resolve doubts concerning the existence of probable cause in favor of the validity of the search warrant. *Id.* (citing *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002)).

Ms. Jones relies on *Thein*, in which the Washington Supreme Court refused to adopt a per se rule that the magistrate presented with evidence that a person is probably a drug dealer may automatically issue a search warrant for his or her residence based on a generalized belief that drug dealers commonly have drugs or paraphernalia at home. It held that the nexus between the items to be seized and the place to be searched must be established by specific facts; a representation as to what drug dealers habitually do is not enough. 138 Wn.2d at 145-47. Ms. Jones argues that the suggestion that she would take fruits of a recent crime to her workplace is the same sort of unwarranted, non-fact-specific generalization.

Yet even *Thein* recognized that under specific circumstances it may be reasonable to infer that certain items will likely be kept where the person lives. *Id*. at 149 n.4. And this court has cited Professor LaFave's treatise for the similar proposition that for the crimes of theft, burglary, or robbery, in which valuable property is obtained by the perpetrator, "'it is proper to infer that the criminal would have the fruits of his crime in

his residence, *vehicle or place of business*.'" *State v. McReynolds*, 104 Wn. App. 560, 569, 17 P.3d 608 (2000) (emphasis added) (quoting Wayne R. LaFave, Search and Seizure § 3.7(d) at 381-84 (3d ed. 1996)). We observed in *McReynolds* that "'the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property'" may all be considered. *Id.* at 570 (internal quotation marks omitted) (quoting LaFave, *supra*, at 381-84).

Ms. Jones argues that "[t]he officer[] who applied for the telephonic warrant, simply told the judge that Ms. Jones worked at 1108 West Entiat Avenue and that she may have been involved in a robbery." Br. of Appellant Jones at 12. For this, she cites page 7 of the transcript of the suppression hearing, at which (beginning at page 6) her trial lawyer said, "[I]n the affidavit for search warrant they indicate that the police believed that Ms. Jones was involved in this robbery and they have seen her at a location and received information that she works there." RP (Jan. 27, 2011) at 6-7. Yet in Ms. Jones's memorandum in support of the motion to suppress, she represented that "information regarding the alleged attack" was also provided to the magistrate, as was the fact that "the vehicle registered to [Ms. Jones] was currently at [the West Entiat address]." Clerk's Papers at 79.

Based upon information the officers had by then obtained from Mr. Koehler, they

might have told the magistrate that the crime had been committed only 24 hours earlier. They might have told the magistrate that it was Ms. Jones who presented the papers for Mr. Koehler's signature during the crime, that she was the person present who told Mr. Koehler she planned to use them in some manner to acquire his car, and that she was the one who left the North Everett residence with the papers in her possession. They might have told the magistrate that in escaping the prior evening, Mr. Koehler saw Ms. Jones or one of the other perpetrators leaving in her white Dodge Caravan now parked at the West Entiat address. These are facts bearing on the type of crime, the nature of the missing items, the extent of Ms. Jones's opportunity for concealment, and normal inferences as to where she would likely to be holding or hiding the papers, which may be considered.

As explained in *State v. Jackson*, 150 Wn.2d 251, 267, 76 P.3d 217 (2003), the problem with the generalization in *Thein* was that it would completely substitute for specific facts and circumstances establishing nexus to a place. Here, we do not know that the magistrate relied on a generalization that "robbers habitually keep evidence and fruits of a robbery at work" as a substitute for the facts and circumstances of this particular robbery. The magistrate might have relied instead on specific facts about Ms. Jones's role in the robbery, the recency of her obtaining the signatures, the fact that she left the North Everett address with the signatures in her possession, and a common sense conclusion that given her stated intention to use the signatures—which were easily

transported—she would likely be carrying them.

CrR 2.3(c) provides that if a search warrant is based on sworn testimony rather than an affidavit or unsworn written statement, then "[t]he recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court." If the tape recording relating to a telephonic search warrant partially fails and omits testimony, the sworn application may be reconstructed based on the testimony of witnesses to the application, but only if the reconstruction does not impair the reviewing court's ability to assess what evidence the magistrate considered and found in determining that probable cause existed. *State v. Smith*, 87 Wn. App. 254, 257, 941 P.2d 691 (1997) (quoting *State v. Myers*, 117 Wn.2d 332, 347, 815 P.2d 761 (1991)).

A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. RAP 9.2(b); *In re Marriage of Haugh*, 58 Wn. App. 1, 6, 790 P.2d 1266 (1990). An insufficient record on appeal precludes review. *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994). Here, there was no reported failure of the recording of the telephonic application for the warrant. It simply has not been transcribed or otherwise provided.

We cannot determine from the record on appeal that the information provided to

the magistrate failed to establish probable cause. Doubt is resolved in favor of the validity of the warrant.[2]

II

Mr. Fischer argues that Washington statutes authorizing suspended sentences require that an offender be supervised by a community corrections officer or a county probation officer—not by a county clerk, as was ordered here. A trial court lacks inherent authority to suspend a sentence, so when it does suspend a sentence, it must exercise its authority in the manner provided by the legislature. *State v. Parent*, 164 Wn. App. 210, 212, 267 P.3d 358 (2011). Mr. Fischer asks that we remand the case "directing the court below to correct the judgment and sentence to comply with the provisions of RCW 9.92.060 and RCW 9.95.210." Br. of Appellant Fischer at 8.

[2] Finding no error, we need not decide the State's alternative argument that any error was harmless, but we address it briefly nonetheless. Ms. Jones denied any involvement in, or knowledge of, Mr. Koehler's beating and denied ever having procured his signature on blank pages. For jurors forced to choose between Mr. Koehler's and Ms. Jones's version of events, the officers' testimony that they discovered Mr. Koehler's signatures in Ms. Jones's purse had probative value. Even though Mr. Koehler disavowed signing the particular pages found in Ms. Jones's purse, the otherwise-unexplained presence of the signatures, if the jury believed the officers, suggested that Ms. Jones had had some interest in Mr. Koehler's signature that she refused to acknowledge or explain.

It does not matter, as the State argues, that, standing alone, the papers did not "prove" Ms. Jones's guilt. They gave the jury a reason for believing Mr. Koehler's version of events over hers. The State must prove that a constitutional error was harmless beyond a reasonable doubt. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Error, had it occurred, would not have been harmless here.

It is unusual to see a *defendant* arguing that a suspended sentence lacking the statutorily-mandated supervision is void. It is usually *the State* that would make such an argument—either complaining of too-lenient sentencing, as in *State v. Hall*, 35 Wn. App. 302, 666 P.2d 930 (1983) (defendant convicted of second degree robbery sentenced to only three hours' probation at his own lawyer's office, to be followed by dismissal of the charge), or to argue that if the required supervision is overlooked, the court remains free, even after other conditions are satisfied, to enforce the sentence. *State ex rel. Pence v. Koch*, 173 Wash. 420, 421, 23 P.2d 884 (1933).

Here, though, the State defends the suspended sentence, arguing that Mr. Fischer fails to consider the two distinct sources of authority for suspending a sentence: RCW 9.92.060, which the Washington Supreme Court has referred to as the suspended sentence act, and RCW 9.95.210, a provision that the court has distinguished, and referred to as the probation act. *State v. Davis*, 56 Wn.2d 729, 730, 355 P.2d 344 (1960). A trial court may suspend an offender's sentence under either statute. *Id.* at 737. If the trial court makes no reference to probation or to the involvement of the Department of Corrections or state parole officers, then it may be reasonable to assume that the court has relied on the suspended sentence act rather than the probation act. *Id.* at 736. Mr. Fischer argues that the suspended sentence act, like the probation act, requires supervision by a community corrections officer or county probation officer but we disagree. RCW

9.92.060(1) provides that the trial court "may, in its discretion" direct that a person be placed under the charge of such an officer. On the other hand, a court may suspend a sentence without ordering probation.

We agree with the State that the trial court's provision for "supervision" by the county clerk was not supervision of probation but responsibility to collect the legal financial obligations whose payment it imposed as the condition of Mr. Fischer's suspended sentence. RCW 9.92.060(2) authorizes trial courts to require monetary payments as a condition of a defendant's suspended sentence. *Cf.* RCW 9.94A.760(8) (authorizing a county clerk's office to collect financial obligations).[3]

There is no indication that Mr. Fischer was sentenced to probation. The trial court acted within its authority in designating the Benton County Clerk's Office as responsible for supervising the purely monetary conditions of Mr. Fischer's suspended sentence.

Both judgments and sentences are affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

[3] RCW 9.94A.760(8) provides authority to the Department of Corrections to collect legal financial obligations from those offenders it supervises, and provides, with respect to those offenders it does not supervise, that "[s]ubsequent to any period of supervision or, if the department is not authorized to supervise the offender in the community, the county clerk is authorized to collect unpaid legal financial obligations from the offender."

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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Kulik, J.