No. 82219-1

MADSEN, C.J. (dissenting)—The issue we are asked to decide is whether we will apply the exclusionary rule to suppress evidence of cocaine that led to defendant Gilberto Ibarra-Cisneros's conviction for possession of cocaine. The majority decides that the only fair resolution of this case is to give Ibarra-Cisneros the benefit of conclusions that the search of his brother's residence was unlawful and that the State has not met its burden of purging taint resulting from that search.

I disagree with the majority's approach. Unlike in his brother's case, the search of the residence is not the relevant starting point for Ibarra-Cisneros's case. Rather, under the circumstances, the key issue is whether Ibarra-Cisneros had any privacy interest in his brother's cellular telephone (cell phone) or in a conversation on that cell phone in which Ibarra-Cisneros talked to police and which eventually led to discovery and seizure of the cocaine.

I also disagree with the majority's refusal to consider this issue. Under a fundamental constitutional analysis, there must be a protectable privacy interest at stake

before there can possibly be any constitutional violation or any need to address taint or suppression of evidence. When, as in this case, a record unequivocally shows that no such interest exists, a court should not conclude that evidence must be suppressed as the only fair thing to do. There is nothing unfair about declining to suppress evidence when no privacy interest has been at stake and consequently none has been violated.

The important principles embodied in article I, section 7 of the Washington Constitution require that we begin with the language and core purpose of our state constitutional provision, asking what is it in the particular case that is protected and what this court must do to assure that the constitutional provision is effectuated. Article I, section 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." We are here concerned with whether there has been disturbance of an individual's private affairs without authority of law.

Our state exclusionary rule differs from the rule applied under the Fourth Amendment to the United States Constitution, which

> applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.

State v. Chenoweth, 160 Wn.2d 454, 472 n.14, 158 P.3d 595 (2007). "[T]he intent" behind article I, section 7 is "to protect personal rights." *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009) (citing *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982), *abrogated on other grounds* by *State v. Potter*, 156 Wn.2d 835, 132 P.3d 1089

(2006)); *see also White*, 97 Wn.2d at 110 ("the emphasis is on protecting personal rights rather than on curbing governmental actions").

Therefore, as we have recently explained, our state constitutional provision requires an exclusionary rule that "provides a remedy for individuals *whose rights have been violated*." *Winterstein*, 167 Wn.2d at 632 (emphasis added). "'[W]henever the right is unreasonably violated, the remedy must follow.'" *Id*. (quoting *White*, 97 Wn.2d at 110). The remedy that is embodied in the exclusionary rule is exclusion of evidence that has been obtained in violation of the defendant's privacy rights.

But before the remedy, there must be the violation, and before the violation, there must be the privacy right. Thus, we need to ask, what is protected in this case by the exclusionary rule? What privacy rights existed that were violated by agents of the government, and thus remediable by applying the exclusionary rule?

The answer is, there were none. Ibarra-Cisneros had no protected privacy interest in his brother's cell phone or in any information stored on it.

The majority declines to address the nature and extent of Ibarra-Cisneros's protectable privacy interest. But, if Ibarra-Cisneros had no privacy interest at stake, there could be no violation of article I, section 7, and no need to require suppression as a remedy for any violation. As mentioned, the exclusionary rule "provides a remedy for individuals *whose rights have been violated*." *Winterstein*, 167 Wn.2d at 632 (emphasis added).

I would conclude that there are no privacy interests at issue under the facts and

circumstances of this case, as the record clearly shows. First, Ibarra-Cisneros himself had no privacy interest in his brother's cell phone or in his phone conversation with a drug enforcement agent who answered the cell phone at the police station. Second, although, as Ibarra-Cisneros contends, cell phones can now store a large amount of personal information, none has ever been of concern in this case and, even if it were, the privacy interest in that information would belong to the owner of the cell phone, not a third party calling the cell phone number.

Discussion

Adrian Ibarra-Raya's cell phone was in police custody when it rang and an agent for the Drug Enforcement Agency (DEA) answered it. His brother Ibarra-Cisneros was the caller. Conversations occurred between the agent and Ibarra-Cisneros while the cell phone was in "walkie-talkie format." 1 Verbatim Report of Proceedings (VRP) at 141; *see also id*. at 148-49 ("walkie-talkie situation"); *Id*. at 193 (like a "walkie-talkie system"). Thus, anyone near the cell phone was able to hear Ibarra-Cisneros's side of the conversation as well as the agent's.

Ibarra-Cisneros asked for his brother Adrian, and the agent told him his brother was in the bathroom and offered to take a message. This exchange was repeated, with Ibarra-Cisneros becoming more agitated. Eventually Ibarra-Cisneros said, "You know, I'm going to put a bullet between your eyes" and challenged the agent, "Well, you want to meet?" *Id*. at 139. The agent agreed and they arranged to meet at a certain store. Local police officers set up surveillance and eventually they and the defendant ended up

in a shopping mall parking lot where officers parked in view of the pickup truck in which Ibarra-Cisneros was the passenger. During the subsequent encounter, police discovered a bindle of cocaine on the asphalt where Ibarra-Cisneros had been standing. Mr. Ibarra-Cisneros was charged with and convicted of possession of cocaine.

Among other things, Ibarra-Cisneros contends that the evidence against him must be suppressed because it was the direct result of the agent's inappropriate use of his brother's illegally seized cell phone. The cell phone had been seized when the brother's residence was searched. Ibarra-Cisneros argues that an illegally seized cell phone cannot be used to obtain evidence against persons calling the cell phone's number and he also complains about police accessing a cell phone's calling history or other data stored on a cell phone. He contends such use violates article I, section 7, because of privacy interests of persons calling cell phone numbers and privacy interests in the information stored on cell phones.

The exclusionary rule in this state is "nearly categorical" and, with few exceptions, applies to require suppression of evidence obtained in violation of the protections afforded privacy interests by article I, section 7. Because this is true, and as explained at the outset of this opinion, the exclusionary rule is not at issue unless there is a privacy interest that has been disturbed.

It must be remembered that it is Ibarra-Cisneros, not his brother, Ibarra-Raya, who is making the arguments here. Of equal importance are the specific arguments he is making—that under article I, section 7, he has a privacy interest as the caller on a cell

phone call and he has privacy interests in the contents of the cell phone. He argues that these privacy interests invariably require that all information or evidence obtained through use of an illegally seized cell phone must be suppressed, no matter what other circumstances may exist or who the defendant is.

Ibarra-Cisneros had no privacy interest in his brother's cell phone. In basic terms, it was not his cell phone. He also had no interest in the information stored on it.

It is true that a cell phone may contain a vast amount of personal information, including photographs and videos. However, the simple fact is that absolutely nothing stored on the cell phone here, if indeed anything was stored, has any relationship whatsoever to this case or Ibarra-Cisneros's conviction. Critically, article I, section 7 states that "[n]o person shall be disturbed in *his* private affairs, or his home invaded, without authority of law." (Emphasis added.) There is no evidence or even any suggestion that police officers accessed or used any such information. The meeting with Ibarra-Cisneros came about because of the verbal exchange between the DEA agent and Ibarra-Cisneros when Ibarra-Cisneros called the cell phone number and the agent answered, and that is the sum total of the information obtained and used by the officers.

Under these circumstances, Mr. Ibarra-Cisneros cannot claim any privacy violations relating to information that might have been stored on the cell phone.

Turning to the matter of the DEA agent answering the phone and the conversations between the agent and Ibarra-Cisneros, in *State v. Goucher*, 124 Wn.2d 778, 881 P.2d 210 (1994), police were executing a search warrant at the residence of a suspected drug

dealer when the telephone rang. An officer answered the call and, when asked, told the caller that the dealer had gone on a run and he was handling the business until the dealer returned. The caller identified himself and expressed his desire to purchase drugs. Arrangements for the purchase were made, and when the caller arrived and turned over money, he was arrested. This court found no violation of article I, section 7 because the defendant voluntarily engaged in a telephone conversation he instigated with an acknowledged stranger and stated he wanted to buy drugs. *Id*. at 784-85.

Similarly, Ibarra-Cisneros has no privacy interest at stake with regard to the cell phone conversation because he called the cell phone number and voluntarily spoke to a stranger, assuming the risk that what he said was not private. The DEA agent did not pretend to be Ibarra-Cisneros's brother, but instead told Ibarra-Cisneros that his brother was in the bathroom. Ibarra-Cisneros clearly knew he was speaking to a stranger and he does not claim otherwise. Not only did he voluntarily speak to a stranger, he did so over a phone that was in "walkie-talkie" mode, making whatever he said equally available to any other stranger within hearing distance.

The fact that the officer in *Goucher* was lawfully on the premises does not alter the analysis because the determinative facts are the same. There can be no privacy interest in a cell phone conversation voluntarily entered into with someone known to be a stranger. This is even more the case when the conversation is over a phone set to "walkie-talkie" mode.

A number of courts deciding similar cases under the Fourth Amendment have

concluded that whether law enforcement officers were lawfully on the premises when they answered a phone is irrelevant if the defendant cannot show that he or she had a protected privacy interest in the phone or the conversation itself. Thus, in *United States v. Congote*, 656 F.2d 971 (5th Cir. 1981), and *State v. Gonzalez*, 278 Conn. 341, 898 A.2d 149 (2006), the courts concluded that, regardless of whether police were unlawfully on the premises, no constitutional violation occurred when the defendants voluntarily spoke with police officers who answered a telephone and a cell phone, respectively, knowing the person answering to be a stranger but nonetheless making incriminating statements about drug transactions that led to their arrests. In *Congote*, 656 F.2d at 976, the court observed that the defendant "instituted the calls and spoke voluntarily and without hesitation to the agents. None of the agents pretended to be Brock, the party that appellant wished to reach. Appellant had no legitimate expectation of privacy in his telephone conversation with the agents. He assumed the risk of exposure when he spoke freely with strangers." In *Gonzalez*, 278 Conn. at 352, the defendant conceded he had no privacy expectation that would allow him to challenge the police seizure of his codefendant's cellular telephone, but claimed a protected interest in his own words spoken during the conversation. The court rejected the argument, saying that "no such expectation exists when the speaker voluntarily speaks to someone whose identity he has made no attempt to ascertain." *Id*. at 353.

The facts in *People v. Rodriguez*, 13 A.D.3d 257, 786 N.Y.S.2d 175 (2004), are like those in the present case. While police were processing an arrestee his cell phone

rang. The police suspected a drug deal and answered the cell phone after the arrestee said that the caller was "probably the guy with the stuff." *Id.* at 257. The caller implicated himself in a drug deal, and through subsequent calls from the caller to the cell phone the police set up a meeting and then arrested the caller. The court found no constitutional violation because the caller voluntarily chose to speak to the individual who answered the cell phone and assumed the risk it was not actually the person he was trying to reach. *Id.* at 258. The court held the caller "had no legitimate privacy interest in conversations he unwittingly chose to have with [the] officer." *Id.*

Although these cases were decided under the Fourth Amendment, they are entirely consistent with this court's analysis in *Goucher*, and explain why Ibarra-Cisneros could have no privacy interest in his brother's cell phone.

I would hold that under article I, section 7, Ibarra-Cisneros had no privacy interest in his brother's cell phone or in his conversation over that phone when he voluntarily chose to speak to a stranger, particularly when he chose to do so over a phone set to broadcast whatever he said to anyone within hearing range of the cell phone in "walkie talkie format."

Contrary to Ibarra-Cisneros's arguments about privacy interests in the information stored on cell phones and conversations on cell phones, the facts of this case are clear and establish that he lacks the privacy interests that he asserts. The court should conclude that Mr. Ibarra-Cisneros had no privacy interests in the cell phone or in his voluntary conversation with a stranger over what was essentially a "walkie talkie." That being the

case, there was no violation of his rights under article I, section 7, and there is no reason to apply the exclusionary rule in this case.

Unfortunately, however, rather than addressing the important question whether Ibarra-Cisneros had any privacy interest at stake, the majority gives Ibarra-Cisneros the benefit of constitutional protection afforded Adrian Ibarra-Raya's privacy interests, although there is no question on this record that Ibarra-Cisneros is not entitled to any exclusionary remedy because there was no violation of his *own* privacy interests. This is an extraordinary and unjustified conclusion, in my view.[1]

Next, I turn to the question whether the evidence was sufficient to sustain Mr. Ibarra-Cisneros's conviction for possession of cocaine. The defendant has argued that all the evidence shows is proximity—the position of the bindle of cocaine in relationship to where he was standing—and this is as a matter of law insufficient to establish constructive possession. If the defendant were correct about the evidence, he would be correct about the conclusion. He is not.

When assessing sufficiency of the evidence to sustain a conviction, the facts and inferences from the facts must be considered in the light most favorable to the State and the question is "whether any rational trier of fact could have found the elements of the

[1] The majority also declines to address the issue of Ibarra-Cisneros's standing. I am not concerned with the question of whether Mr. Ibarra-Cisneros can complain about asserted constitutional violations, i.e., standing. My concern goes to a more fundamental issue: How can we analyze an article I, section 7 issue without identifying the specific privacy interest that has allegedly been violated? If there is no privacy interest at stake, any attempt at analysis is necessarily an exercise in assumptions, or, as in the majority opinion, an exercise in granting the defendant the constitutional protection due another person's privacy interests.

crime beyond a reasonable doubt." *State v. Elmi*, 166 Wn.2d 209, 214, 207 P.3d 439 (2009).

Under RCW 69.50.4013, "[i]t is unlawful for any person to possess a controlled substance," with exceptions not applicable here. The only element of the crime that is at issue is the fact of possession by the defendant. *See State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Cleppe*, 96 Wn.2d 373, 378, 635 P.2d 435 (1981); 11 Washington Practice: Washington Pattern Jury Instructions: Criminal WPIC 50.02, at 946 (3d ed. 2008) (WPIC). Possession may be either actual possession or constructive possession, and means "having a substance in one's custody or control." WPIC 50.03, at 949. Constructive possession requires that the person has dominion and control over the goods. *Staley*, 123 Wn.2d at 798. Mere proximity does not establish dominion and control. *Id*. at 801.

Viewing the evidence in the light most favorable to the State, at the time that Ibarra-Cisneros called and engaged in conversation with the DEA agent, law enforcement officers had arrested Ibarra-Raya after discovering cocaine and a large amount of money in his home. During the conversation between Ibarra-Cisneros and the DEA agent, Ibarra-Cisneros became agitated when he could not speak to his brother, and eventually threatened to put a bullet between the agent's eyes and then challenged the agent to meet. The DEA agent testified that he thought that Ibarra-Cisneros's threat to put a bullet between the agent's eyes was a serious threat, that Ibarra-Cisneros meant it.

The DEA agent also testified that he answered the cell phone in order to continue

the investigation involving Ibarra-Raya, knowing that drug dealing arrangements are sometimes made using cell phones or a "walkie-talkie" format. The call he answered was received on a cell phone owned by someone then believed to be a drug dealer, with the caller making the threat of violence after he learned he could not speak with his brother, the phone's owner. Given this context, the officers legitimately set up surveillance while investigating both a threat of deadly violence and possible drug activity.

The undercover officer who was dispatched to the designated meeting place, a local store, watched for the model of car that Ibarra-Cisneros had said he would be in.[2] After he was there 5 or 10 minutes he saw a pickup come into the store's parking lot very slowly with two Hispanic individuals obviously looking for someone or something. It circled the lot and stopped near the surveillance vehicle, at which time the officer could see that the passenger, who turned out to be Ibarra-Cisneros, had a cell phone in his hand. The pickup stayed a short time and drove out of the lot. The undercover officer also left and when he stopped at a light with the pickup broad side to him, he could see Ibarra-Cisneros on the cell phone at the same time the officer's partner said that the police were talking to the caller (Ibarra-Cisneros). The officer was sure that it was the caller was in the pickup.

A second undercover car took over surveillance to avoid having the occupants of the pick-up confirm they were under surveillance. The officers in the second car were

[2] As the DEA agent testified, there were several conversations over the period of time between the first call and the eventual contact, during which Ibarra-Cisneros identified the type and color of car he would be in, asked where the agent was, and stated his own estimated arrival time.

close enough to see that the occupants of the pickup "were definitely concerned about what was going on behind them" and the officers could see "some swivel-necking going on," they "were pretty animated and looking around . . . obviously checking . . . more exaggerated than the average driver." 1 VRP at 161, 195. The officers followed the pickup into a mall parking lot where the pickup parked and the driver exited and went into the mall. The officers saw Ibarra-Cisneros also exit the vehicle on the passenger side and walk to the front of the vehicle. One of the officers testified that Ibarra-Cisneros continuously watched them, maintaining eye contact while they drove through the lot and parked behind the pickup several rows back. Ibarra-Cisneros walked toward the back of the truck on the passenger side and continued to watch the officers.

The officers decided they should make contact with Ibarra-Cisneros, reasoning that if there was going to be a problem with violence, it was better to be out of the car. The officers testified that Ibarra-Cisneros had his left hand in his pants pocket, and one of the officer testified that this caused concern since they "had a phone conversation about this person we were looking for wanting to put a bullet into [the DEA agent's] head" and, the officer further testified, "I had reason to believe he may be armed." *Id*. at 165-66.

As the officers approached with guns out but in a lowered position,[3] the driver came out of the mall and then hurriedly started to go back in when he saw them. He stopped when the second officer identified them as police. At this point the first officer

[3] As one of the officers testified, the guns were not pointed at Ibarra-Cisneros or the driver, but "were drawn at low ready. We don't actually point our guns at somebody unless there is a threat there." 1 VRP at 217.

was about a car's length from Ibarra-Cisneros. After being told to take his hands out of his pocket more than once, Ibarra-Cisneros complied. The officers approached Ibarra-Cisneros and were in the process of handcuffing him when the second officer pointed to the ground next to Ibarra-Cisneros's feet where the bindle of what proved to be cocaine was located just behind the passenger door, at Ibarra-Cisneros's feet where he was standing between the open door and the seat, facing toward the back of the truck. Ibarra-Cisneros had been on that side of the truck during the entire time the officers watched him.

The bindle was "just a little plastic parcel." *Id*. at 170. It had a ball of white substance at one end and was about an inch and a half from the bulb part to the end of the bindle where the plastic flared out above the tied-off point. One officer testified that if it had been there before the pickup truck arrived the truck would have run over the bindle given the way a photograph introduced into evidence showed the truck parked. However, it did not look as if it had been driven over. Rather, it appeared to have been recently deposited and was fresh looking and not dusty.

One of the officers spoke Spanish fluently, the language that Ibarra-Cisneros also speaks. He testified that after he notified the first officer of the bindle, they collected it, and he advised Ibarra-Cisneros that he was under arrest. Ibarra-Cisneros said, "If you saw me drop it, then I'll admit it's mine" or "I'll say it's mine. But if you didn't see me drop it then you can't charge me with it." *Id*. at 210-11. The officer testified that Ibarra-Cisneros did not appear to be joking but rather "trying to make a point" because, the

officer explained, Ibarra-Cisneros did not understand there was probable cause to arrest. *Id*. at 211.

There is sufficient evidence supporting the conviction. As we have frequently noted, the determination of whether probable cause exists to make an arrest is determined based on the totality of facts and circumstances known by the officer at the time of the arrest. *E.g.*, *State v. Potter*, 156 Wn.2d 835, 844, 132 P.3d 1089 (2006); *State v. Knighten*, 109 Wn.2d 896, 899, 748 P.2d 1118 (1988). The invalidation of the warrantless search of Ibarra-Cisneros's brother' house had not yet occurred, and it was appropriate for police to consider the possibility of a drug connection between a person calling a cell phone owned by an arrestee having drugs and large amounts of cash in his home. Thus, it is appropriate to consider that the officers were investigating possible drug activity. It is also appropriate to consider that a serious threat of deadly violence had been made by someone possibly engaged in drug transactions and the possibility of this threat being carried out.

The bindle was discovered immediately next to Ibarra-Cisneros in the middle of a parking lot. There was evidence that the drug is expensive, and a rational jury could reasonably infer that it would not be casually discarded in a parking lot. It was fresh looking and not dusty, and did not look as if it had been run over despite evidence that the pick-up truck was positioned in a way that indicated it would have run over the bindle had the bindle been there when the truck was parked. Because the officers drove around the truck and parked several rows back, it is reasonable to infer they could not have seen

Ibarra-Cisneros drop the bindle during that time because they were too far away to see such a small item. As they approached, they were intent on Ibarra-Cisneros and watching his hands because of concerns that he might be armed. The officers thus might have missed seeing the bindle on the ground as they drew closer.

Even if the bindle was dropped after the officers closed in, a rational jury could infer that when the driver came out of the mall both officers were momentarily distracted, giving Ibarra-Cisneros the chance to discard the bindle unobserved.

Highly relevant to the question of sufficiency is the statement that Ibarra-Cisneros himself made when the officers discovered the bindle. As the trial judge observed when he denied the defense *Knapstad*[4] motion based on insufficient evidence, one interpretation is that the only way that Ibarra-Cisneros would make the statement is if he had the bindle in the first place. A rational juror could readily have concluded from the evidence that Ibarra-Cisneros believed that he could not be arrested unless the police actually saw him drop the bindle (which is untrue), and that he would admit to the bindle being his if they did. Put another way, the jury was entitled to believe Ibarra-Cisneros meant that he did drop the drug but he was not going to say so unless the officers actually saw him drop it. The jury could rationally have viewed the statement as very nearly an outright admission of guilt.

There is sufficient evidence supporting Ibarra-Cisneros's conviction.

Conclusion

[4] *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

Mr. Ibarra-Cisneros argues that use of an illegally seized cell phone always requires suppression of any evidence obtained as a result of officers accessing information stored on the cell phone or using the cell phone, including answering calls made to the cell phone. He contends suppression is required because such conduct in this case violated protections afforded to privacy interests by article I, section 7.

There is no evidence that police officers accessed or used any information stored on the cell phone. Accordingly, Ibarra-Cisneros clearly has no privacy interest in any such information at stake in this case. Further, Ibarra-Cisneros had no privacy interest in the cell phone, which was not his, or in the conversation he voluntarily engaged in with the DEA agent who answered the cell phone, who was known by Ibarra-Cisneros to be a stranger.

We should decline to apply the exclusionary rule unless there has been a violation of privacy rights. Any other approach conflicts with the mandate to apply the exclusionary rule as a remedy for violation of privacy rights and thereby carry out article I, section 7's purpose to protect individual privacy interests. Here, no privacy rights of Ibarra-Cisneros have been at issue.

The trial court properly declined to suppress the evidence against Ibarra-Cisneros, and his conviction for possession of cocaine should be affirmed.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR: