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Case Number 189,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN WHEELER,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 189, 2018
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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DATE: November 26, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

On October 20, 2016, Stephen Wheeler was arrested and charged with Home Invasion, Robbery in the Second Degree, Assault in the Second Degree, and Conspiracy in the Second Degree. Super. Ct. Docket Item ("DI") 1. (A1, B53-54). On January 10, 2017, a grand jury indicted Wheeler for the same charges. (DI 7; A1, 8-9). On March 20, 2017, at his scheduled case review, the Superior Court ordered Wheeler held without bail pending his proof positive hearing. (DI 15; A2). At the April 11, 2017 proof positive hearing, the Superior Court found that the State met its burden and modified Wheeler's bond.

On April 13, 2017, Wheeler's counsel filed a motion to suppress, which the Superior Court approved for a hearing. (DI 21-22; A3). After obtaining additional time to conduct further investigation, Wheeler's counsel withdrew the motion to suppress on August 7, 2017. (DI 24, 30; A3). By August 28, 2017, Wheeler obtained new trial counsel. (DI 33; A4). Wheeler's new counsel, who continued through trial, refiled the motion to suppress. (DI 34; A4). The Superior Court held a hearing on the motion on October 27, 2017, and denied it. (DI 46; A5).

Wheeler declined the State's plea offer at his March 21, 2018, final case review. (DI 55; A5). On March 26, 2018, in a pre-trial office conference, the State moved to amend the indictment: (1) to change the assault charge from subsection (a)(5) to (a)(6); and (2) to change the property in count 3 to add electronics to the

items stolen. (B62). The Superior Court granted the former and denied the latter. (DI 57; A5, 41). After a colloquy with the Superior Court, Wheeler waived his right to a trial by jury. (DI 57; A6, 41; B24-28).

After a two-day bench trial, on March 26-27, 2017, the trial judge found Wheeler guilty as charged. (DI 58-59; A6). The Superior Court ordered a limited presentence investigation. (DI 58; A6). On April 6, 2018, the Superior Court sentenced Wheeler to a total of 67 years at Level V, to be suspended after 13 years for 8 years of Level III probation. Sent. Trans. (B269-79).

Wheeler has appealed. On August 20, 2018, he filed his Opening Brief. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. DENIED. Wheeler has failed to establish any violation of his Fourth Amendment rights related to search of a cell phone for which he denied ownership. Using a cell site locator for a very limited time to track a cell phone used in a violent home invasion was not an unreasonable search. Even so, the State obtained an order based on probable cause to conduct the search. Were Wheeler to identify a personal right that was violated, any error was harmless given the overwhelming evidence against him and the independent sources for much of it.

II. DENIED. In his Opening Brief, Wheeler concedes there was evidence of missing U.S. Currency, the only fact underlying his robbery conviction which he contests. Viewing the evidence in the light most favorable to the State, there was sufficient evidence to prove his robbery conviction beyond a reasonable doubt.

STATEMENT OF FACTS

At approximately 1:51 a.m. on October 20, 2016, Delaware State police received a call for a home invasion/robbery in Millville. (B31-32, 75). The victim, a 64 year-old real estate broker, had watched the presidential debates and gone to bed with his girlfriend, Lauren Melton ("Melton"). (B75-78, 97). He was awakened by several men beating his face with their fists. (B75-79). At first, the victim thought it was a nightmare. When he realized he was actually being beaten, he rolled over to protect his face. (B79). One man whispered in his ear "where is the money" and "what is the combination for the safe." (B80). The victim tried to break free, but the men restrained his arms and legs with belts. (B81). Physically exhausted, the victim started having trouble breathing. *Id.* The men started to strangle him with a belt, but the victim was able to put his arm between the belt and his neck, which he believed saved his life. (B81). There were at least three men, possibly four. (B81). The victim was not able to see any of them. (B101).

The victim fell on the floor. (B82). The men kicked his ribs repeatedly. *Id*. Someone hit him over the head with a heavy lamp, then pushed a heavy oak dresser on top of him, and a mattress on top of that. (B82, 85).

After some time, it got quiet. (B82). The victim waited a few minutes and called for help. Melton was still there, and lifted the edge of the dresser. The victim was able to wriggle out from under the dresser and the bed. *Id.*

The victim went to the living room with Melton. (B83). He was telling her to call 911. *Id.* She first called her mother, who convinced her to call 911. *Id.* Melton took a picture of the victim on her cell phone. (B88-89, 132; St. Ex. 19).

When police arrived, they observed the residence "ransacked and in disarray." (B33, 66). In the master bedroom, a safe was in the middle of the floor, apparently dragged there from the closet. (B71-73). There was blood on the safe, and it had been pried open. (B74). The mattress was leaning against the dresser. (B71-72). There was blood on the mattress, where the victim had been sleeping. (B73).

The victim was transported to the hospital to be treated for his injuries. (B35-36, 86). The men fractured the victim's skull above his eyebrow, knocked out the bridge that held his front teeth, split his lip and caused several contusions and many areas of bruising. (B83, 86). He was diagnosed with four broken left ribs, three broken right ribs, a broken nose, a pulmonary contusion, and a concussion. (B35, 104). The victim stayed in the hospital for five days in severe pain, and walked with a cane for about 30 days after he was released from the hospital. (B91-92).

Melton did not go to the hospital with the victim. (B33). She was at the house trying to sleep while police investigated. (B44-45). Police interviewed her at the scene twice. (B33-34). The first time, she told police that a person named

NiKialla robbed the victim. (B59, 133). Later, she told police that the victim mistreated her—that he locked her in the house, made her have sex with him, and would not let her leave. (B156, 159-60).

Melton consented to police reviewing her cell phone. (B36). Police seized her iPhone and obtained a warrant to search it. (B37). Police reviewed the phone and determined that Melton had sent and received several text messages from the number (302) 249-6594 (the "249" number) before and after the home invasion. (B38-39). The messages started with Melton stating that the back door was unlocked, that she and the victim were going to bed, then "he is sleep," and that she was looking for the keys to the safe. (B137-37, 139). After the home invasion, she messaged that "He called the cops" and "What tf am I going to do yo," to which the person responded, "Call your mom in u delete the messages." (B136-38). Melton did both. (B141). A photo of Melton and Stephen Wheeler ("Wheeler") was associated with Wheeler's number in Melton's phone. And police associated Wheeler with the 249 number from a photo message. (B38, 40, 140, 191). Later, at Troop 4 when police tried to interview Melton again, she invoked her right to remain silent. (B46).

Melton was Wheeler's girlfriend. (B132). She was part of his plan to rob the victim, and in her first statement to police, she "made up a really big story because she didn't want [Wheeler] to get in trouble." *Id.* Melton met Wheeler in

2015 and dated him on and off for about a year and a half. (B112, 115). Melton also worked for Wheeler as an escort. (B151-54, 178). In exchange for drugs, Melton did whatever Wheeler said. (B167, 171-72).

Wheeler told Melton about the victim and gave Melton the victim's phone number. (B152). Melton texted the victim asking if he was lonely, they talked and arranged to meet. (B104-05). Wheeler dropped Melton off at the victim's home. (B152). She dated the victim for 2-3 months before the home invasion. (B113-14). Melton moved into the victim's house, and stayed either at his house or at her mothers. (B115-16). The victim knew Wheeler was Melton's boyfriend, and that they were still seeing each other while the victim dated Melton. (B93, 108). The victim also knew that Melton had sex with other men for money. (B188-89).

About a week prior to the home invasion, the victim gave Melton $3,200 to buy a pound of marijuana. (B77). Melton told the victim that her friend Ky robbed her of the money, but in reality, she gave it to Wheeler. (B77, 121-22). Whenever Melton asked the victim for money, he would give it to her, and she gave it to Wheeler. (B116, 120).

The day of the home invasion, Melton left the victim's house and went to her mother's home in Frederica because she had a dentist appointment. (B116-17). Wheeler picked her up from her mother's house, but instead of going to the dentist, they drove around for hours. *Id*. They talked about Wheeler's plan to rob the

victim of money, including a large check Melton had seen. (B119, 165-66).

At about 8 or 9 p.m., Wheeler dropped Melton off at the victim's house, where Melton met her mother. (B117). Melton, her mother and the victim all talked for a while before Melton's mother left. (B122). Eventually, Melton and the victim went to bed. (B122-23). Melton talked on the phone to Wheeler, and the two texted each other. (B123, 180-81).

Melton made sure the victim was asleep before Wheeler and his cousins Jerome Wheeler and "Patrick" entered the house through the back sliding door, which Melton had unlocked. (B67, 124-25, 130, 143). The three men wore black hoodies and had masks covering their faces. (B127-28). Wheeler went to the bed and got Melton, and they took the victim's safe from the closet while Jerome and Patrick beat up the victim. (B125-27). Wheeler brought a bag with a crowbar and opened the safe. (B129). When he discovered there was no money in the safe, he got angry and searched the rest of the house. *Id*.

The men stole the victim's wallet and cell phone, along with several electronic items the victim had purchased for his children for the holidays—an Apple computer, four iPads, an HP laptop, and two phones. (B83-84, 95, 102-03, 130). The safe contained a passport and some credit cards.[1] (B84).

[1] None of the victim's property was recovered. (B60).

Police obtained a court order for a pen register for the 249 telephone number Melton had been messaging. (B41). Using information obtained from the court order, police used a cell site simulator to track the phone. (B219). They located it at about 6:30 p.m. that day, on the center console of a car in which Wheeler and his cousin Jerome were seated. (B219). Police arrested Wheeler. (B42, 53). Police arrested Melton the same day. Melton entered into a plea agreement in which she pled guilty to misdemeanors and agreed to "Cooperate with police and testify truthfully against Stephen Wheeler and any other co-defendants in accordance with prior statements to police." (B141-43, 147; St. Ex. 29). Police also arrested and charged Jerome Wheeler, who pled guilty to at least one charge.

I. WHEELER HAS NO EXPECTATION OF PRIVACY IN A PHONE HE DISCLAIMED; VERY LIMITED REAL-TIME TRACKING OF THE CELL PHONE, SUPPORTED BY PROBABLE CAUSE, WAS NOT AN UNREASONABLE SEARCH.

Question Presented

Whether the Superior Court should suppress evidence obtained by a court order supported by probable cause, where the defendant has not established any violation of his privacy rights.

Scope and Standard of Review

This Court reviews questions not preserved below for plain error.[2] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[3] This Court "review[s] . . . alleged constitutional violations *de novo*. [The Court] also appl[ies] *de novo* review to the Superior Court's legal conclusions when reviewing the denial of a motion to suppress. '[The Court] review[s] the Superior Court's factual findings to determine "whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."'"[4]

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[2] Supr. Ct. R. 8; *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004).

[3] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[4] *Wheeler v. State*, 135 A.3d 282, 295 (Del. 2016) (quoting *Bradley v. State*, 51 A.3d 423, 433 (Del. 2012) (additional citations omitted)

Argument

For the first time on appeal, relying on the recent United States Supreme Court decision in *Carpenter v. United States*, Wheeler asserts that his "location was illegally tracked," therefore, "the argument is that the cell phone that was seized incident to his arrest was illegally seized." Op. Br. at 13. This claim fails for numerous reasons: (1) Wheeler did not have a reasonable expectation of privacy in a phone in which he disclaimed ownership; (2) *Carpenter* is distinguishable; and (3) the application, accompanying affidavit, and Superior Court order used to obtain the pen register stated that the search was supported by probable cause. Even if Wheeler could establish a violation of his privacy rights, police had a valid warrant for his co-defendant's cell phone which contained all the relevant text messages, and police could have obtained the cell tower location information admitted at trial even if they had not recovered the cell phone. Thus, any error was harmless.

1. Wheeler has not established a violation of *his* Fourth Amendment rights.

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

cause."[5] In *Byrd v. United States*,[6] the United States Supreme Court explained that "[w]hether a warrant is required is a separate question from . . . whether the person claiming a constitutional violation 'has had his own Fourth Amendment Rights infringed by the search and seizure which he seeks to challenge." The Supreme Court cited *Rakas*, which explains:

> "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.[7]

Wheeler's claim fails because he has not established any personal right to him that the State allegedly violated.

At the suppression hearing, the Superior Court correctly found that, where Wheeler disclaimed ownership of the phone, he had no "standing" to assert privacy rights in the phone.[8] In his police interview, Wheeler distanced himself from the

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[5] U.S. Const. Amend. IV.

[6] *Byrd v. United States*, 138 S.Ct 1518, at 1526 (2018).

[7] *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978) (citations omitted) (explaining the nexus required while declining to apply the concept of standing)).

[8] At the hearing, the issue (the only issue raised below) was whether police found Wheeler and his cousin inside or outside the car where the cell phone was located. (PH 48). Wheeler alleged they were outside the car and police seized the cell phone in an unlawful search of the car. The Superior Court found that the

phone. Wheeler never admitted ownership of the phone in question. (B204-05). The cell phone was registered to an apparent false name, "John White," of "123 Gophne Way, City, PA 19962." (B108, 122). Wheeler cites no case in which a court has recognized that a defendant had a constitutionally protected privacy right in a cell phone for which he disclaimed ownership. Wheeler's claim is unavailing because he fails to establish any reasonable expectation of privacy in a phone he does not claim to own, and thus fails to establish any violation of his rights.

2. Wheeler's reliance on *Carpenter* is misplaced.

In *Carpenter*, the United States Supreme Court considered the issue of "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a *comprehensive chronicle* of the user's *past movements*."[9] The Court found that "[t]he Government's

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evidence would be admissible no matter where Wheeler was located:

> [A]s I see it, you are in a little bit of a Catch 22. If the defendant is in the vehicle, the cell phone is on the console in the middle, between the two seats, is easily within his reach and it's a search incident to arrest.
>
> If the defendant is outside the vehicle, he doesn't own the vehicle . . . . then he has no standing.
>
> Further, he claims he doesn't own the phone in the statement. So the two stories, either way, do not get you to a suppression. Because on the firsthand, if you accept the defendant's version of events as they've been argued, he was outside the phone and it is not his phone, so no standing.

(B19-20). The Superior Court denied the suppression motion. (B19-23).

[9] *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018).

acquisition of the cell-site records was a search within the meaning of the Fourth Amendment," and "the Government must generally obtain a warrant supported by probable cause before acquiring such records."[10] The Court specifically narrowly tailored *Carpenter* to its facts, which involved months of HCSLI related to a series of robberies:[11]

> Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or 'tower dumps' (a download of information on all devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller*, or call into question conventional surveillance techniques and tools, such as security cameras."[12]

The Court further explained that "this case is not about 'using a phone' or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years."[13]

At issue here is not a detailed historical chronicle of every movement of

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[10] *Id.* at 2220-21.

[11] The two court orders sought disclosure of 152 days of HCSLI by MetroPCS and seven days by Sprint. *Id.* at 2212.

[12] *Id.* at 2220 (citing *Smith v. Maryland*, 442 U.S. 735 (1979) (no reasonable expectation of privacy in dialed numbers, which are used by telephone company for legitimate business purposes (pen registers)) and *United States v. Miller*, 425 U.S. 435 (1976) (checks and bank statements, which are business records of the bank)).

[13] *Id.*

Wheeler's life over the course of several years, or even one week. Here, the State used real time location information to track a cell phone that had been used in a violent felony *just hours before*. *Carpenter* does not assist Wheeler because *Carpenter* specifically declined to rule that the government must obtain a warrant any time they seek CSLI, no matter how small the time frame:

> The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. . . . [W]e need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing even seven days of CSLI constitutes a Fourth Amendment search.[14]

Even if this case did involve historical CSLI, it was for such a short period, a few hours, that *Carpenter* does not apply.

This case is more akin to *United States v. Knotts*[15] than *Carpenter*. In *Knotts*, the government planted a beeper in a container, which was purchased by one of Knotts' co-conspirators, and the government followed the container from Minneapolis to Knotts' home in Wisconsin.[16] The United States Supreme Court found that Knott's co-conspirator had no reasonable expectation of privacy in his

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[14] *Id.* at 2217, n.3.

[15] 460 U.S. 276 (1983).

[16] *Carpenter*, 138 S. Ct. at 2215 (citing *Knotts*, 460 U.S. at 281).

travel over public roads.[17] The *Carpenter* Court did not overrule *Knotts*, but did explain:

> This Court in *Knotts*, however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. The Court emphasized the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey." Significantly, the Court reserved the question of whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country were possible."[18]

This case is the "discrete 'automotive journey'" addressed in *Knotts* and *Carpenter*. Here, the government used advanced technology, but over less than 18 hours. Wheeler had no reasonable expectation of privacy in his location near a cell phone that had just been used as an instrument of a home invasion. To the extent the State conducted a search, it was not unreasonable given the limited time frame.

3. The application, affidavit and court order permitting the real time tracking were all supported by probable cause.

Recently, in *State v. Rone*, the Superior Court suppressed historical cell site location information gathered for a two-year period, because there was no specific finding of probable cause by the Superior Court.[19] Unlike *Rone*, in this case, the application, affidavit and order all affirmatively state that they are based on a

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[17] *Id*.

[18] *Id*.

[19] 2018 WL 4482462, at *3-4 (Del. Super. Sept. 17, 2018).

finding of probable cause and all other requirements of the search warrant statute, 11 *Del. C.* § 2306. The application states, "The following information is offered in support of *probable cause* for the interception of real-time cell site information." (A13). The order sought authorization to use cell cite information and to "initiate a signal to determine the location of the subject's mobile device," to obtain "cell site locations," and directing the provider to give the police "all call data . . . and cell site data simultaneous with all communications." (A13, 15, 17). The application is "Sworn and subscribed" by the Superior Court judge "[u]pon a finding that *probable cause* exists based upon the information supplied in this application, that the said individual is using the above captioned cell phone for criminal activity and that the application will lead to evidence of the crime(s) under investigation." (A18). The Order itself, also signed by the judge, states, "the Court finds that *probable cause* exists that the application has certified that the information likely to be obtained by the use of the above listed device(s) is relevant to an ongoing criminal investigation." (A19, 22). The Affidavit provides ample probable cause by detailing the evidence of the crime, tying Wheeler to the crime, and seeking the order "for purposes of obtaining the location of an unknown male, possibly identified as Stephen Wheeler. This information will then be used for purposes of identifying [the] physical location of this male suspect via mobile precision location." (A25). The Affidavit also states that it is "being submitted for the

limited purpose of securing a search warrant" and thus, the "Affiant has set forth only the facts that he believes are necessary to establish probable cause." (A25). The Affidavit is also signed by the Superior Court judge. *Id.*

Not only did police have probable cause to obtain this location information, they and the Superior Court each expressly stated they had probable cause to do so. As such, if Wheeler had established a personal constitutional privacy interest in this information, that interest was protected. In this case, suppression of evidence obtained using the cell site location information would inappropriately place form over substance.

The Fourth District Court of Appeal of Florida reached the same conclusion in *State of Florida v. Sylvestre*.[20] In that case, the State obtained an order to obtain real-time CSLI to locate a cell phone that would lead to evidence related to a restaurant robbery.[21] The appellate court found that the order authorizing the CSLI was supported by probable cause:

> We agree that the statute prevents a court from imposing a stricter standard when reviewing an application for a CLSI Order. But the statute does not prevent a court from making additional findings to support a showing of probable cause. Had the court not made those findings, the CSLI Order would have violated the Fourth Amendment. Thus, the court's additional findings were not "superfluous," but necessary.

[20] 2018 WL 4212162 (Fla. Dist. Ct. App. Sept. 5, 2018).

[21] *Id.* at *2.

> The content of a court's order—not the label affixed to it—determines whether a warrant satisfies the Fourth Amendment. Here, in issuing the CSLI Order, the court found probable cause existed. We affirm.[22]

Here, as in *Sylvestre*, the application, affidavit and order made findings of probable cause not required in the statute. As in *Sylvestre*, the order here, which established probable cause, is equivalent to a search warrant.[23]

4. Of the three forms of evidence related to the 249 cell phone, two were obtained by search warrants from independent sources and the third was insignificant given the overwhelming evidence against Wheeler.

The only evidence introduced at trial related to the 249 number consisted of: (1) the text messages between Wheeler and Melton; (2) cell tower information placing the 249 phone near the victim's home at the relevant time; and (3) the fact that police used a stingray device working off of the pen register/trap and trace information to locate the phone, and found Wheeler and Jerome Wheeler when they found the phone. For the first two items, police had an independent source. First, police obtained a warrant to search Melton's cell phone, which contained all the relevant text messages. Later in the investigation, police obtained the cell tower location information for the 249 cell phone at the time of the home invasion using a search warrant directed at the cell phone provider. (B214-18). As this

[22] *Id.* at *2-3 (citing *Carpenter*, 138 S.Ct. at 2221).

[23] The parties in *Sylvestre* cross-appealed. The court ultimately suppressed the evidence obtained using the cell site simulator on grounds not related to the facts in this case. *Id.* at *3.

information comes from the provider, police could have obtained this information even if the cell phone was never traced and never discovered.

The third piece of information was that police used a stingray-type device in conjunction with the information from the pen register/trap and trace order to locate the phone and Wheeler (and his cousin Jerome).[24] (B41-43, 50, 57-58, 219). They located the two men and the phone in a car parked outside Wheeler's grandmother's house on Peachtree Run Drive in Dover.[25] This evidence was insignificant given the overwhelming evidence of Wheeler's guilt introduced at trial. That Wheeler was with family and not out-of-state or hiding out at a remote location supports the conclusion that police would have found him very quickly even without use of the stingray device. Any error, therefore, was harmless.

Wheeler has not asserted any constitutional right *of his* that was violated. The search in this case was not unreasonable, and the order authorizing it was applied for and granted under upon findings of probable cause. The only evidence

[24] "Stingray" is a brand name of one of many cell phone site simulators. A stingray device mimics a cell tower and attracts cell phones in the area to connect to the device, rather than the cell provider's nearby towers, allowing the device to locate the cell phone in question. *See* B10-11.

[25] Police obtained evidence using the stingray device evidence that located the phone near a home on Peachtree Run Road in Dover. (B1-19). They conducted visual surveillance of that area and observed two individuals sitting inside a car. They approached the car and found Wheeler, Jerome Wheeler, and the phone in question on the center console of the car. (B1-3). The car did not belong to Wheeler or his grandmother. (B20-21).

admitted at trial that resulted from the CSLI was the fact that police located the phone, and with it, Wheeler. Simply finding the phone and Wheeler does not change the overwhelming evidence against him, which was police had discovered independent of Wheeler's location. Thus error, if any, was harmless.

II. THERE WAS SUFFICIENT EVIDENCE TO FIND WHEELER GUILTY BEYOND A REASONABLE DOUBT OF ROBBERY.

Question Presented

Whether testimony that Wheeler intended to steal cash when he broke into the victim's home, and that $10 had been stolen, viewed in the light most favorable to the State, supports Wheeler's conviction for robbery.

Scope and Standard of Review

"A claim of insufficiency of evidence requires [this Court] to determine 'whether, after reviewing the evidence in the light most favorable to the prosecu[tion], any rational trier of fact could have found the essential elements of ... [the] crime beyond a reasonable doubt.'"[26]

Argument

Wheeler argues that there was insufficient evidence to convict him of robbery because, "while Wheeler concedes that there was testimony of missing U.S. currency, . . . there was *more* credible evidence that there was no missing currency and that the Court gave too much weight to the victim's testimony and not enough to the contradictory evidence." Op. Br. at 19. This claim fails because the standard of review requires the Court to review all evidence *in the light most*

[26] *Bialach v. State*, 744 A.2d 983, 984 (Del. 2000) (citing *Davis v. State*, 453 A.2d 802, 803 (Del. 1982) (additional citation omitted)).

favorable to the State. Wheeler's concession resolves the issue.

Wheeler raised this issue in his motion for judgement of acquittal, the Superior Court succinctly denied the motion, finding, "And [in the light] most favorable to the State, the gentleman testified that his wallet was taken and there was $10 in his wallet." When the trial judge rendered his verdict, he found:

> The robbery, there is clear evidence based upon the finding of facts thus far that they intended to go in and commit the crime of robbery in the second degree by compelling the immediate use of force upon [the victim] to deliver up property, U.S. currency, and during the commission of that crime they cause physical injury to [the victim], who is 62 years of age or older and not a participant. I have already covered the physical injury, his age and the assault.
>
> The question about whether or not there was U.S. currency, [the victim] testified that they took his wallet. And in his wallet was credit cards and $10. The [co-defendant] who testified . . . there [was] a lot going on and it's dark and they are taking things. And her recollection of what was taken did not match his recollection of what was taken as far as all the other stuff, but I'm satisfied that the State has met its burden as to the robbery.

(B242-43). The Court also found that Wheeler's "intent was to get the money. . . to get the money by robbing and assaulting [the victim]." (B244). Finally, the judge found, "I think realistically this case wasn't close at all." (B246).

The Superior Court was correct that the victim testified that his wallet was taken and it contained about ten dollars. (B60, 102-03). Wheeler concedes this point. Op. Br. at 19. There was extensive evidence that the purpose of the home invasion and robbery was to steal money the co-defendants believed the victim had in the

house. This is evidenced by one of the perpetrators asking the victim "where is the money," Melton's extensive testimony that they did it for money, and the fact that they broke into the safe. Viewed in the light most favorable to the State, there was sufficient evidence for a reasonable person to find Wheeler guilty of robbery beyond a reasonable doubt.

Wheeler's argument that the trial judge, as finder of fact, was unduly influenced by the State's attempt to amend the indictment has no merit. As this Court has explained with respect to a bench trial a "trial judge's training and experience allows him to overcome any undue prejudice that might attach and give testimony its due weight."[27] This trial judge was highly experienced, and in fact in his last week before retirement. (B248). The trial judge made clear he was aware of his role as factfinder; at one point he stated, "I'm basically pretending there's a jury here. Let this be a learning process for everyone." (B54). When rendering his verdict, the judge stated, "I'm satisfied the State has established the crimes charged beyond a reasonable doubt. I, again, filtered it through the filters that the Supreme Court wants any trier of fact to do." (B246). The record is clear that the judge was experienced at sifting relevant evidence from irrelevant evidence.

[27] *Eley v. State*, 2001 WL 1388710, at *1 (Del. Nov. 1, 2001) (finding that "even if the trial judge should not have considered this evidence, its admission constitutes harmless error.").

Wheeler has identified nothing from the record that supports the inference that this judge was biased or improperly influenced by the State's motion to amend the indictment, nor could he.

Wheeler concedes that there was evidence the co-defendants stole currency. It was clearly their intent to steal money when they unlawfully entered the home. Viewed in the light most favorable to the state, there was ample evidence for a reasonable factfinder to find Wheeler guilty of robbery beyond a reasonable doubt.

CONCLUSION

The judgment of the Superior Court should be affirmed.

/s/Abby Adams
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DATE: November 26, 2018

CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on November 26, 2018, I caused the attached document to be served by File and Serve to:

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN WHEELER,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 189, 2018
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,687 words, which were counted by Microsoft Word 2016.

Dated: November 26, 2018

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