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FILED
SEPTEMBER 10, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 39411-5-III
Respondent,)	
)	
v.)	OPINION PUBLISHED IN PART
)	
AMBER DAWN KELLY,)	
)	
Appellant.)	

FEARING, J. — Amber Kelly appeals from her convictions for delivering hydrocodone and fentanyl. According to the State, the delivered drugs by themselves, or in combination with other substances, killed Nichole Overton. Kelly, on appeal, argues that the superior court should have suppressed messages found on Overton’s cell phone, that the superior court committed error when allowing testimony that she did not visit Overton’s parents after the death, that the State committed prosecutorial misconduct, that insufficient evidence supports her conviction for delivering hydrocodone, and that the trial court erred when denying her release on bond during the appeal. We discern one error, but deem the error harmless. We affirm the convictions.

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FACTS

This prosecution arises from the death of Nichole Overton late on the night of May 22, 2021 or the early morning of May 23 from a drug overdose. The State alleges that defendant Amber Kelly delivered the drugs to Overton. We garner the facts from the trial and a hearing on a motion to suppress evidence.

In May 2021, decedent Nichole Overton was unmarried with no children, living in the small Whitman County farming town of Tekoa in the rolling wheat fields of the Palouse. Months earlier she suffered a hip injury. Within a month before her passing, Nichole was on the prescriptions alprazolam for anxiety and methylphenidate for attention deficit disorder. She lacked a prescription for hydrocodone at that time, but had been prescribed the drug in the past due to a surgery. She never had a prescription for fentanyl.

By the time of her death, Nichole Overton had roomed with her high school friend, Ashley Schavolt, for one week. Richard Kelly, Amber Kelly's father, owned the house where the two lived.

Amber Kelly worked as the cashier at the Tekoa Market, a grocery store owned by her father. Nichole Overton and Ashley Schavolt were friends with accused Amber Kelly.

Nichole Overton's parents were Phil and Laurie Overton, who also resided in the small town of Tekoa. Laurie was also a friend of Amber Kelly. The two would visit

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when Laurie shopped at the grocery store, and they occasionally communicated on Facebook.

Before trial, Amber Kelly sought to suppress messages found on a cell phone used by Nichole Overton. Law enforcement had seized the phone after Nichole's demise. Father Phil Overton testified that he purchased multiple cell phones for Nichole, including the one confiscated and searched by law enforcement. Phil paid the cell phone's plan charges. The father did not expect to be repaid by Nichole for paying the bills. When asked if the phone was a gift to Nichole, Phil replied:

No, it was just an agreement. We had purchased the plan, a family plan for both of my daughters when they were very young, and we just had a family plan, and so as renewals or breakages happened, I would purchase a phone to replace it.

Report of Proceeding (RP) at 31.

Mother Laurie Overton declared that she did not expect to be repaid for the cost of Nichole's phone bills. When asked whether the phone was a gift, Laurie responded:

It was just something that we provided to them [her children] at a certain point in their lives.

RP at 34.

On May 22, 2021, Ashley Schavolt, Nichole Overton's roommate, contacted Amber Kelly through Facebook messenger and requested hydrocodone. Kelly was Schavolt's only source for hydrocodone. By May 2021, Schavolt had ingested hydrocodone for two years. She began using the drug after an oral surgery. At trial, the

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State introduced as an exhibit a screenshot of Kelly and Schavolt's May 22 Facebook conversation. Schavolt later sent Kelly money over Facebook for two hydrocodone.

At 11:08 p.m. on May 22, 2021, Amber Kelly sent Nichole Overton a Facebook message:

I have 1 I can give regardless, so hopefully I get them so you can have your
2. And Ashley is getting 2 dros if you could give them to her.

Exhibit (Ex.) 134. "Dros" is shorthand for hydrocodone. The State introduced as a trial exhibit this message and other electronic communications between Kelly and Overton.

At trial, Ashley Schavolt averred that, late on May 22, Nichole Overton returned home and brought her the two hydrocodone Schavolt had ordered from Amber Kelly. Overton told Schavolt that Kelly gave her the white, oval pills to deliver to Schavolt. Schavolt was familiar with how hydrocodone affected her body. After ingesting the pills she received from Nichole, the drug resulted in the usual impact on her.

At trial, Whitman County Sheriff Deputy Bryce Nebe testified that, through his time with the Quad Cities Drug Task Force, he learned how to identify hydrocodone. A hydrocodone pill is "white, oval shape." RP at 202.

On the morning of May 23, 2021, Ashley Schavolt called 911 to report the death, resulting from a drug overdose, of her roommate, Nichole Overton, during the previous night. Sheriff Deputy Bryce Nebe responded to Schavolt's apartment. The deputy confirmed Nichole's death and then obtained Schavolt's permission to search Nichole's

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bedroom. Bryce Nebe confiscated two cell phones belonging to Nichole. Nebe also seized two straws cut short with white powder inside and a white pill box, which contained one and a quarter green and blueish green fentanyl tablets.

At 8:00 a.m., on May 23, Laurie Overton received a message on her phone from Amber Kelly. The message notified Laurie of police and ambulance present at Nichole's residence. Laurie and Phil Overton drove to Nichole's home, where they spoke to law enforcement. Law enforcement informed the couple of the death of Nichole. Laurie then texted Kelly: "She's gone. She OD'd." RP at 166; Ex. 101. Kelly responded: "Oh, my God. I don't know what to say. I'm so sorry." Ex. 101.

News of Nichole Overton's death rapidly spread through the small community of Tekoa. On May 23, many visitors called on Phil and Laurie Overton to give condolences. Amber Kelly did not visit the parents.

On May 24, Deputy Bryce Nebe called Phil and Laurie Overton and asked for the passcode to Nichole's phones. Deputy Nebe informed the parents that Nichole used the older of the two cell phones. The Overtons consented to a search of the phones and provided Nebe with two passcodes. On the phone used by Nichole, Nebe discovered Facebook conversations between Nichole and Amber Kelly about the sale of fentanyl and hydrocodone. Deputy Nebe procured a search warrant for the phone after looking at the Facebook messages.

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Nichole Overton died without executing a will. Phil and Laurie Overton filed no probate or any court proceeding to gain possession or ownership of Nichole's property after her death. We do not know the extent of Nichole's property, other than two cell phones.

Law enforcement forwarded, to the Washington State Patrol Crime Laboratory, the two straws and the pills from the pill box seized in the bedroom of Nichole Overton. The white powder in the straws tested positive for hydrocodone, diazepam, Ritalin, oxycodone, and cocaine. The pills tested positive for fentanyl.

PROCEDURE

The State of Washington charged Amber Kelly with two counts of delivery of a controlled substance—one count for delivering fentanyl and one count for delivering hydrocodone.

Amber Kelly moved to suppress the Facebook messages that law enforcement found on Nichole Overton's cell phone. In response, the State argued that Nichole's parents held lawful authority to consent to the search of the phone because they became the owners of the phone as the next of kin to Nichole on her death. The State also argued that Phil Overton, Nichole's father, paid for Nichole's phone and her phone bills, which actions established his ownership of the phone even before Nichole's death. Kelly argued that Nichole owned the phones and her parents did not inherit the phones immediately on her death.

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The superior court denied the motion to suppress. The court found the parents to have owned the cell phone even before Nichole Overton's death. The court reasoned that the parents also possessed the right to her property on her death regardless of the lack of any probate proceeding and thus could consent to the search of the phone. According to the superior court, no other person inherited from Nichole or enjoyed the right to handle her property.

The superior court entered findings of fact when denying the motion to suppress:

12. Phil Overton had paid for the cell phones found in Nicole [sic] Overton's bedroom. Phil Overton had a family cell phone plan where he had multiple numbers and cell phones for the family, including Nichole Overton, on a single plan that was billed monthly to him. Phil Overton had provided the cell phones to Nichole Overton for her use but retained ownership of the cell phones. This has been Phil Overton's practice for some time. Involving a series of phones that Phil Overton had provided for Nichole Overton's use, Nichole Overton had broken earlier cell phones that he had provided for her for her use, and he had then lectured her before taking physical possession of the broken cell phone and then providing a new phone for her use.

13. Although he let Nichole Overton use the cell phones, Phil Overton retained ownership of the cell phones found by Deputy Nebe and had authority to give consent to search them.

. . . .

16. Nichole Overton was 23 years old when she died, she was not married and had no children. Phil and Laurel Overton were the next of kin for Nichole Overton. Nichole Overton died without a will.

17. After Nichole Overton died, Nicole [sic] Overton's sibling and Nichole Overton's friends went to Ms. Overton's apartment and retrieved Nichole Overton's belongings and returned them to Phil and Laurel Overton. There was no probate proceeding for Nicole [sic] Overton's estate.

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Clerk's Papers at 152.

At trial, the State questioned Phil Overton about who visited him and Laurie after Nichole's death. Amber Kelly objected to the question on the ground of relevance. The following colloquy occurred:

Q Okay. What happened after you came home from Nikki's?

A We made some difficult phone calls. A lot of people coming to the house. Called my oldest daughter.

MR. MILLER [defense counsel]: Judge, again, relevance, and I apologize to Mr. Overton, but I don't see where this has to do anything with this case. This is a delivery case.

MS. LIERMAN [State's counsel]: I'm getting there.

Q (By Ms. Lierman) So—

THE COURT: You may answer the question.

THE WITNESS: Just a lot of people coming over, and Deputy Brown was the first officer to come over. I think he was the only officer to come over that day, and then the coroner gal. I can't remember her name.

Q (By Ms. Lierman) Did Amber Kelly come over to the house?

A No.

Q Okay. Do you—are you aware of where Ms. Kelly worked at that time?

MR. MILLER: Same. I don't know where this is going. Ms. Kelly didn't have an obligation to go to these people house. I mean, this has nothing to do with delivery of a controlled substance, and I apologize, Mr. Overton, for your loss, but we're just kind of going all over the place and not staying with what is at task.

THE COURT: Okay. Ms. Lierman, your response to that?

MS. LIERMAN: Well, I think it shows consciousness of guilt.

THE COURT: Okay. The objection will be overruled.

Q (By Ms. Lierman) And are you familiar with where Ms. Kelly worked at the time?

A Yeah. She was at the grocery store is where she worked, the Tekoa grocery store.

Q In what capacity?

A She was a clerk up front.

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RP at 157-59 (some alterations in original).

Mother Laurie Overton also testified at trial. When asked whether Amber Kelly visited the house to give her condolences, Laurie responded in the negative. Kelly did not object to this question.

Ashley Schavolt testified at trial. She declared that, when Nichole Overton gave Schavolt her two pills, Nichole said they were from Amber Kelly. Kelly moved to strike Schavolt's testimony on hearsay grounds. The trial court denied the request.

During closing, the State did not mention that Amber Kelly failed to visit Nichole Overton's parents after Nichole's death. A jury found Kelly guilty of delivering both fentanyl and hydrocodone.

During Amber Kelly's sentencing hearing in December 2022, more than a year after her conviction, Phil and Laurie Overton informed the court that they still grieved the loss of their daughter, Nichole.

At sentencing, Amber Kelly moved for an appeal bond. The sentencing court denied the request while stating that Kelly should serve her sentence immediately because of harm that otherwise might result if she remained free and continued to deliver controlled substances. The court commented:

The families of each side and certainly, sure, Nikki Overton was a drug addict. She bought the pills. She wanted the pills, and she had a

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friend that sold her the pills knowing and everybody knows in this country that fentanyl is an extremely dangerous drug. A substantial amount of those pills are lethal, and there's a nationwide epidemic of fentanyl use and deaths. There's thousands of victims dying daily from this drug. It is a scourge on America and America's safety and America's children.

It is important for society to be protected from drug dealers. There are innumerable parents see their children's name on stone as a result of them buying what they think to be is a hobby drug from a friend and it turns out that the hobby drug is fentanyl that kills them, and it's the Russian roulette of drug users buying pills, but sellers have to accept the responsibility and the results.

RP at 395-96.

LAW AND ANALYSIS

On appeal, Amber Kelly asserts evidentiary error, prosecutorial misconduct, and insufficient evidence. She contends the superior court should have granted her motion to suppress the cell phone messages and the court should have excluded evidence of her declining to visit Nichole Overton's parents after the death. Kelly argues the State committed prosecutorial misconduct by eliciting testimony about her failure to visit the Overtons. She argues that the State based the conviction of delivery of hydrocodone solely on the testimony of Ashley Schavolt that the white oval pills taken by Schavolt had the usual effect on her. According to Kelly, this evidence fell short in establishing beyond a reasonable doubt that the pills delivered to Nichole were hydrocodone. She also assigns error to the trial court's denial of her motion for an appeal bond. We agree with Kelly that the trial court committed error when overruling her objection to testimony

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about others visiting the Overton home, while she failed to appear. Nevertheless, we rule the error to be harmless.

Motion to Suppress

Amber Kelly argues that the trial court erred in denying her motion to suppress the Facebook messages sent between Nichole Overton and her found on Nichole's cell phone. She contends law enforcement officers violated her constitutional privacy rights when seizing the phone and when reviewing its contents because law enforcement lacked a warrant and valid consent to search. Kelly does not argue that Deputy Bryce Nebe lacked authority to enter Overton's bedroom.

Both parties, in arguing their contradictory positions, assume that ownership of the cellphone, at the time of seizure, controls. Both parties refuse to concede Nichole and her parents co-owned the phone. Neither party addresses whether a deceased person retains any privacy interest in property, for purposes of Washington Constitution, article I, section 7, in property.

Amber Kelly maintains that Nichole Overton's parents lacked authority to consent. According to Kelly, Nichole Overton owned the phone, even after her death, for at least another forty days. Kelly emphasizes that Overton solely used the phone. Kelly also contends the trial court erred when relying on the law of

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intestate distribution of assets as an alternative basis for the parents' ability to consent.

The State contends that consent from Nichole Overton's parents, Phil and Laurie, justified the seizure of the cellphone and the phone's contents. The State argues that Phil and Laurie Overton always retained ownership of the phone because they purchased the phone, repaired the phone, paid the phone bill under a family plan, and replaced any inoperable phones. The State highlights Phil and Laurie Overton's testimony that they did not consider the phone to be a gift to Nichole. The State also argues that, immediately on Nichole Overton's death, her parents, the sole heirs, gained ownership of the phone, assuming they did not previously own the cellphone.

Amber Kelly assigns no error to the findings of fact entered by the superior court when denying the motion to suppress. Thus, this reviewing court treats the findings of fact as verities. *State v. Piatnitsky*, 170 Wn. App. 195, 228, 282 P.3d 1184 (2012), *aff'd*, 180 Wn.2d 407, 325 P.3d 167 (2014); *State v. Inman*, 2 Wn. App. 2d 281, 288, 409 P.3d 1138 (2018). Both findings of fact 12 and 13 include a finding that Phil Overton owned the cellphones. Despite the failure of Amber Kelly to object to this finding, we deem the finding to be in the nature of a conclusion of law and decline to preclude Kelly from arguing, on appeal, that Nichole Overton owned the phone.

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We depart from the parties and conclude that ownership does not act as the controlling factor when determining the party or parties authorized to consent to a search or seizure. Ownership stands as an important factor, but, in the end, the right to control possession and use of the object seized holds primacy. We conclude that, under Washington’s law of intestate succession, Phil and Laurie Overton possessed the right to control the possession and use of Nichole Overton’s cell phone when asked for authority to search by law enforcement. We do not decide whether the Overtons held such authority before the death of Nichole. We do not address the many cases cited by the parties in support of their respective contentions regarding ownership of the cellphone.

The Fourth Amendment to the United States Constitution establishes the right of the people “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Under article I, section 7 of our state constitution, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

The state constitutional right extends to an individual’s reasonable expectation of privacy. *State v. Bowman*, 198 Wn.2d 609, 617, 498 P.3d 478 (2021). Under the Fourth Amendment, a search occurs if the government intrudes on a subjective and reasonable expectation of privacy. *State v. Hinton*, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). Under article I, section 7, a search occurs when the

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government disturbs those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant. *State v. Hinton*, 179 Wn.2d 862, 868 (2014); *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). Kelly relies only on the Washington Constitution.

Washington courts employ a two-part test to determine whether a violation of article I, section 7 occurred: (1) whether the government intruded on a private affair and, if so, (2) whether the governmental conduct was justified by authority of law. *State v. Bowman*, 198 Wn.2d 609, 618 (2021). We address the two parts in such order, while focusing on the second element.

Amber Kelly argues that the police search of Nichole Overton's cell phone before the issuance of the search warrant constituted an intrusion into a private affair because Kelly possessed a reasonable expectation of privacy in her Facebook message communications with Overton. If the State does not intrude unreasonably into someone's private affairs, no search has occurred and article I, section 7 has not been violated. *State v. Bowman*, 198 Wn.2d 609, 618 (2021); *State v. Goucher*, 124 Wn.2d 778, 783-84, 881 P.2d 210 (1994). The State argues that one has a limited right to privacy in electronic communications, but it does not deny that Kelly held a protected right to her communications even when found in Nichole Overton's cell phone. We conclude that Kelly possessed a

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constitutionally recognized privacy interest in the Facebook messages found on Overton's phone.

To have standing to challenge a search and seizure, a defendant must have a privacy interest in the place or item searched. Our state Supreme Court has recognized that individuals possess a constitutionally protected privacy interest in information on their cellular devices. *State v. Bowman*, 198 Wn.2d 609, 618 (2021); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016).

Amber Kelly did not own, possess, or control the use of Nichole Overton's cell phone. In *State v. Hinton*, 179 Wn.2d 862 (2014), the Washington Supreme Court addressed whether a sender of text messages retained a privacy interest in his messages contained in the receiver of the message's cell phone. The Supreme Court resolved the issue on state constitutional grounds, holding Shawn Hinton retained a privacy interest in the text messages he sent to an associate's phone.

We move to the second element of the article 1, section 7 test. The "authority of law" component of section 7 demands a valid warrant unless the State shows that a search or seizure falls within one of the exceptions to the warrant requirement. *State v. Hinton*, 179 Wn.2d 862, 868-69 (2014). Consent is one of the exceptions. *State v. Bowman*, 198 Wn.2d 609, 618 (2021). The State has the burden of proving an exception applies. The State must show that any consent to search was voluntary, the consenting

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party had authority to consent, and the search did not exceed the scope of the consent.

State v. Bowman, 198 Wn.2d 609, 618-19 (2021).

We could affirm the trial court’s finding of consent on either one of two independent grounds: (1) Phil Overton retained ownership or control of the phone even though he delivered the phone to his daughter to use; or (2) control, if not ownership, of the phone passed to the parents immediately on Nichole’s death. We affirm based on the second ground.

Article I, section 7 case law does not reference ownership of property when assessing effective consent to a seizure. Ownership may be in one person and the right of possession or control in another. *Retail Store Employees Union, Local 1001 Chartered By Retail Clerks International Association, AFL-CIO v. Washington Surveying & Rating Bureau, Washington Bureau*, 87 Wn.2d 887, 897, 558 P.2d 215 (1976). At least in the setting of a residential landlord-tenant relationship, the owner of the premises generally lacks authority to consent. *State v. Mathe*, 102 Wn.2d 537, 544, 688 P.2d 859 (1984). Instead, a person must hold “authority” over the place or thing to be searched. *State v. Cantrell*, 124 Wn.2d 183, 187, 875 P.2d 1208 (1994). Stated differently, the person bestowing consent must maintain a right to “control” over the property. *State v. Mathe*, 102 Wn.2d 537, 544 (1984). Expectation of privacy in property relates to the authority to control the property. *State v. Morse*, 156 Wn.2d 1, 15, 123 P.3d 832 (2005); *State*

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v. White, 141 Wn. App. 128, 140, 168 P.3d 459 (2007). That person can be one other than the accused. *State v. Cantrell*, 124 Wn.2d 183, 188 (1994).

A foreign decision involving the search of property after the death of the property owner is *State v. Libby*, 546 A.2d 444 (Me. 1988). The state of Maine charged Jeffrey Libby with the murder of his grandfather. Both Libby and the grandfather resided in the same domicile at the time of the grandfather's death. Law enforcement found inculpatory evidence in the garbage at the residence. The grandfather's sister-in-law had authorized law enforcement to search the garbage on the night of the murder. On appeal, Libby argued that the decedent's sister-in-law lacked authority to grant officers consent for a search. The Maine Supreme Court disagreed and affirmed the conviction.

In his will, the grandfather devised his property equally to the sister-in-law and Jeffrey Libby, but, more importantly, appointed the sister-in-law as the personal representative of his estate. The Maine court followed Maine law that the sister-in-law immediately became vested in a one-half interest in the victim's real estate, subject to the right of the personal representative to use the property to pay creditors. As personal representative of the estate, the sister-in-law assumed the additional power of taking possession of and control of the decedent's property. Although the Maine court does not mention these facts, the sister-in-law had yet to

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apply to the court for letters authorizing her to act as personal representative or an order transferring ownership of the residence.

RCW 11.04.015 controls the descent and distribution of both real property and personal property of a decedent lacking a will. Nichole Overton died without a husband or children. Under RCW 11.04.015(2)(b), all of Overton's property passed to her parents, Phil and Laurie Overton. RCW 11.28.120(2) entitled the parents of Nichole Overton to administer the estate. Thus, we conclude that Phil and Laurie Overton had the right to control the cellphone and the right to authorize and seizure and search after Nichole's death.

Amber Kelly cites RCW 11.62.010(1) as instructing that Nichole Overton's parents did not gain ownership or control of the cellphone until forty days after the death of Nichole. The statute declares:

Disposition of personal property, debts by affidavit, proof of death—
Contents of affidavit—Procedure—Securities.

(1) At any time after forty days from the date of a decedent's death, any person who is indebted to or who has possession of any personal property belonging to the decedent . . . shall pay such indebtedness or deliver such personal property, or so much of either as is claimed, to a person claiming to be a successor of the decedent upon receipt of proof of death and of an affidavit made by said person which meets the requirements of subsection (2) of this section.

This statute does not address who has the right to control a decedent's property during the first forty days succeeding the death.

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In other settings, foreign courts have recognized that an heir of one dying intestate has the right to take possession and control of the decedent's assets at the time of death. *State v. Jessup*, 279 N.C. 108, 181 S.E.2d 594 (1971). In *Peterson v. Herndon*, 221 So. 2d 615 (La. Ct. App. 1969), the Louisiana court noted that the transfer of title to property occurs immediately on death. In an adverse possession suit, the court ruled that heirs by intestate succession immediately took possession and ownership of the property on the death of their father such that possession of the property continued uninterrupted. *Noel v. Jumonville Pipe & Machinery Co.*, 245 La. 324, 158 So. 2d 179 (1963). In *State v. Black*, 193 Or. 295, 236 P.2d 326 (1951), our neighbor state's high court adjudged a decedent's heirs entitled to possession of property from the date of death until the court appointed a personal representative.

Based on the Colorado Probate Code, the daughter of the deceased, who died intestate, became entitled to possession of the decedent's property on the death. *People v. McCormick*, 784 P.2d 808, 810 (Colo. App. 1989). The Colorado reviewing court absolved the defendant of theft of property since the daughter had authorized the accused to take the property.

Amber Kelly cites *State v. Mathe*, 102 Wn.2d 537 (1984) in support of her argument that, even if Nichole Overton's father owned the phone, Nichole still owned its contents. In *State v. Mathe*, the court ruled that the landlord of an apartment lacked authority to consent to search of the residence against the wishes of the tenant. Of

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course, the tenant remained alive at the time of the search. The decision lacks relevance to permission to search the contents of a cell phone after the phone user's demise.

Subsequent Conduct

When complaining that the superior court admitted evidence that she failed to visit Nichole Overton's parents after Nichole's death, Amber Kelly assigns error to both prosecutorial misconduct and the trial court's decision to admit the evidence. We first address the argument of prosecutorial misconduct.

Prosecutorial Misconduct

Amber Kelly contends that the State's counsel attempted to inappropriately conflate delivery of a controlled substance with murder by suggesting, numerous times, that Kelly did not visit Nichole's parents on the day she died because she had "consciousness of guilt." Kelly analogizes the State attorney's tactic as infringing on an accused's right to remain silent, but does not directly assert the Fifth Amendment right.

The complaint of prosecutorial misconduct generally references remarks uttered by the State's attorney during voir dire, in the middle of trial before the jury, or during comments delivered during opening or closing arguments. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015); *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 712-13, 286 P.3d 673 (2012); *State v. Pierce*, 169 Wn. App. 533, 554, 280 P.3d 1158 (2012). Courts generally do not apply the concept to the introduction of evidence, particularly when the trial court overrules the defendant's objection to the evidence.

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Thus, we question the suitability of a contention of prosecutorial misconduct to purported evidentiary error. We address rules of prosecutorial misconduct, nonetheless.

A defendant arguing that prosecutorial misconduct violated his or her right to a fair trial has the burden of showing the prosecutor's conduct was both improper and prejudicial in the context of the entire trial. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). When a defendant raises the issue for the first time on appeal, the defendant must also show that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *State v. Walker*, 182 Wn.2d 463, 477-78 (2015). We do not focus on the prosecutor's subjective intent in committing misconduct, but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Although we agree with Amber Kelly that her failure to visit the parents lacked relevance to the prosecution, we reject the claim of misconduct. The prosecutor asserted a good faith argument in support of introduction of the evidence. As analyzed later, the evidence caused only slight prejudice.

Relevance

Amber Kelly argues that the State's testimony of her failure to visit Nichole Overton's parents on the day of or after Nichole's death bore no relevance on whether

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she delivered a controlled substance to Nichole. Sometimes the prosecution seeks to introduce evidence of the accused's conduct after the alleged crime in an attempt to sway the jury of the accused's guilt because the conduct suggests a guilty mind. Flight from the crime or from apprehension is a prime example. Actual flight is not the only evidence in this category; evidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime. *State v. Bruton*, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965); *State v. Freeburg*, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001).

When addressing the relevance of subsequent behavior, the court should consider whether the evidence is necessary and relevant to prove an essential ingredient of the crime charged. *State v. Lew*, 26 Wn.2d 394, 174 P.2d 291 (1946); *State v. Messinger*, 8 Wn. App. 829, 836, 509 P.2d 382 (1973). The subsequent misconduct must possess a logical relationship with the question of the defendant's guilt. *State v. Messinger*, 8 Wn. App. 829, 836-37 (1973).

Subsequent conduct often carries only marginally probative value on the ultimate issue of guilt or innocence. *State v. Freeburg*, 105 Wn. App. 492, 498 (2001). Thus, the circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful. *State v. DeJesus*, 7 Wn. App. 2d 849, 877, 436 P.3d 834 (2019); *State v. Jefferson*, 11 Wn. App. 566, 571, 524 P.2d 248 (1974).

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Many questions arise as to a logical relationship between the failure to visit the parents and Amber Kelly's guilt. We take judicial notice of Tekoa being a close-knit farming community where most everyone knows everyone. The State suggests that, in such friendly communities, many townspeople visit a decedent's family at the family home shortly, if not immediately, after the death. The State goes further and contends that small-town American mores demanded that each townspeople visit Nichole Overton's parents. We question this suggestion. No witness testified to such a custom prevailing in Tekoa. No one testified to moral standards of pastoral hamlets, and we refuse to take judicial notice of any tradition to visit family of a deceased individual. Many friends and neighbors choose not to visit at the decedent's home in order to allow the family privacy in which to grieve.

Phil Overton testified to many visitors in their home on May 23, but he did not quantify the number. Neither parent provided any detail as to those who visited on May 23. All of the visitors may have been closer in friendship to the Overtons than Amber Kelly. We also do not know the age of those who visited the Overtons or for how long the Overtons had known their visitors. The record does not show that Ashley Schavolt, the housemate of Nichole Overton visited the parents on May 23. Kelly was a young adult and young adults may be less likely to express condolences in person. Kelly had already expressed her sorrow when texting Laurie. Kelly may have considered the text message sufficient in communicating her concern to the Overton family.

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Although Laurie Overton befriended Amber Kelly at the Tekoa Market, we do not know if Kelly ever visited the Overton home before Nichole Overton's death. We can surmise that Kelly could have asked someone for the location of the Overton residence, but still we do not know if Kelly knew of the situs.

O. J. Simpson attended the funeral of his deceased wife, Nicole Brown Simpson. We question whether this conduct subsequent to the knifing of Brown and Ronald Goldman bore relevance to Simpson's innocence in murdering Brown. So too, we conclude that any visit by Amber Kelly to the Overton residence would not tend to show Kelly's innocence. If she had visited and if Kelly thereafter argued the visit established consciousness of innocence, the State would have argued that Kelly visited solely for the purpose of pretending innocence. If visiting the family does not tend to show innocence, failing to visit conversely should not be deemed pertinent to guilt.

One might argue that the jury should have heard the evidence and been given the opportunity to ruminate as we have done. But the law wishes restraints on evidence so that a jury does not base a decision on speculation. *Salisbury v. City of Seattle*, 25 Wn. App. 2d 305, 322, 522 P.3d 1019 (2023).

The State cites no authority to support its position that an accused's failure to visit the decedent's family bears any relevance to a drug delivery prosecution. This court only finds two decisions, in which the court reviewed whether a failure to visit a location after a crime held relevance to a prosecution. These two foreign cases help to distinguish

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between instances when failing to visit holds relevance and circumstances when withholding a visit lacks relevance.

In *Tyra v. State*, 17 Ala. App. 92, 82 So. 631 (Ala. Ct. App. 1919), the State prosecuted Joe Tyra for burglary and larceny of money taken from Rayburn's house. Rayburn testified that Tyra only visited him twice after the theft of the money and each visit was at Rayburn's request. Tyra had previously been a frequent visitor to the house. The appellate court ruled the testimony of Tyra ceasing visits tended to prove the guilt of Tyra.

Closer to modern times is *State v. Scott*, 330 S.C. 125, 497 S.E.2d 735 (S.C. Ct. App. 1998). The State charged William Scott with stealing money from his employer. After the employer noticed missing bank deposits entrusted to Scott, Scott did not visit the employer's store from which someone took the funds. The court deemed this fact tantamount to flight from the scene of the crime and evidence of Scott's guilty knowledge and intent. The court noted the difficulty of proving fraudulent intent because the perpetrator of the crime keeps his thoughts secret. Conduct, including subsequent conduct, may unveil a guilty mind.

Joe Tyra's and William Scott's refusal to visit sites held relevance to guilt because the crimes occurred at the place where each no longer visited. Tyra had frequently visited Rayburn's residence before. Scott worked at the place he no longer visited. None of these facts emerge in the prosecution of Amber Kelly. In *State v. Scott*, the South

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Carolina court noted the trouble in proving the intent to embezzle. Conversely, the State of Washington needed to only show that Amber Kelly intended to deliver drugs and that she knew the drugs were controlled substances, which intent and knowledge the State could easily prove by Facebook messages announcing the plan to give Nichole Overton illicit drugs.

This court reviews trial court decisions to admit evidence for abuse of discretion. *State v. DeJesus*, 7 Wn. App. 2d 849, 877 (2019); *State v. Tien Thuy Ho*, 8 Wn. App. 2d 132, 139-40, 437 P.3d 726 (2019). We might defer to the discretion of the trial court and affirm the ruling under the general test of relevance found in ER 401 and 402. But, because of the questionable relevance of subsequent conduct compared to its probity, Washington law requires any link between the conduct and consciousness of guilt to be substantial and real. *State v. DeJesus*, 7 Wn. App. 2d 849, 877 (2019); *State v. Jefferson*, 11 Wn. App. 566, 571 (1974). Because of no substantial and real logical connection between Amber Kelly's absence from the Overton residence and because of the lack of need for the testimony, we hold that the superior court abused discretion when admitting the evidence.

Despite finding error, we conclude the error was harmless. For such an error to warrant reversal, it must prejudice the defendant. *State v. McComas*, 186 Wn. App. 307, 319-20, 345 P.3d 36 (2015). A defendant does not suffer prejudice unless, within

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reasonable probabilities, the trial's outcome would have differed had the error not occurred. *State v. McComas*, 186 Wn. App. 307, 320 (2015).

The jury could have discounted the failure to visit because of the sorrow expressed by Amber Kelly in the text message to Laurie Overton. The State presented strong, if not uncontradicted, evidence that Kelly gave fentanyl and hydrocodone to Nichole Overton and that Kelly knew the nature of the drugs. The jury saw 27 pages of text and Facebook messages among Ashley Schavolt, Nichole Overton, and Amber Kelly that discussed, in part, Kelly supplying hydrocodone and other controlled substance to the other two ladies. The State did not need to prove any other elements of the crime. The prosecutor did not mention, during closing, that Kelly failed to visit the parents' residence.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder having no precedential value shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Sufficiency of Evidence

Amber Kelly argues that the State failed to provide evidence confirming that one of the substances delivered to Nichole Overton was hydrocodone. According to Kelly, the State must chemically test the substance in order to convict. Kelly argues that, due to the failure to test the alleged hydrocodone, the State did not satisfy its burden of proof, warranting reversal of Kelly's conviction. She relies on *State v. Colquitt*, 133 Wn. App.

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789, 137 P.3d 892 (2006) to support her arguments. Alternatively, Kelly contends that, even if the State need not perform scientific assaying, other evidence submitted by the State did not prove beyond a reasonable doubt that she delivered hydrocodone to Overton. We reject the evidence challenge.

This court reviews a challenge to the sufficiency of evidence by viewing the evidence in the light most favorable to the State and asking whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Treat*, 109 Wn. App. 419, 426, 35 P.3d 1192 (2001); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). The State bears the burden of proving each element of the charged offense beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796 (2006). To convict Amber Kelly of delivery of a controlled substance—hydrocodone, the State had to prove that she (1) delivered hydrocodone and (2) knew the delivered substance was controlled. *State v. Martinez*, 123 Wn. App. 841, 846 (2004).

In *State v. Colquitt*, 133 Wn. App. 789, 801 (2006), this court wrote:

Whether the State has met its burden of establishing the identity of the items depends on a nonexhaustive list of factors, including: (1) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled

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substance; and (6) sensory identification of the substance if the substance is sufficiently unique.

In *State v. Colquitt*, this court held that circumstantial evidence consisting of a police report containing an officer's statement that a substance appeared to be rock cocaine and field tested positive for cocaine was insufficient to sustain Mack Colquitt's conviction for possession of a controlled substance. This court noted that the State did not send a sample of the field-tested substance to a crime lab to verify it as cocaine. This court agreed that lay testimony and circumstantial evidence may suffice to establish the identity of a controlled substance. Nevertheless, the officer's field identification was based on his conjecture, at best. The officer testified that the substance "'appeared to be rock cocaine.'" *State v. Colquitt*, 133 Wn. App. 789, 800 (2006). He did not testify to any details of the appearance.

According to Amber Kelly, the evidence presented by the State in her case parallels that presented by the State in *Colquitt* because the evidence against her consisted entirely of speculation and lacked confirmatory testing. Kelly also cites *Colquitt* for the rule that, in circumstances when the State fails to conduct laboratory tests on a controlled substance, a conviction may be sustained only with an independent field test and a confession. She highlights that she did not confess and law enforcement conducted no field test.

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This court in *Colquitt* announced no rule that required both a confession and a field test. Instead, this court ruled that the occurrence of both presents only one manner by which the State can convict.

The State presented evidence against Amber Kelly that exceeded conjecture. Deputy Bryce Nebe testified, based on his experience, that hydrocodone comes in a white, oval shape. Ashley Schavolt asked Kelly to sell her two hydrocodone pills and paid Kelly for the pills over Facebook. Nichole Overton gave Schavolt two hydrocodone pills and said they were from Kelly. The two pills Nichole gave Schavolt were white, oval pills. Kelly was Schavolt's only source of hydrocodone at the time of Nichole's death. Schavolt had been prescribed hydrocodone for oral surgeries, she had taken the drug for two to three years, and she knew its effects on her body. Schavolt felt the same way when she took the pills Nichole gave her.

The clincher comes from a Facebook message sent by Amber Kelly to Nichole Overton on May 22, 2021 at 11:08 pm:

I have 1 I can give regardless, so hopefully I get them so you can have your 2. And Ashley is getting 2 dros if you could give them to her.

Ex. 134. A lab test performed on one of the two straws Deputy Nebe discovered in Nichole's bedroom tested positive for the presence of hydrocodone.

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Appeal Bond

Amber Kelly argues that the trial court abused its discretion by failing to follow CrR 3.2(h) when deciding her motion for an appeal bond. This court reviews a trial court's decision on a motion for an appeal bond for an abuse of discretion. *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974).

CrR 3.2 declares in relevant part:

Release After Finding or Plea of Guilty. After a person has been found or pleaded guilty, and subject to RCW 9.95.062, 9.95.064, 10.64.025, and 10.64.027, the court may revoke, modify, or suspend the terms of release and/or bail previously ordered.

(Boldface omitted). RCW 9.95.062(1) reads:

Notwithstanding CrR 3.2 or RAP 7.2, an appeal by a defendant in a criminal action shall not stay the execution of the judgment of conviction, if the court determines by a preponderance of the evidence that:

- (a) The defendant is likely to flee or to pose a danger to the safety of any other person or the community if the judgment is stayed; or
- (b) The delay resulting from the stay will unduly diminish the deterrent effect of the punishment; or
- (c) A stay of the judgment will cause unreasonable trauma to the victims of the crime or their families; or
- (d) The defendant has not undertaken to the extent of the defendant's financial ability to pay the financial obligations under the judgment or has not posted an adequate performance bond to assure payment.

Although the trial court must find one of the requirements listed above when deciding a motion on an appeal bond, this reviewing court will not find an abuse of discretion when we can infer, from the available record, that the trial court would have

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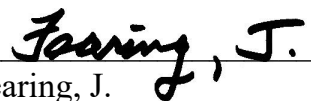
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made the required finding. *State v. Smith*, 84 Wn.2d 498, 506 (1974); *State v. Hanson*, 14 Wn. App. 625, 633-34, 544 P.2d 119 (1975).

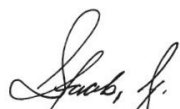
The trial court conducted a separate hearing on the request for release based on an appeal bond. When reviewing the record from the hearing, we infer that the court believed Amber Kelly's release to pose a danger to society because the court stated that society needed to be protected from drug dealers. The court commented that Kelly's "offenses must be taken seriously," that "there must be accountability to those that deal drugs and to those that sell drugs," and that "sellers have to accept the responsibility and the results." RP at 396-97. From these statements, reasonable minds could infer that the trial court would have found Kelly to pose a danger to society.

CONCLUSION

We affirm Amber Kelly's convictions for delivery of a controlled substance.


Fearing, J.

WE CONCUR:


Staab, A.C.J.


Cooney, J.