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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1218

Filed: 3 December 2019

Rowan County, No. 13 CRS 54510

STATE OF NORTH CAROLINA

v.

MARLENE JOHNSON

Appeal by defendant from judgment entered 24 January 2018 by Judge R. Stuart Albright in Rowan County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak and Assistant Attorney General Kenzie M. Rakes, for the State.

Leslie Rawls for defendant.

DIETZ, Judge.

Marlene Johnson was convicted and sentenced to life without parole for the brutal murder of a woman whom Johnson believed was having an affair with her husband. The State's evidence was beyond compelling—threatening text messages; surveillance-style photos of the victim and maps of the victim's home in Johnson's possession; DNA matching Johnson's inside the victim's home, including on objects

used to clean the scene and in the shower where the killer left the victim's body; credit card records placing Johnson in key locations the night of the murder; and Johnson's attempt the morning after the murder, before she could have innocently known of the victim's death, to persuade her boyfriend to lie and create an alibi for her whereabouts the previous night.

The State also seized cell phone location data for Johnson's cell phone without obtaining a warrant and introduced that evidence at trial. Johnson contends the warrantless seizure of that evidence violated her constitutional rights. On appeal, the State does not dispute that recent U.S. Supreme Court precedent renders that seizure unconstitutional. But the State argues that it has shown any constitutional error was harmless beyond a reasonable doubt. We agree. As explained below, this is an example of the extraordinary situation where the State met its burden to show "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010). We therefore find no prejudicial error in the trial court's judgment.

Facts and Procedural History

In the summer of 2013, Shirley Pierce's fiancé tried calling her but got no answer. He drove to her home and found it in disarray, which was highly unusual for Pierce. He made his way to the bedroom, where he heard the sound of water running. When he entered the bedroom, he saw bloodstains on the carpet. He went into the

bathroom, pulled back the shower curtain, and discovered Pierce's body in the tub. She had been brutally murdered.

The investigation of Pierce's murder pointed in a single direction: Defendant Marlene Johnson. Johnson has a history of stalking and threatening Pierce, whom Johnson believed was having an affair with her husband. Pierce and Johnson's husband both worked at a textile company. A few years before the murder, Johnson asked a waitress at a restaurant frequented by company employees to install a camera that Johnson could use to monitor her husband and Pierce. The waitress refused.

Several months later, the same waitress noticed Johnson in the restaurant, watching the company employees eating, while hiding her face with a menu. The waitress alerted the group to Johnson's presence and they all left together. In the parking lot, Johnson approached the group and attacked Pierce while shouting "I will kill you for f***ing my husband." Pierce was treated at a hospital and, after her release, obtained a no-contact order against Johnson.

Johnson and her husband later separated, and Johnson began dating Tim Connor. But Johnson remained fixated on the relationship between Pierce and her husband. At one point, she asked Connor to accompany her to "observe and follow" her husband to look for signs of the affair.

On 21 July 2013, the day before the murder, Johnson sent a text message to a number she believed belonged to Pierce. The message said: "Back off only way you will get [my husband] is over my dead body. You will not steel my husband you scankie whore." Johnson had the wrong number. The recipient of the text was a fifteen-year-old high school student. The student responded, "I think u have the wrong number." Johnson then texted "Is this Shirley Pierce?" and the student told her it was not.

On the morning of Pierce's murder, Johnson drove Connor to a Charlotte hospital for a medical procedure. After the procedure, Johnson drove the pair to Connor's home. Then, unexpectedly, she told Connor she had an appointment with her attorney and left. Johnson never returned to check on Connor that night.

The next morning, Johnson asked Connor to meet her for breakfast. She told him that, if anyone asked, he should lie and say that Johnson was with him the previous night and had spent the night at his house. Later that afternoon, Johnson called Connor again. She was upset and said that Pierce had been killed, that the police were investigating, and that Johnson "might be on their radar." She later texted Connor and asked him to go to her home and retrieve her computer, keys, and a napkin from the table of her home so that others "can't get hold of it."

Law enforcement identified Johnson as the key suspect and obtained warrants to search her, her car, and her home. When officers located Johnson, she had "several

cuts on the inside of her palms" and smaller cuts along her arms. Officers also found mail from Pierce's mailbox in the trunk of Johnson's car along with a digital camera and storage device containing surveillance-style photographs of Pierce's van at locations Pierce visited. In Johnson's home, officers discovered several maps of Pierce's home and the street she lived on. They also found additional photographs of Pierce's van.

Law enforcement obtained Johnson's credit card and debit card records and found purchases placing Johnson near Pierce's work and home on the night of the murder. Officers also obtained historical cell phone data—admittedly without a warrant—that placed Johnson in the general vicinity of Pierce's home the night of the murder. Finally, forensic experts founds DNA matching Johnson's in several different areas of Pierce's home, including on paper towels that appeared to have been used by the assailant in an attempt to clean the crime scene, and on the shower curtain in the bathroom where Pierce's fiancé found her body.

The State charged Johnson with first-degree murder and first-degree burglary. Before trial, Johnson moved to suppress the cell phone data obtained without a warrant. The trial court denied Johnson's motion.

The jury found Johnson guilty of both first-degree murder and first-degree burglary. The trial court arrested judgment on the burglary charge and sentenced Johnson to life without parole. Johnson timely appealed.

Analysis

Johnson argues that the trial court erred by denying her motion to suppress. Much of Johnson's brief is devoted to a discussion of the U.S. Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), which held that the government must obtain a search warrant in order to access an individual's historical cell phone location data through a wireless service provider. The State does not dispute that, under *Carpenter*, the trial court erred by denying Johnson's motion to suppress. But, as explained below, we agree with the State that this is an example of the rare case in which a constitutional error—whether under the U.S. Constitution or our State Constitution—is harmless beyond a reasonable doubt. We thus find no prejudicial error in the trial court's judgment.

We assume, for purposes of Johnson's argument, that the State's warrantless search of Johnson's cell phone location data violated both the Fourth Amendment to the United States Constitution and the corresponding provision of the North Carolina Constitution. "Errors affecting a constitutional right of a defendant are presumed to be prejudicial." *State v. Welch*, 316 N.C. 578, 583, 342 S.E.2d 789, 792 (1986). Thus, the ordinary rules applying to harmless error analysis do not apply to constitutional violations. Instead, with constitutional errors, the State bears the burden to show

"that the error was harmless beyond a reasonable doubt." *Id.*; N.C. Gen. Stat. § 15A–1443(b).

Johnson contends that "[t]he State's case rested heavily on the impermissible cell phone evidence." The record refutes this argument. The trial court observed at sentencing that there was "overwhelming evidence of guilt in this case" and the court was correct, even setting aside all cell phone location evidence. This is so because all of the location evidence—including both the challenged cell phone evidence and other, unchallenged evidence of Johnson's location the night of the murder—was vastly overshadowed by other uncontroverted evidence of Johnson's guilt.

First, Johnson had a long history of threatening and attacking the victim based on the belief the victim had an affair with Johnson's husband. The day before the murder, Johnson sent a threatening text to a number she believed was the victim's, only to learn it was the wrong number.

Second, the morning after the murder—before Johnson could have innocently learned of the victim's death—Johnson met with her boyfriend and asked him to falsely claim they were together the night before, which would have created a fake alibi. Later that same day, Johnson texted her boyfriend and asked him to go to her home and retrieve her computer, keys, and a napkin from the table of her home so that others "can't get hold of it."

Forensic analysis of the crime scene found DNA matching Johnson's throughout the victim's home, including on paper towels that were used to clean the crime scene and on the shower curtain in the shower where the murderer left the victim's body. Although there were items strewn about the house in a manner suggesting someone had burglarized the home, there were signs that the murderer took the time to conceal evidence of the crime, including the use of bleach to clean the home and a missing comforter from the victim's bedroom.

Finally, when officers searched Johnson's car and home, they found surveillance-style photographs of Pierce and her vehicle indicating that Johnson had followed her; several maps of Pierce's home and street; and mail addressed to Pierce that had been delivered, at most, a day or so before the murder.

This is overwhelming evidence of Johnson's guilt. In particular, the uncontroverted evidence that Johnson asked her boyfriend to lie and create an alibi for her the morning after the murder—when no one had yet learned that the victim had been murdered—demonstrates Johnson's guilt. In light of this evidence, the additional evidence indicating that Johnson was in the vicinity of the victim at several points the night of the murder is of little moment.

But, even setting that aside, the cell phone location data was duplicative. The State presented Johnson's credit card and debit card records showing purchases at locations in the same areas, at the same times, that the cell phone location data

indicated Johnson was there. The cell phone location data, as witnesses explained, was not precise. It provided only a general geographic area in which Johnson's phone made contact with cell towers that night, and thus offered no greater precision than the credit card and debit card records. Simply put, the cell phone location evidence, although incriminating, was both duplicative and vastly overshadowed by other evidence of Johnson's guilt, the key pieces of which were uncontroverted at trial.

We are mindful of the high burden the State bears in this case. We cautiously must guard the standard of harmless error in constitutional cases, or that extraordinary standard risks collapsing into the more forgiving standard applicable to ordinary evidentiary or instructional error. *See State v. Bozeman*, 115 N.C. App. 658, 661, 446 S.E.2d 140, 142 (1994). But this is the rare example of an extraordinary case where the State has met its burden; it has shown "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Bunch*, 363 N.C. at 845, 689 S.E.2d at 869. Accordingly, even if we assume for purposes of this appeal that the warrantless seizure of Johnson's cell phone location data violated her constitutional rights, that error was harmless beyond a reasonable doubt.[1]

Conclusion

We find no prejudicial error in the trial court's judgment.

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[1] Johnson also contends that, without the cell phone location data, there was insufficient evidence to convict her and thus the trial court should have granted her motion to dismiss. For the reasons explained above, there was substantial evidence of Johnson's guilt and this argument is meritless.

NO PREJUDICIAL ERROR.

Judges TYSON and YOUNG concur.

Report per Rule 30(e).