IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DOMINIQUE TRAVELL HOUSTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80978-COA

ORDER OF AFFIRMANCE

Dominique Travell Houston appeals from a judgment of conviction, pursuant to a jury verdict, of one count of robbery, two counts of burglary, and one count of fraudulent use of a credit or debit card. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Reno Police Officer Scott Roberts responded to a report of a robbery at the Atlantis Casino Resort Spa in Reno. Officer Roberts interviewed the victim, Edward Williams, who relayed the following: Williams was gambling at the casino for about an hour. He stopped at the restroom before leaving. While standing at one of the urinals, a man "spun [Williams] around in a violent manner." The man threw Williams into a stall where he started searching Williams's pants. Williams surrendered his wallet—containing debit and credit cards, various identification cards, but no cash—after which the man hit Williams on the side of the head with either a handgun or his fist and fled the restroom. Williams said he did not get a good look at the attacker but described him as an African-American male wearing a red top.

Officer Roberts then reviewed Atlantis color video surveillance footage. The footage of the entrance to the restroom showed an African-American male wearing an orange jacket enter the restroom shortly after Williams and exit two minutes later. Atlantis security reviewed earlier

footage and identified the gaming machine the African-American man used before entering the restroom. The machine recorded the use of a "player's club" membership card while the patron gambled. That card belonged to Houston. The membership records contained Houston's Alabama driver's license with his photograph, Alabama-based cell phone number, and a local home address at 2901 Harvard Way, Reno, Nevada.

Officer Roberts was familiar with Harvard Way and discovered that the address on the membership card was invalid because the street terminated at the 2400 block. The last address on this street was 2401 Harvard Way. Apparently, three different apartment complexes shared this address, including the Brooktree Apartment complex. Officer Roberts used Houston's Alabama cell phone number to order an "emergency locate"—that is, a one-time ping[1] of Houston's cell phone through his cellular-service provider to obtain the phone's approximate location using prospective cell-site location information (CSLI). The ping located the phone at 2401 Harvard Way, Apartment 162, with 90 percent accuracy. Officer Roberts went to the Brooktree Apartments and tried to contact the manager, but the office was closed on that Sunday. Officer Roberts left without taking further action.

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[1]A cellular-service provider may locate a cell phone quickly by sending an electronic signal to it—that is, by "pinging" the cell phone. *United States v. Powell*, 943 F. Supp. 2d 759, 767 (E.D. Mich. 2013), *aff'd*, 847 F.3d 760 (6th Cir. 2017). When a cell phone service provider pings a cell phone, the service provider causes the phone to transmit its real-time location information to the nearest cell tower or towers. The request is known as obtaining a phone's "real-time" or "prospective" cell-site location information (CSLI). Prospective CSLI originates at the cell site and transmits directly to a user's phone. *Id.*

Nearly two weeks later, Detective Allison Jenkins-Kleidosty began investigating the Atlantis crime. Detective Jenkins-Kleidosty familiarized herself with Houston's Atlantis membership records and the address from the cell phone ping. She searched Houston's name through Facebook and discovered Houston's profile with a picture similar to the one on his driver's license, which also matched the Atlantis security footage. Houston's profile revealed that he was dating a woman named "Jay Conwell" and it included a photograph of her.

Detective Jenkins-Kleidosty went to the Brooktree Apartments and spoke with the apartment manager, who confirmed that Conwell leased Apartment 162. However, the name on file with the lease was "Jo'aiera" Conwell, not Jay. The manager nevertheless confirmed Conwell as the lessee based on the picture from Facebook. The manager provided Conwell's cell phone number, which had the same Alabama area code as Houston's, and said that Conwell drove a silver 2013 Malibu with a personalized Alabama license plate and substantial body damage on the driver's side. The manager also disclosed that Conwell used two money orders to pay rent for that month.

Detective Jenkins-Kleidosty also spoke with victim Williams. Williams provided records of several unauthorized purchases made on the day of the robbery that were charged to his stolen bankcards. There were purchases at a local Walmart—for a 65-inch television, PlayStation game console, and two money orders—and a small purchase at a Shop-N-Go gas station. Detective Jenkins-Kleidosty recovered purchase receipts and video-surveillance footage from each store. The footage showed Houston inside each store making purchases. It further showed Houston arriving and leaving each store in a silver Malibu that had damage to the driver's

side and personalized Alabama plates, consistent with the description of Conwell's Malibu. The purchase receipts indicated that Houston used the bankcards to purchase a 65-inch television, a PlayStation, and two money orders. The money order serial numbers matched those used to pay Conwell's rent.

Detective Jenkins-Kleidosty then obtained a search warrant to search Conwell's apartment and seize stolen property as well as any other items related to the robbery and fraudulent use of Williams's bankcards. The warrant application relied in part on the apartment address obtained from the cell phone ping. Police searched the apartment and recovered the TV and copies of the money orders. Conwell confirmed that Houston had lived with her in the apartment but recently moved back to Alabama. Police also recovered a Charter Communications internet bill in the apartment in Houston's name.

Detective Jenkins-Kleidosty obtained an arrest warrant for Houston. While preparing the warrant application, she discovered that Houston was already in custody in Reno on unrelated charges. While in jail, Houston made telephone calls to his wife, an Alabama resident. The calls were automatically recorded, and in one call Houston admitted that he stole a man's wallet at the Atlantis. He specifically said that he took another man's wallet while the man was already on the restroom floor.

The State charged Houston with one count of robbery with use of a deadly weapon, one count of battery with use of a deadly weapon, two counts of burglary, and one count of fraudulent use of a credit or debit card. Houston pleaded not guilty. Houston moved to suppress the one-time cell phone ping as an unconstitutional search and the items recovered pursuant to the search warrant as the derivative fruit of the unlawful search. The

State countered that, among other things, the ping was not a search, and even if it was, Detective Jenkins-Kleidosty would have inevitably discovered Houston's address and seized the evidence found therein.

After an evidentiary hearing, the district court denied Houston's motion. The district court held that the ping was a search because Houston had a "reasonable expectation of privacy in his real-time CSLI." However, the district court found that Detective Jenkins-Kleidosty would have inevitably discovered Houston's apartment because "[t]here are only a limited number of addresses in the 2000 block of Harvard Way," the termination point of the street is 2401 Harvard Way, and Detective Jenkins-Kleidosty testified that she was familiar with both Harvard Way and the Brooktree Apartments, so "her investigation would have [inevitably] begun at that complex." The district court also noted Jenkins-Kleidosty's belief that "2901 Harvard Way was likely 2401 Harvard Way, only appeared as 2901 due to a transcription error," and that she found "Defendant's personal profile on Facebook" indicating Houston "was in a relationship with Jo'aiera Conwell."

During trial, Houston's defense theory was that he took Williams's wallet and used the bankcards but did not commit robbery with a deadly weapon or battery with a deadly weapon. A jury convicted Houston of robbery, both burglary counts, and credit card fraud, but acquitted him on the deadly weapon enhancement for the robbery charge, and acquitted him on the battery with the use of a deadly weapon charge. This appeal followed.

Houston argues on appeal that the district court's inevitable-discovery finding was erroneous. The State again raises the argument that the ping was not a search, and even if it was, the evidence would have

inevitably been discovered, and any errors were harmless because overwhelming evidence supports the jury's verdict even without the allegedly improper evidence. Houston elected not to file a reply brief addressing the State's arguments on appeal.

Standard of Review

We review the district court's findings of fact for clear error, but the legal consequences of those factual findings, such as constitutional issues, are reviewed de novo. *Manning v. State*, 131 Nev. 206, 209-10, 348 P.3d 1015, 1017-18 (2015); *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'" *McAllister v. United States*, 348 U.S. 19, 20 (1954) (quoting *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 339 (1952)).

Whether the cell phone ping was a search

On appeal, Houston does not formally address the constitutionality of the one-time ping of his cell phone as being a search requiring a warrant because he prevailed on this issue below. However, in his motion to suppress, Houston argued that the one-time ping was a search under the Fourth Amendment because *Carpenter v. United States*[2] requires a warrant to obtain all forms of CSLI.

The State on appeal contends that the one-time ping was not a search under the Fourth Amendment, so the items recovered pursuant to the search warrant were lawfully seized, and the exclusionary rule does not apply. If the State is correct, and the ping of Houston's cell phone does not

[2]585 U.S. ___, 138 S. Ct. 2206 (2018).

qualify as a search, then we need not address the other issues raised on appeal because police lawfully seized the evidence at issue. *See United States v. Place*, 462 U.S. 696, 701 (1983) (looking first to see if a reasonable expectation of privacy exists in the place or person to be searched before addressing any exceptions to the warrant requirement). In support of its position, the State argues that *Carpenter* applies only to voluminous historical CSLI and not to singular, real-time CSLI inquiries to obtain the location of a wanted suspect, so the search warrant was properly issued. However, Detective Jenkins-Kleidosty testified at the suppression hearing that she believed a warrant is necessary to obtain the real time CSLI unless exigent circumstances are present. The district court rejected the State's argument below. We agree with the district court that based on the facts and circumstances presented here, it was not in error to conclude that a warrant was required to obtain the real-time CSLI.

This case involves a novel issue of Fourth Amendment search-and-seizure jurisprudence that the State presents in a preemptive manner as an alternative basis for affirmance. There is no mandatory authority binding this court on whether the Fourth Amendment to the United States Constitution prevents law enforcement from obtaining prospective, real-time CSLI from a cell phone without a warrant. *See* 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 2.7(f) n.291 (6th ed. 2020) ("[I]t is open to question whether [the Fourth Amendment] has any application to police acquisition of real-time CSLI records . . . ."). However, the United States Supreme Court in *Carpenter v. United States* addressed the issue of historical CSLI in the context of Fourth Amendment privacy interests. 585 U.S. ___, ___, 138 S. Ct. 2206, 2217-18 (2018). The *Carpenter* court held that the Government's access to 127 days of historical

CSLI obtained from suspects wireless carrier invaded the suspect's reasonable expectation of privacy under the Fourth Amendment, "in the whole world of his physical movements," including public areas. 585 U.S. at ___, 138 S. Ct. at 2217-18, 2219.

Use of CSLI is one of several methods of electronically tracking a suspect. There are two types of CSLI that law enforcement can acquire from cell phone companies: historical and prospective. *Taylor v. State*, 132 Nev. 309, 316, 371 P.3d 1036, 1041 (2016). Historical CSLI consists of past location records that a cellular-service provider stores as a normal business practice. *Id.*; *Carpenter*, 585 U.S. at ___, 138 S. Ct. at 2211. "[E]ach time the phone connects to a cell site, it generates a time-stamped record . . . ." *Carpenter*, 585 U.S. at ___, 138 S. Ct. at 2211. This includes a user's approximate location, stored for later review. *Id.* A cell phone logs CSLI location records through regular operation of the device "without any affirmative act on the part of the user beyond powering up." *Id.* at 2220. These passive location records are stored through "incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates." *Id.*

Prospective CSLI, on the other hand, is real-time location information received from a user's cell phone. *Taylor*, 132 Nev. at 316, 371 P.3d at 1041. Compared to historical CSLI, prospective CSLI originates at the cell site and transmits directly to a user's phone. *United States v. Powell*, 943 F. Supp. 2d 759, 767 (E.D. Mich. 2013), *aff'd*, 847 F.3d 760 (6th Cir. 2017). A cellular-service provider may, at the direction of law enforcement under the Stored Communications Act (SCA), locate a cell phone more quickly by sending an electronic signal to it—that is, by pinging

the cell phone. *Id.* at 767, 769. This will generate real-time location information about the user's phone. *Id.* at 767.

Cell site pings are not an exact science to determine a phone's precise location, but they are generally accurate. Mobile phones typically ping the closest cell tower within range, so the precision of this information depends on the size of the geographic area covered by the cell site. *Carpenter*, 585 U.S. at ___, 138 S. Ct. at 2211. The greater the concentration of cell towers, the smaller the coverage area, and the easier it is to determine a phone's exact location. *Id.* at ___, 138 S. Ct. at 2211-12. Using this method, it is possible to determine "the tower receiving a signal from a particular phone at any given moment" and the geographical direction of the phone in relation to the cell tower. *Id.* Over time, cell tower triangulation has become more precise. *See id.* at ___, 138 S. Ct. at 2212.

"The touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). A warrantless search is "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). A search in the constitutional sense occurs when the government's conduct intrudes on a person's reasonable expectation of privacy. *Id.* at 361 (Harlan, J., concurring). In determining reasonableness, courts balance the intrusion into a person's "Fourth Amendment interests against [the] promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

In considering the application of the Fourth Amendment to obtaining real-time CSLI data, privacy expectations extend to location tracking, and the location and the length of time that a suspect is tracked

often determines if a warrant is required. *Compare Carpenter*, 585 U.S. at ___, 138 S. Ct. at 2220 (obtaining 127 days of CSLI is a search), *United States v. Jones*, 565 U.S. 400, 404-05 (2012) (remotely monitoring a vehicle's movements for 28 days requires a warrant), *and United States v. Karo*, 468 U.S. 705, 716-17, 719 (1984) (using a GPS tracker inside a suspect's home violated his Fourth Amendment protections because the location tracked was inside an area with a reasonable expectation of privacy), *with United States v. Knotts*, 460 U.S. 276, 284-85 (1983) (using a location-tracking beeper to follow a vehicle through traffic was not a search because the beeper only tracked the suspect's vehicle on public roads).

Courts that have considered the prospective CSLI issue have differing approaches. For example, the Texas Court of Criminal Appeals addressed the prospective CSLI issue and held that whether a person has a Fourth Amendment privacy interest in real-time CSLI "must be decided on a case-by-case basis." *Sims v. State*, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019), *cert. denied*, ___U.S.___, 139 S. Ct. 2749 (2019). The more times police ping a suspect's cell phone and the longer they track a person using prospective CSLI, the greater the privacy interest effected. *Id.* Additionally, the magnitude of prospective CSLI information police seize will ultimately determine when police conduct has ripened into a Fourth Amendment search. *Id.* In *Sims*, the Texas court determined that less than five pings, but more than one, over the course of less than three hours of tracking a known and armed murder suspect was not a search. *See id.* Texas extended the *Carpenter* rationale—applying Fourth Amendment privacy interests to historical CSLI—to prospective CSLI, but focused on the length of time a murder suspect's phone was tracked via CSLI, the quantity of CSLI ultimately obtained, and curiously, the exigent

circumstances of the situation involving a murder suspect to determine that less than five pings was not a search. *Id.* at 646.

In contrast, the Massachusetts Supreme Judicial Court, applying state constitutional law and citing to federal jurisprudence construing the Fourth Amendment for guidance—but not deciding the case under the United States Constitution—focused on the privacy interest at stake, rather than the length of time tracking or amount of CSLI information recovered. *Commonwealth v. Almonor*, 120 N.E.3d 1183, 1193 (Mass. 2019). The *Almonor* court reasoned that with prospective CSLI data, police could "immediately locate an individual whose whereabouts were previously unknown," which contravenes reasonable privacy expectations. *Id.* at 1195. In this case, the police pinged a murder suspect's cell phone one time after he shot and killed someone four hours prior. *Id.* at 1187. Even though the court held that the ping was a search, the court held that there was an exigent circumstance justifying the use of a ping without a warrant because of a continuing threat. *Id.* at 1198.

Similar to the Massachusetts court, the Court of Special Appeals of Maryland held that "cell phone users have an objectively reasonable expectation that their cell phones will not be used as real-time tracking devices through the direct and active interference of law enforcement." *State v. Andrews*, 134 A.3d 324, 350 (Md. App. 2016). In *Andrews*, officers conducted a Fourth Amendment search when they walked around the perimeter of a suspect's house while using a hand-held CLSI tracking device, known as a "Hailstorm," to send repeated signals into the suspect's phone. *Id.* The device returned directional data pointing in the direction of the phone, and as the police walked the perimeter, they were able to triangulate the directional information to determine that the suspect

was inside. *Id.* The Maryland court engaged in an exhaustive historical analysis of federal constitutional law on CSLI, which formed the basis for its broad holding. *Id.* Based upon the federal authority construing the privacy interests involved with location tracking in the Fourth Amendment context, the Maryland court concluded that a cell phone ping "requires a search warrant based on probable cause and describing with particularity the object and manner of the search, unless an established exception to the warrant requirement applies." *Id.*

The *Andrews* case stands for the proposition we reach in this case: that "cell phone users have an objectively reasonable expectation that their cell phones will not be used as real-time tracking devices through the direct and active interference of law enforcement." *See id.* We rely on *Andrews* because of its focus on the privacy interest involved. The broad language used in *Andrews* suggests that even one ping involves a privacy interest, and thus can be a search.

The facts at hand are appreciably different from the *Sims*, *Almonor*, and *Andrews* cases. In this case, Houston's phone was pinged only a single time, which was arguably less intrusive than in *Sims* where a suspect's phone was pinged more than once but less than five times over a longer period of time and while the phone was in public areas. On the other hand, *Sims* involved a wanted murder suspect and exigent circumstances, which the Texas court partially used as a basis to determine there was no privacy interest in the limited number of pings, whereas here, the district court concluded that the crime did not involve a similar exigency. Additionally, the singular ping in the instant case was effectuated in a manner that returned much more precise location information—giving an exact apartment number location—than the less precise directional

information supplied by the Hailstorm device used in *Andrews*, but accomplishing the same result—accurately pinpointing the location of the suspect inside his residence.

We therefore recognize that even a single ping into a home implicates serious Fourth Amendment privacy concerns, especially when the ping is precise enough to locate a suspect in an exact apartment. We find the rationale of the *Almonor* and *Andrews* courts persuasive to our determination. Although these appellate courts dealt with materially different facts than the instant case, their rationale for extending Fourth Amendment protections to prospective real-time pings is compelling and instructive. Under the facts and circumstances presented here, the district court's rationale that the ping was a search requiring a warrant was not in error. And considering real-time pings of a suspect's cell phone as a constitutional search seems to be most in accord with the spirit and scope of the Fourth Amendment. *See In re Application United States Order Authorizing Disclosure of Location Info. Specified Wireless Tel.*, 849 F. Supp. 2d 526, 540 (D. Md. 2011) (noting the difficulties involved with knowing whether a phone is located in a constitutionally-protected place before pinging a phone); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) ("One of the main rights attaching to property is the right to exclude others . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.").

In affirming the district court's order that a warrant was required, we are mindful that cell phones are a ubiquitous part of everyday life. *See In re Application Tel. Info. Needed Criminal Investigation*, 119 F. Supp. 3d 1011, 1026 (N.D. Cal. 2015) (concluding "that cell phone users have an expectation of privacy in the historical CSLI associated with their

cell phones, and that society is prepared to recognize that expectation as objectively reasonable"); *Riley v. California*, 573 U.S. 373, 403 (2014) ("Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life . . . .' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))); *Boyd*, 116 U.S. at 630 (noting that the Fourth Amendment's protections "affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employe[e]s of the sanctity of a [person's] home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty[,] and private property").

Furthermore, people regularly take their phones with them into private areas, such as homes, thereby implicating heightened privacy interests. And if a phone is taken into the home, like in this case, "[t]he Fourth Amendment's protection is at its zenith[ ]." *See Lastine v. State*, 134 Nev. 538, 545-46, 429 P.3d 942, 950 (Ct. App. 2018) (alteration in original) (internal quotation marks omitted); *see also Andrews*, 134 A.3d at 349 ("[B]ecause the use of the cell site simulator in this case revealed the location of the phone and Andrews inside a residence, we are presented with the additional concern that an electronic device not in general public use has been used to obtain information about the contents of a home, not otherwise discernable without physical intrusion."). Without Fourth

Amendment protections for prospective CSLI, intrusions into areas where people have a reasonable expectation of privacy will occur, at least to a certain extent when inside the home. We must recognize that most cell phone pings will occur because law enforcement officers do not know the location of the suspect, but if they do know the suspect is in a public place, the privacy interest at stake would be viewed differently.

Therefore, for purposes of this order only, we conclude that the district court did not err in concluding that the one-time ping of Houston's cell phone, which located the phone within a private residence, was a search requiring a warrant. We do not, however, decide the boundaries or limitations of the privacy interests that the Fourth Amendment provides to cell phones and the degree that pings infringe upon that interest, as this should be determined on a case-by-case basis.[3] Additionally, this case does

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[3]We note that situations involving exigent circumstances supported by probable cause normally justify law enforcement pinging a suspect's phone without a warrant. *See Carpenter*, 585 U.S. at ___, 138 S. Ct. at 2222-23 (explaining in dicta how a warrant is unnecessary to obtain CSLI during an exigency). Here, the district court ruled that there was no exigency because Officer Roberts responded to other calls and got his car washed while waiting for the Atlantis staff to obtain the surveillance footage and did not pursue the investigation further when he went to the Brooktree Apartments. The State initially claims on appeal that there were exigent circumstances to justify the warrantless ping because the situation involved an armed robbery. So, the State argues, even if the cell phone ping was a search, it was not subject to the warrant requirement. However, the State does not argue or raise this as a separate issue on appeal and cites no authority in support. Therefore, we need not address this argument, and we see no reason to disturb the district court's factual finding. *See Somee*, 124 Nev. at 441, 187 P.3d at 157-58 (reviewing factual findings for clear error); *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an argument that lacks the support of relevant authority).

not present us with an opportunity to provide authoritative guidance on cell phone pings because Houston did not brief the issue at all and the State summarily briefed the issue. The holding of this order, therefore, is limited to this case.

Whether the district court's inevitable-discovery finding was not clearly erroneous

Having concluded that the ping was an unlawful search due to Officer Roberts's failure to obtain a warrant, we now turn to whether the district court erred in determining that suppression due to the illegal nature of the search was not required because the inevitable-discovery exception applied. Houston argues that the district court erred in applying this exception because Detective Jenkins-Kleidosty only speculated that she would have ended up going to Houston's apartment complex and there were no preexisting investigatory protocols employed that would have led her there. The State counters that Jenkins-Kleidosty would have ended up at the Brooktree Apartments based on her social media investigation and familiarity with the apartment complex area, and the fact that the street address of 2901 Harvard Way is very similar to 2401 Harvard Way and may simply have been a typographical error on the player's card.

The exclusionary rule requires suppression of evidence that police obtained in violation of the Fourth Amendment, which applies not only to the illegally obtained evidence, but also to all incriminating evidence derived from it. *New York v. Harris*, 495 U.S. 14, 19 (1990) (explaining the fruit-of-the-poisonous-tree doctrine). Under the inevitable-discovery exception to the exclusionary rule, improperly obtained evidence will not be suppressed if the prosecution can prove by a preponderance of the evidence that it ultimately would have been discovered by lawful means. *See State v. Nye*, 136 Nev., Adv. Op. 48, 468 P.3d 369, 371 (2020); *see also Nix v.*

Williams, 467 U.S. 431, 444 (1984). This exception places "police in the same, not a worse, position" than if no misconduct occurred. *Nix*, 467 U.S. at 443. But inevitable discovery must be certain and cannot be based on speculation; it must be proven by "demonstrated historical facts capable of ready verification." *Id.* at 444 n.5.

One way the prosecution can demonstrate inevitable discovery is through proof of a standard investigatory procedure or policy that would have necessarily led the police to discover the unlawfully seized evidence. *United States v. Virden*, 488 F.3d 1317, 1322 (11th Cir. 2007). However, the prosecution must also show that these investigation protocols "were being *actively pursued* prior to the occurrence of the illegal conduct," otherwise, this exception would "eviscerate" the exclusionary rule. *Id.* (emphasis in original).

Here, the district court's finding that Houston's apartment would have been inevitably discovered was not clearly erroneous. At the evidentiary hearing, Detective Jenkins-Kleidosty testified that she would have begun the investigation the same way even without the evidence revealed by the ping by searching for Houston through social media, so a preexisting investigatory process was in place. She further testified that she believed that the address on file with Houston's membership at the Atlantis Casino—2901 Harvard Way—was likely a transcription error because it was close to Brooktree's address—2401 Harvard Way—which was the termination point of the street. Detective Jenkins-Kleidosty testified that she would have taken the photos of Houston and Conwell to the Brooktree Apartments, as part of the active ongoing investigation into the crimes at the Atlantis, regardless of the information received from the ping. We grant considerable deference to the district court, as the fact

finder, who found this testimony credible. Under the clearly erroneous standard, we defer to factual findings unless we are left with a definite and firm conviction that the district court made a mistake in its inevitable-discovery finding.

We further note that Detective Jenkins-Kleidosty was able to see Conwell's silver Chevy Malibu and license plate number in the Walmart and Shop-N-Go video footage. Having this license plate number would have been another basis for eventually discovering that Conwell associated with Houston. Detective Jenkins-Kleidosty would have taken the vehicle's description and license plate information to the manager at the Brooktree, who would have been able to identify Conwell's vehicle, and her as a lessee of apartment 162. Thus, there was another avenue to discover that Houston lived with Conwell in the Brooktree Apartments and to have eventually sought a search warrant for the apartment. Hence, putting Detective Jenkins-Kleidosty in the same place she would have been in without the CSLI ping, she still would have inevitably discovered Houston's apartment and obtained a valid search warrant.

Harmless Error

While we conclude that the district court properly denied Houston's request to suppress the evidence and therefore need not reach the State's harmless error argument on appeal, we conclude that this doctrine provides an independent basis for affirming the judgment of conviction even if the evidence should have been suppressed. The State argues that even without the cell phone ping and the evidence derived from it, there was overwhelming evidence of guilt presented at trial. Therefore, the jury would have found Houston guilty even without presentation of the allegedly improper evidence. Houston did not provide a harmless-error analysis and opted not to file a reply brief.

A constitutional error is harmless only if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *see Chapman v. California*, 386 U.S. 18, 23-24 (1967); *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008); *see also Lastine*, 134 Nev. at 549, 429 P.3d at 952 (applying harmless-error analysis to the district court's erroneous denial of a motion to suppress). "[I]t is the jury's function, not that of the [reviewing] court, to assess the weight of the evidence and determine the credibility of witnesses." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Based on the State's harmless error argument, we conclude there are two other bases for affirmance. First, we consider Houston's failure to oppose the argument as a concession that the State's argument is correct. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position").

Second, Houston essentially conceded the burglary and fraud charges at trial and on appeal. Houston stipulated that he was the person in the Walmart and Shop-N-Go surveillance footage at the suppression hearing so that no in-court identification would be necessary to authenticate the footage at trial. Houston only argued during trial that there was a reasonable doubt as to the robbery and battery charges. On appeal, Houston does not address his stipulation that he was the person depicted in the videos using the stolen credit or debit cards. Nevertheless, he asks this court to reverse the judgment of conviction and remand for a new trial

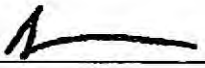
without the evidence obtained from the search warrant. Even if we set aside all of the evidence obtained from the ping and search warrant, there remains overwhelming evidence to support Houston's conviction: the Atlantis surveillance footage of Houston, the identifying information on file with Houston's player's club membership, Williams's trial testimony describing the attack in the restroom and theft of his wallet containing his credit and debit cards, the Walmart and Shop-N-Go footage identifying Houston and the related contemporaneous store purchase records and credit card entries, the jail call from Houston to his wife admitting to taking the victim's wallet, and Conwell's testimony. We conclude that this evidence is overwhelming to convict Houston on the burglary and fraud charges and the jury would have reached the same verdict without the evidence obtained from the ping.

There was also overwhelming evidence presented, without the evidence obtained via the search warrant, for this court to conclude beyond a reasonable doubt that the jury would have found Houston guilty of robbery. In addition to the evidence described above, Houston was seen on surveillance video entering the Atlantis restroom shortly after Williams, only to leave two minutes later, and then using Williams's credit cards that same day. Williams described the assailant as an African-American male wearing a red top, and the person seen on the surveillance video matched Williams's description. A guilty verdict may stand on circumstantial evidence alone, *Hernandez v. State*, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (noting circumstantial evidence is enough to support a conviction); *see also* NRS 200.380 ("The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with property."), so we will not disturb the verdict on appeal, *see McNair*, 108 Nev. at 56, 825 P.2d at

573. Finally, Conwell testified that she called Houston while he was in jail and he admitted to robbing someone to obtain her rent money that he had lost gambling. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Bulla

TAO, J., concurring in part:

I concur in affirming Houston's conviction because I agree that discovery of Houston's home address would have been inevitable. Further, because of the odd procedural posture of this appeal—in which the State's brief argued the question of whether the Fourth Amendment encompasses a single CLSI ping of Houston's phone but Houston's brief did not (he filed no reply brief), meaning that we've heard from only one side—I agree that the appropriate and narrow outcome is to affirm the district court's conclusion.

However, I write separately to note that, had the question been fully briefed and argued, the answer to the question whether a single cell phone CLSI ping of Houston's phone constitutes a Fourth Amendment search is very much in doubt. Indeed, considerable authority suggests that it is not.

For example, multiple courts in New York have concluded that "[t]he mere 'pinging' of [a suspect's] cell phone to obtain one-time location information is not a search." *People v. Wells*, 45 Misc. 3d 793, 797 (Sup. Ct. 2014).

> First, the Court holds that "pinging" defendant's cell phone to determine defendant Davis's location, so that the police could then pick him up right away, was not a search or seizure; and this "ping" did not implicate either the Fourth Amendment or the New York State Constitution. That is the holding of *People v. Moorer*, 39 Misc.3d 603, 959 N.Y.S.2d 868 (County Ct. Monroe Co.2013) and *People v. Wells*, 45 Misc.3d 793, 991 N.Y.S.2d 743 (S.Ct. Queens Co.2014).

People v. Campos, 50 Misc. 3d 1216(A) (N.Y. Sup. Ct. 2015), *aff'd sub nom. People v. Davis*, 127 N.Y.S.3d 27 (2020).

Courts in Texas agree. Indeed, they go even further than New York and hold that even multiple pings do not constitute a search because there is no Fourth Amendment privacy interest in a suspect's mere location if the ping does not extract any more sensitive data from the phone. In *Sims v. State*, 569 S.W.3d 634, 646 (Tex. Crim. App. 2019), *cert. denied*, ___U.S.___, 139 S. Ct. 2749 (2019), the Texas Court of Criminal Appeals (the highest court in the state on criminal matters, as the Texas Supreme Court does not have jurisdiction over criminal cases) held that five pings over the course of three hours did not constitute a Fourth Amendment search because while a suspect possesses a Fourth Amendment privacy interest in the data stored on his phone, he possesses no privacy interest in his location in the world. Clearly, if five repeated pings over the course of three hours does not implicate the Fourth Amendment, then the lesser intrusion of a single instantaneous ping would not either.

As far as I (or the majority) can tell, no court in America has ever held that a single CLSI ping constitutes a Fourth Amendment search. The majority cites *Commonwealth v. Almonor*, 120 N.E.3d 1183, 1193 (Mass. 2019) as a case it "agrees" with, but I have no idea why, because that case interprets a state constitution, not the Fourth Amendment. Under our federal system of government, states are always free to be more liberty-protective than the U.S. Constitution requires as a minimum floor. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford Univ. Press 2018). The majority says that *Almonor* cites federal cases, which it technically does, but merely because a Massachusetts court cites federal cases to help interpret its state constitution does not mean that it says anything meaningful about interpreting the Fourth Amendment, especially not when the opinion itself contains the following express disclaimer:

> For the reasons set forth below, we conclude that, under art. 14 [of the Massachusetts Declaration of Rights], it does [constitute a search]. . . As we have noted, this issue remains an open question as a matter of Fourth Amendment jurisprudence. Nevertheless, as we conclude that a ping is a search under art. 14, we "have no need to wade into these Fourth Amendment waters."

Id. at 1191 n.9. In other words, *Almonor* expressly said nothing about the Fourth Amendment beyond observing that its scope "remains an open question." No doubt a single CLSI ping could conceivably constitute a search under any number of state constitutions, but outside of this appeal no court to date has ever held it to constitute one under the Fourth Amendment (including *Almonor*).

The situation becomes more complicated when the police execute multiple pings over an extended period of time. In those cases, some

courts draw a distinction between CLSI pings to a phone known to be in a public place and CLSI pings to a phone known or suspected to be within the suspect's home where a "man's home is his castle" and Fourth Amendment is at its peak. *Ker v. State of Cal.*, 83 S. Ct. 1623, 1636 (1963); *see Riley v. California*, 134 S. Ct. 2473, 2490 (2014) ("Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building."). Thus, in *U.S. v. Forest,* 355 F.3d 942, 949 (6th Cir. 2004), *cert. granted, judgment vacated on other grounds sub nom. Garner v. United States*, 125 S. Ct. 1050 (2005), the Sixth Circuit held that repeatedly pinging the phone of a suspect known to be driving on a public highway did not constitute a Fourth Amendment search because the pings revealed nothing more than the naked eye could see.

> In the present case, Garner acknowledges that the cell-site data was used to track his movements only on public highways. The rationale of *Knotts* therefore compels the conclusion that Garner had no legitimate expectation of privacy in the cell-site data because the DEA agents could have obtained the same information by following Garner's car. *See Knotts* [*v. U.S.*], 460 U.S. [276] at 281-82, 103 S. Ct. 1081 (emphasizing that the defendants had no legitimate expectation of privacy because the police could have tracked the defendants' movements by driving behind them on the public roads).

Id. at 951. Similarly, in *Wells*, the court noted that, at the time of the CLSI ping, the suspect was not inside his own home but rather was present in someone else's home where no reasonable expectation of privacy could exist. 45 Misc. 3d at 797.

On the other hand, *State v. Andrews*, 134 A.3d 324, 350 (Md. App. 2016), involved repeated directional pings into a suspect's phone as police officers physically circled the perimeter of the suspect's home and collated and triangulated the multiple pings to determine that the suspect was inside. Partly because their physical surveillance gave the police strong reason to believe the phone they were repeatedly pinging was inside the home, the court held that a Fourth Amendment search occurred. *Id.* Likewise, *In re Application United States Order Authorizing Disclosure of Location Info. Specified Wireless Tel.*, 849 F. Supp. 2d 526, 540 (D. Md. 2011), involved a police request to repeatedly ping a phone in real time continuously for 24 hours to track a suspect's movements throughout a city over the course of an entire day. In requiring a warrant, the court noted that the intrusion went far beyond detecting the suspect's location in public but would inevitably go further to intrude within his home to reveal more than merely his physical location but also his daily habits and routines over an extended period of time.

The bottom line is that courts seem to have adopted two complementary approaches depending upon how many pings the police wish to execute. A single CLSI ping is never a Fourth Amendment search because suspects possess no Fourth Amendment privacy interest in their mere location somewhere in the world. Even when they happen to be at home, they possess no protected interest in the mere fact that they are inside their home as opposed to somewhere else, so long as the pings reveal no data more sensitive than where they are. On the other hand, multiple CLSI pings over an extended period of time might potentially implicate the Fourth Amendment either if the police have reason to know that the suspect is inside his own home during the pings, or if the pings are so numerous or

continuous that they go beyond identifying mere location to reveal additional information such as daily habits and routines.

The problem here is that neither of these lines of authority supports the conclusion that a single CLSI ping of Houston's phone constituted a Fourth Amendment search. There was only one ping, and at the instant of the single ping the police had no particular reason to believe that he was inside his home; indeed the very problem was that they had no idea where he lived.

Consequently, although I narrowly concur in the judgment of affirmance, I harbor significant doubt that a single CLSI ping would constitute a Fourth Amendment search had the question been better presented and argued. No other court has reached that conclusion, and I wouldn't so blithely ignore the wisdom of so many other judges on so many other courts, all of whom are just as capable of reading the Fourth Amendment as the members of this court. Nonetheless, given the procedural posture we have and the inevitability that the police would have discovered Houston's home address anyway, I concur with affirmance in this case.

Tao, J.

Tao

cc: Hon. Scott N. Freeman, Chief Judge, Second Judicial District Court
Department 10, Second Judicial District Court
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk