

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1310**

State of Minnesota,
Respondent,

vs.

Bret Ryne Lott,
Appellant.

**Filed October 14, 2024
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge
Concurring specially, Larson, Judge**

Ramsey County District Court
File No. 62-CR-22-2375

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant
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Considered and decided by Larson, Presiding Judge; Segal, Chief Judge; and
Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this appeal from final judgment, appellant argues that his conviction for third-degree murder must be reversed because the district court erred by denying his motion to suppress evidence obtained pursuant to search warrants for appellant's Facebook Messenger and cellphone accounts. In the alternative, appellant seeks a correction of his sentence, arguing that the state failed to prove that an out-of-state conviction qualifies as a felony under Minnesota law. We affirm the district court's denial of appellant's motion to suppress, but reverse and remand for resentencing.

FACTS

Just before 10:30 a.m. on November 2, 2019, appellant Bret Ryne Lott called the nonemergency phone number of the Roseville Police Department to request a welfare check of a person staying at a motel in Roseville. Lott relayed that he had been staying with a woman in a motel room that was booked in his name, but that he had left and asked the woman to message him when she checked out. He said he was worried about the woman because she had not messaged him back and he “ha[d]n’t seen her since like 2:00 a.m. yesterday.” Law enforcement also received two 911 calls that same morning—one from the motel manager reporting that a woman was found in room 216 of the motel who was cold to the touch and appeared to be deceased. The second one was from Lott’s mother who called 911 at about 11:15 a.m. to report a “possible overdose” in Roseville.

When officers arrived, fire and ambulance personnel were already on the scene. In room 216, the officers saw a woman, later identified as Z.B., lying on the bed. Z.B. was

pronounced dead at the scene. Testing revealed the presence of morphine (a metabolite of heroin) and fentanyl in Z.B.'s blood and the medical examiner determined the cause of her death was opiate toxicity.

The motel's registration information showed that room 216 had been rented by a woman, C.L., for the nights of October 13 through November 2, 2019, and that Lott was listed as an additional occupant of the room. The motel's keycard entry system showed that the door to room 216 had been opened numerous times between 5:20 a.m. and 8:04 a.m. on November 2, and then was not opened again until 11:09 a.m. when housekeeping entered the room.

Law enforcement followed up with Lott's mother two days later. Lott's mother informed law enforcement that she had received a call from Lott around 8:00 p.m. on November 1 and that he told her that he had been "using drugs with a girl," that they had dozed off, and when he woke up he realized the "girl was not breathing and her lips were blue." Lott's mother said that she told Lott to call 911. She reported that Lott said he believed the girl was already dead and that he did not think she could have died from \$9 worth of drugs. She also told the investigator that her son uses a Facebook account under the name "Indiana Jonesy" and that she sent him a message via Facebook Messenger, an instant messaging application, notifying him that she had contacted police.

As part of its investigation of Z.B.'s death, law enforcement also spoke with a Wisconsin deputy sheriff who was investigating a different overdose death possibly involving Lott. The Wisconsin deputy stated, as set out in the search-warrant affidavit, that he had "found Facebook Messenger messages discussing [Z.B.]'s death."

Law enforcement applied for a search warrant of Lott's Facebook data. The affidavit accompanying the search-warrant application summarized the circumstances of Z.B.'s death, the information learned from Lott's mother, and that the motel room "was registered to a Bret Lott and [C.L.] from October 13, 2019 through November 2, 2019." The affidavit also included the following:

Your affiant found the following Facebook user profiles:

- Bret Lott
- Indiana Jonesy

The two Facebook user profiles share some photos in common with one another. The photos match known photos of Bret Ryne Lott

In January 2020, your affiant spoke with an investigator from the Chippewa County Sheriff's Office in Chippewa Falls, Wisconsin. The investigator shared that during the course of an investigation he was conducting, he found Facebook Messenger messages discussing [Z. B.]'s death. The messages include conversation about Bret Lott and [C.L.] possibly being involved.

The affiant included in the affidavit his knowledge "that often times there is communication between individuals related to criminal activity around the time they are involved in that activity in the form of text messages, phone calls, and social media/communication applications including Facebook and Facebook Messenger."

The district court granted the application for the Facebook search warrant for Lott's Facebook data from October 31, 2019, the day before Z.B.'s death, to February 19, 2020, the day the search-warrant application was submitted. Law enforcement executed the warrant and obtained evidence indicating Lott sold Z.B. heroin before she died. Lott's Facebook messages with Z.B. showed that the two had agreed to meet at the motel so he

could sell her some “strait bomb.” Lott included a photograph of what appeared to be heroin in his messages.

After they had executed the Facebook warrant, law enforcement applied for and obtained a search warrant of Lott’s cellphone data. The cellphone-warrant application sought disclosure of records related to Lott’s cellphone number for the period between October 3, 2019, and December 2, 2019. The affidavit accompanying the search-warrant application detailed much of the same information as the Facebook-warrant affidavit, but it also included information from October 31 through November 2 that was obtained as a result of the execution of the Facebook warrant.

The cellphone data disclosed pursuant to the search warrant showed that Lott first met up with Z.B. at the motel on October 31 and that Lott was at the motel on the morning of November 2 with the last ping at 6:44 a.m.

With permission from Z.B.’s family and a separate search warrant, law enforcement also searched Z.B.’s Facebook data. The search of Z.B.’s data yielded the same Facebook Messenger exchange detailed in law enforcement’s search of Lott’s data, including Lott’s message that he had some “strait bomb” and the photograph of what appeared to be heroin. Law enforcement also recovered a message posted by Z.B. on November 1, 2019, with a photograph of her and Lott.

Respondent State of Minnesota charged Lott by complaint with third-degree murder, alleging he “proximately cause[d] the death of [Z.B.]” by selling her heroin and fentanyl in violation of Minn. Stat. § 609.195(b) (2018). Lott moved to suppress the evidence obtained pursuant to the warrants for his Facebook and cellphone data. The

district court determined that the Facebook warrant was supported by probable cause as to Facebook Messenger data, but that as to Lott's other Facebook data the warrant lacked probable cause and suppressed that data. The district court otherwise denied the motion to suppress the information obtained from the warrants.

The case proceeded to trial. The only evidence submitted by the state at trial from the two search warrants involved data created between October 31 and November 2, 2019. The jury found Lott guilty of third-degree murder. The district court sentenced Lott to 146 months in prison, which is a sentence within the presumptive range based on a criminal-history score of five. Lott's criminal-history score included one felony point for a Wisconsin identity-theft conviction.

DECISION

On appeal, Lott challenges the district court's denial of his motion to suppress evidence obtained pursuant to the search warrants for his Facebook Messenger and cellphone data. He maintains that the warrant for Facebook Messenger data was without probable cause because of an alleged lack of nexus and that both warrants lacked particularity. He also maintains, in the alternative, that he is entitled to be resentenced because the state failed to prove that a Wisconsin conviction for identity theft would qualify as a felony conviction under Minnesota law.

I. The district court did not err in denying, in relevant part, Lott’s motion to suppress evidence obtained from the Facebook Messenger and cellphone search warrants because the issuing judge had a substantial basis for concluding probable cause existed.

In “reviewing a district court’s probable cause determination made in connection with the issuance of a search warrant, an appellate court should afford the district court’s determination great deference.” *State v. Rochefort*, 631 N.W.2d 802, 804-05 (Minn. 2001) (reaffirming that appellate courts do not apply the de novo standard of review when reviewing search warrants, which is different from the standard of review for a warrantless search). In reviewing a search warrant, the reviewing court considers only whether the issuing judge had a substantial basis for concluding probable cause existed. *Id.* at 804. In our analysis, we first address Lott’s probable-cause challenge to the Facebook Messenger warrant, and then address his challenges to the lack of particularity in both warrants.

A. The issuing judge had a substantial basis for determining that there was a sufficient nexus between Lott’s Facebook Messenger data and Z.B.’s death.

In determining whether to grant a search-warrant application, the issuing judge must “make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). “Elements bearing on this probability determination include information establishing a nexus between the crime, objects to be seized and the place to be searched.” *State v. Jenkins*, 782 N.W.2d 211, 223 (Minn. 2010). Our review is limited to “the warrant application and supporting affidavits.” *State v.*

Wiggins, 4 N.W.3d 138, 145 (Minn. 2024); *see also State v. Hill*, 918 N.W.2d 237, 242 (Minn. App. 2018) (reviewing a challenge to the “four corners” of the warrant affidavit). And in “doubtful or marginal cases,” our determination is guided “by the preference to be accorded to warrants.” *Wiggins*, 4 N.W.3d at 150 (quotation omitted).

Lott’s probable-cause challenge to the Facebook Messenger warrant focuses on the issue of nexus—the requirement that there must be a connection between the crime and the place to be searched. *See Souto*, 578 N.W.2d at 747-48. Lott contends that the search-warrant application lacked a sufficient nexus to justify a search of his Facebook Messenger data because the only facts alleged in the search warrant included: (1) the statement of Lott’s mother that Lott used a Facebook account with the name “Indiana Jonesy” and that she had sent Lott a message via Facebook Messenger to communicate with him; (2) a Wisconsin deputy’s statement that, “during the course of an investigation he was conducting, he found Facebook Messenger messages discussing [Z. B.]’s death” and that the messages included conversations “about Bret Lott and [C.L.] possibly being involved”; and (3) a boilerplate statement about the affiant’s knowledge that individuals engaged in criminal activity often use Facebook to communicate about that activity. We are not persuaded.

The probable-cause standard requires that the issuing judge has a substantial basis to find that there is a “fair probability” that evidence about Z.B.’s death would be found in Lott’s Facebook Messenger data. *Id.* at 747 (quotation omitted). We agree with the district court’s determination that the affidavit provided a substantial basis for the issuing judge to make such a finding. The circumstances, as outlined in the affidavit, involve Z.B.’s death

from opiate toxicity; the call from Lott's mother to police the morning Z.B.'s body was discovered, which revealed that Lott was present when Z.B. overdosed; that room 216 was registered to a woman named C.L. and Lott; and that a patron identified Lott as having been at the motel at 6:00 a.m. on the morning of November 2. Thus, the affidavit contained ample evidence connecting Lott to Z.B. and reason to suspect that Lott may have had some involvement in her death.

As to the connection to Facebook Messenger, the affidavit details that Lott had not one but two Facebook accounts and that he used them both. In addition, on the very same morning that Z.B.'s body was discovered, Lott's mother sent a message to Lott via Facebook Messenger telling Lott that she had alerted the police to the possible overdose. It is a reasonable inference that, if nothing else, Lott's Facebook Messenger data might contain a communication from Lott via Facebook Messenger to his mother with information relevant to his involvement in Z.B.'s death. This alone creates a nexus between the investigation and Lott's Facebook Messenger data. The issuing judge thus had a substantial basis for determining that there was a fair probability that Lott's Facebook Messenger data contained evidence related to Z.B.'s death.

We are not persuaded otherwise by the case cited by Lott—*State v. Kahn*, 555 N.W.2d 15, 18 (Minn. App. 1996). In that case, we held that a search-warrant affiant's boilerplate statement—that drug dealers often keep their supply of drugs, records, and monetary profits at their residence—was insufficient to support a finding of probable cause. We reasoned in *Kahn* that there was no link between the defendant's possession of an ounce of cocaine in Minneapolis to his residence 80 miles away, reasoning that “[m]ore than mere

possession . . . is required to demonstrate probable cause that an individual is a dealer.” 555 N.W.2d at 18. Here, there was a direct link between Lott’s suspected involvement in Z.B.’s death and his Facebook Messenger data. Thus, contrary to Lott’s characterization, this case does not contain similar facts to *Kahn*.¹

We therefore conclude that, viewed under the totality of the circumstances set forth in the search-warrant affidavit and the deference accorded an issuing judge’s determination of probable cause, the district court did not err in denying Lott’s motion to suppress his Facebook Messenger data based on an alleged lack of nexus.

B. The issuing judge had a substantial basis for finding that the warrants were sufficiently particular.

We turn next to Lott’s argument that the Facebook Messenger and cellphone warrants failed to meet the minimum constitutional requirements for particularity. A warrant is overbroad and lacks particularity if it does not specify the area, things, or persons for which there is probable cause to search. *State v. Fawcett*, 884 N.W.2d 380, 386-87 (Minn. 2016). The particularity requirement thus ensures “that the search will be carefully

¹ The state also argues that the evidence is admissible under the inevitable-discovery doctrine because the state obtained virtually the same evidence from its search of Z.B.’s Facebook account. The inevitable-discovery doctrine allows for the admission of evidence “[i]f the state can establish by a preponderance of the evidence that the fruits of a challenged search ultimately or inevitably would have been discovered by lawful means . . . even if the search violated the warrant requirement.” *State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (quotation omitted). The district court determined that the inevitable-discovery doctrine offered an alternate ground for the admission of Lott’s Facebook Messenger data. Lott challenges this argument and contends that, because the inevitable-discovery doctrine was considered sua sponte by the district court, he had no opportunity to contest its application. But we need not resolve this issue because we conclude that the district court did not err in finding that the search warrant as to Lott’s Facebook Messenger data was supported by probable cause.

tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” *State v. Contreras-Sanchez*, 5 N.W.3d 151, 166 (Minn. App. 2024) (quoting *Maryland v. Garrison*, 480 U.S. 79, 84 (1987)), *rev. granted* (Minn. May 29, 2024). “When determining whether a clause in a search warrant is sufficiently particular, the circumstances of the case must be considered, as well as the nature of the crime under investigation and whether a more precise description is possible under the circumstances.” *Id.* at 167 (quotations omitted).

Facebook Messenger

In addressing Lott’s argument about the lack of particularity in the warrant for his Facebook Messenger data, we note at the outset that the district court suppressed the results of the search warrant from Lott’s Facebook accounts for all but Facebook Messenger data. As explained above, the district court ruled that the search warrant lacked probable cause as to Lott’s Facebook data other than Facebook Messenger data. This ruling greatly narrowed the scope of the search warrant.

The warrant also contained a temporal requirement, seeking data only between October 31, 2019, and February 19, 2020. “[A] temporal limitation may make a warrant sufficiently particular, even if the authorized search is otherwise broad as to subject matter.” *State v. Sardina-Padilla*, 7 N.W.3d 585, 600 (Minn. 2024).

In addition, the only Facebook Messenger data admitted into evidence at trial was from the time period between October 31 and November 2. Thus, even if the temporal limitation was overly broad because it extended to February, any such error would be harmless beyond a reasonable doubt because the data admitted at trial was all created over

only three days—October 31 through November 2, a narrow window directly related to the time period involved in the offense. *See State v. Horst*, 880 N.W.2d 24, 36 (Minn. 2016) (declining to decide “whether the search warrants were overly broad in their scope because, even if they were, there would be nothing to suppress, as the information obtained by the search warrants was never admitted at trial”). Given these facts, we discern no error in the district court’s determination that the requirements of particularity were satisfied.

We are guided in our conclusion by the supreme court’s very recent opinion in *Sardina-Padilla*, which addressed particularity in connection with a search warrant for the defendant’s Facebook data.² 7 N.W.3d at 598. In *Sardina-Padilla*, the supreme court affirmed that a broad search warrant seeking *all* of a defendant’s Facebook data for two accounts satisfied the minimum constitutional requirements for particularity because the warrant contained a temporal limitation. *Id.* at 599-603. The temporal limitation in that case was a period of three months—two months before the offense and one month after. *Id.* at 592. The supreme court emphasized that the scope of the warrant “approache[d] the outer edge of the particularity requirement,” but held that it satisfied the requirement given the grievous nature of the crimes under investigation—kidnapping and attempted murder—and that “the circumstances justified the investigators’ request for all content from the Facebook accounts within the designated timeframe.” *Id.* at 601-02.

² The supreme court’s opinion in *Sardina-Padilla* was released after initial briefing was completed. We requested and received supplemental briefing from the parties on the impact of *Sardina-Padilla* on this appeal.

In this case, Lott’s role in Z.B.’s death was arguably less grievous than the attempted murder in *Sardina-Padilla*, where the victim was shot and left to die, but the search-warrant evidence included only Lott’s Facebook Messenger data and, even though three and one-half months of data was sought in the warrant, the only evidence admitted at trial was from a narrow three-day window. We thus reject Lott’s argument that the Facebook warrant, as limited by the district court, lacked particularity.

Cellphone Warrant

As to Lott’s contention that the cellphone warrant lacked particularity, this warrant also contained a temporal limitation—October 3 to December 2, 2019. And again, the evidence admitted at trial focused on Lott’s location over the three days relevant to Z.B.’s death, October 31 through November 2. We thus similarly conclude that the district court did not err in its denial of Lott’s motion to suppress the evidence obtained as a result of the search warrant.

II. The district court abused its discretion when sentencing Lott by considering an out-of-state conviction that was not proven by a preponderance of the evidence.

Finally, Lott argues that the district court abused its discretion by sentencing him to 146 months in prison based on a criminal-history score that included an unsubstantiated out-of-state conviction. Calculation of a criminal-history score is reviewed for an abuse of discretion. *State v. Strobel*, 921 N.W.2d 563, 573 (Minn. App. 2018), *aff’d*, 932 N.W.2d 303 (Minn. 2019). A sentence based on an incorrect criminal-history score is an illegal sentence that may be corrected at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007) (referencing Minn. R. Crim. P. 27.03, subd. 9). “When a defendant’s

sentence is based on an incorrect criminal-history score, his case must be remanded for resentencing.” *State v. Woods*, 945 N.W.2d 414, 416-17 (Minn. App. 2020).

An offender’s criminal-history score is the sum of points from eligible prior adult felonies, prior juvenile adjudications, and prior misdemeanors and gross misdemeanors, as well as the offender’s custody status at the time of the offense. Minn. Sent’g Guidelines 2.B.1-7 (Supp. 2019). The presumptive range for Lott’s sentence was based on a criminal-history score of five. This score included one felony point for a Wisconsin identity-theft conviction. To include the Wisconsin conviction in the calculation of Lott’s criminal-history score, the state was required to prove by a preponderance of the evidence both that the conviction would be defined as a felony in Minnesota, and that it would result in a felony-level sentence. *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008); Minn. Sent’g Guidelines 2.B.5.b. In assessing the equivalency of an out-of-state conviction and sentence, the court should primarily consider the offense definition, but also the underlying conduct of the offense. *Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992).

We are persuaded that, as stated in the presentence investigation report (PSI), Lott’s conviction of “Identity Theft-Financial Gain,” under Wis. Stat. § 943.201(2)(a) (2014), appears to equate to an identity-theft conviction under Minn. Stat. § 609.527 (2014). The Wisconsin offense occurs when a person “intentionally uses, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual . . . without the[ir] authorization or consent . . . [t]o obtain credit, money, goods, services, employment, or any other thing of value or benefit.” Wis. Stat.

§ 943.201(2)(a). The Minnesota crime of identity theft pursuant to Minn Stat. § 609.527, subd. 2, occurs when a person “transfers, possesses, or uses an identity that is not the person’s own, with the intent to commit, aid, or abet any unlawful activity.”

We are also persuaded that the state proved that Lott was convicted of the Wisconsin identity-theft offense: the PSI states that Lott pleaded guilty to the Wisconsin identity-theft crime. The state need not provide a certified copy of conviction or adjudication—it must merely submit “persuasive evidence” to substantiate a record of conviction. *State v. Maley*, 714 N.W.2d 708, 711-12 (Minn. App. 2006).

But we agree with Lott that the state failed to prove that the Wisconsin conviction would result in a felony-level sentence in Minnesota. First, the state provided no details about either the number of victims or the value of loss caused by the act of identify theft. This information is needed to determine whether the offense would be a gross-misdemeanor or felony-level offense under Minnesota law. *See* Minn. Stat. § 609.527, subd. 3.

Second, the state also failed to prove that Lott’s sentence for the Wisconsin conviction was for a felony-level offense under Minnesota law. The PSI states only that Lott’s sentence was “withheld,” that he was “placed on supervised probation for 30 months,” and that probation was later revoked, resulting in Lott’s commitment to the local jail for ten months. Under Minnesota law, even if a defendant is convicted of a felony-level offense, the offense will be “deemed” a lower-level offense if the sentence is for a shorter duration than a felony-level sentence. Minn. Stat. § 609.13, subd. 1 (2022) (stating that a felony conviction will be “deemed to be for a misdemeanor or a gross misdemeanor

if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor” or as “a misdemeanor if the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence”).

Without more information about the nature of the offense and the sentence, the record is insufficient for us to determine whether the sentence would qualify as a felony-level sentence in Minnesota. We therefore reverse and remand for resentencing. But because Lott did not object to the district court’s reliance on the Wisconsin conviction in the calculation of his criminal-history score, the state should be permitted on remand “to further develop the sentencing record so that the district court can appropriately make its determination” whether the Wisconsin conviction would qualify as a felony conviction under Minnesota law. *Outlaw*, 748 N.W.2d at 356.

Affirmed in part, reversed in part, and remanded.

LARSON, Judge (concurring specially)

I concur with the majority opinion in Parts I.B and II. I write separately because I respectfully disagree with the majority’s decision that the Facebook warrant was supported by probable cause. But because I would conclude that this constitutional error was harmless beyond a reasonable doubt, I concur in the result.

The United States and Minnesota Constitutions provide that no warrant shall issue without a showing of probable cause. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The probable-cause requirement “seek[s] to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.” *Brinegar v. United States*, 338 U.S. 160, 176 (1949). When, as here, an appellant challenges the district court’s decision that a search-warrant application was supported by probable cause, “our review is limited to the information presented in the application, and the reasonable inferences that can be drawn from that information.” *State v. Sardina-Padilla*, 7 N.W.3d 585, 596 (Minn. 2024). Based on the application, we must evaluate whether the district court had a “substantial basis” to determine that probable cause existed. *State v. Yarbrough*, 841 N.W.2d 619, 622 (Minn. 2014). We afford the district court great deference, “recognizing that doubtful or marginal cases should be largely determined by the preference to be accorded to warrants.” *State v. Fawcett*, 884 N.W.2d 380, 385 (Minn. 2016) (quotations omitted).

“A warrant is supported by probable cause if, on the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. Holland*, 865 N.W.2d 666, 673 (Minn. 2015) (quotations omitted). In other

words, there must be a sufficient “nexus” between the evidence sought and the place to be searched. *Yarbrough*, 841 N.W.2d at 622. This nexus “may be inferred from the totality of the circumstances.” *Id.* Under our substantial-basis standard of review, we consider “the type of crime, the nature of the items sought, the extent of the suspect’s opportunity for concealment, and the normal inferences as to where the suspect would keep the items.” *State v. Pierce*, 358 N.W.2d 672, 673 (Minn. 1984).

Here, the Facebook-warrant application made the following averments connecting Facebook and Z.B.’s death:

- “A Roseville Police detective spoke with patrons of the Motel 6 while officers and detectives were on scene processing the crime scene. The detective had a photo of Lott, retrieved from the internet website—Facebook. One of the patrons confirmed that he recognized the male in the photo (Lott)”
- “[Lott’s mother] told your affiant that her son uses the Facebook name ‘Indiana Jonesy’ and that she sent him a message via Facebook Messenger notifying him that she had contacted police.”
- “Your affiant found [two] Facebook user profiles . . . The two Facebook user profiles share some photos in common with one another. The photos match known photos of [Lott].”
- “In January 2020, your affiant spoke with an investigator from the Chippewa County Sheriff’s Office in Chippewa Falls, Wisconsin. The investigator shared that during the course of an investigation he was conducting, he found Facebook Messenger messages discussing [Z.B.’s] death. The messages include conversation about [Lott] . . . possibly being involved.”
- “Your affiant also knows that often times there is communication between individuals related to criminal

activity around the time they are involved in that activity in the form of . . . social media/communication applications including Facebook and Facebook Messenger. Your affiant believes that the content located on the Facebook accounts belonging to [Lott] will assist in furthering the investigation of the death of [Z.B.].”

Among these, the majority relies on a single statement to conclude that the Facebook-warrant application established the requisite nexus between Z.B.’s death and Lott’s Facebook accounts; namely, that Lott’s mother “sent [Lott] a message via Facebook Messenger notifying him that she had contacted police.” The majority concludes that it is a reasonable inference from this statement that Lott’s Facebook accounts might contain a communication from Lott responding to his mother’s message. According to the majority, that possible response from Lott, alone, established a sufficient nexus between Z.B.’s death and Lott’s Facebook accounts. I respectfully disagree that a third party’s unilateral conduct—absent some indication that the suspect themselves used the social-media account in connection with the crime—creates an inference that is reasonable.

State and federal courts addressing motions to suppress social-media data have consistently denied motions to suppress in cases in which the warrant application included some evidence tying the *defendant*’s conduct to the social-media account. Sometimes that was through the defendant’s publicly available posts. *See, e.g., United States v. Arnold*, No. 15-20652, 2017 WL 4036312 (E.D. Mich. Sept. 13, 2017) (denying motion to suppress Facebook evidence when affidavit cited information from defendants’ publicly available profile including post accusing another individual of being a “federal informant”). Other times, the warrant application included statements from witnesses that the defendant *used*

Facebook in connection with a crime. *See, e.g., United States v. DeLeon*, No. CR 21-8-DLB-EBA, 2021 WL 4338939, at *8 (E.D. Ky. Sept. 23, 2021) (“the information requested was ... based on the Facebook message in which DeLeon requested [criminal] material from one of the victims”). And, in a case like *Sardina-Padilla*, nexus has been shown from the suspect making explicit statements indicating information relevant to a crime may be present on a social-media account. *See* 7 N.W.3d at 598 (emphasizing that defendant made statements during jail phone call asking someone to delete his Facebook account).

Notably absent from state and federal caselaw, however, are cases stating that a nexus is established *without* some action on the part of the defendant. *See United States v. Whitt*, No. 1:17CR060, 2018 WL 447586, at *4 (S.D. Ohio Jan. 17, 2018) (warning that the nexus requirement would become superfluous if all that is required is (1) being a suspect; (2) having a Facebook account; and (3) expert statements about the information suspects are likely to have stored on a Facebook account). And the absence of such cases is unsurprising; if all that is required to create a nexus between a crime and a social-media account is a third party *initiating* a communication, we create a system in which a third party—acting intentionally or unintentionally—could unilaterally manufacture probable cause when probable cause would not otherwise exist. *Cf. United States v. Dennis*, 115 F.3d 524, 529 (7th Cir. 1997) (discussing similar concern in the context of anticipatory warrants).

For this reason, in my view, Lott’s mother’s conduct alone—sending a Facebook message to Lott about Z.B.’s death—cannot by itself create the reasonable inference that Lott discussed Z.B.’s death on Facebook. And without at least some affirmative indication

that Lott *himself* used Facebook in connection with Z.B.’s death, Lott’s mother’s use of Facebook messenger is not sufficient to establish probable cause to search Lott’s Facebook accounts.¹

Reviewing the Facebook-warrant application in its totality, the other averments do not cure this defect. An individual merely having Facebook accounts and being suspected of a crime is not sufficient to form the nexus required to establish probable cause. *See Whitt*, 2018 WL 447586, at *4; *cf. State v. Kahn*, 555 N.W.2d 15, 18 (Minn. App. 1996) (concluding there was insufficient nexus when warrant averred that “(1) respondent was arrested for possession of one ounce of cocaine in Minneapolis; (2) the affiant, an expert in the field of drug enforcement, stated that he knew ‘through training and experience that an ounce of cocaine is considered more [than] that for personal use and indicates that the person possessing that quantity normally sells the drug in smaller quantities’; and (3) that respondent resided at the residence to be searched”).

Moreover, the statement regarding the Wisconsin investigator does not establish any tie between Lott’s Facebook accounts and Z.B.’s death. Third parties using Facebook messenger to “discuss[]” a crime and talk “about [Lott] possibly being involved” does not reasonably create a nexus between Z.B.’s death and *Lott’s* Facebook accounts. At most, the Wisconsin investigator’s statement creates a nexus between the third parties’ Facebook accounts and Z.B.’s death. But a nexus between the crime and the third parties’ Facebook accounts is not the same as a nexus between the crime and Lott’s Facebook accounts.

¹ Lott’s mother’s statement may have created probable cause to obtain a search warrant for Lott’s mother’s Facebook account to determine whether Lott responded to the message.

For these reasons, I would conclude that the Facebook-warrant application was not supported by probable cause because it failed to establish a nexus between Lott's conduct on Facebook and Z.B.'s death. I would accordingly decide that the district court erred when it denied the motion to suppress.

Nonetheless, I concur in the majority's decision to affirm Lott's conviction because the district court's failure to suppress the illegally obtained evidence was harmless beyond a reasonable doubt. *See State v. Caulfield*, 722 N.W.2d 304, 314 (Minn. 2006) ("A constitutional error does not mandate reversal and a new trial if we determine that the error was harmless beyond a reasonable doubt."). Here, after obtaining the warrant for Lott's Facebook accounts, police also obtained a warrant to search Z.B.'s Facebook account. That unchallenged warrant yielded largely the same evidence—Facebook messages that proved Lott sold Z.B. heroin shortly before she died. Thus, even if the district court had granted the motion to suppress, the same information would still have been introduced at trial by way of Z.B.'s Facebook account. I would, therefore, conclude beyond a reasonable doubt that the admission of the messages from Lott's Facebook accounts did not affect the jury's verdict.