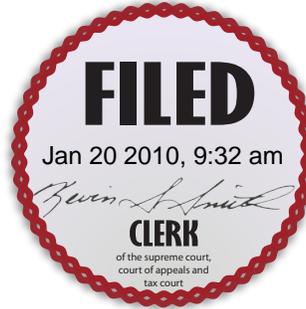


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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KEITH CHANDLER, )  
 )  
Appellant-Defendant, )  
 )  
vs. )  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

No. 49A02-0903-CR-264

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Carol Orbison, Judge  
Cause No. 49G22-0805-MR-122570

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**January 20, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Keith Chandler appeals his convictions for felony murder<sup>1</sup> and robbery as a class A felony.<sup>2</sup>

We affirm.

### ISSUE

Whether the trial court abused its discretion in admitting evidence.

### FACTS

During the weekend prior to May 21, 2008, Rodney Pence purchased three guns: a 380 semi-automatic handgun, a 22 caliber handgun, and an AK-47. He stored them in an abandoned house, near his “Auntie’s house,” which was located at 640 Eugene Street, an area located approximately one-half block west of 30<sup>th</sup> Street and California Street and one and one-half blocks south of West 31<sup>st</sup> Street. (Tr. 352). He left the guns “in the open,” where “[a]nybody had access to them,” including his cousin, Tyrell Resnover, and his sister’s boyfriend, Chandler. (Tr. 370).

On May 19, 2008, Pence and Resnover stayed the night in the abandoned half of a duplex located at 3024 California Street. Tonnia Phillips rented 3022 California Street, the other half of the duplex. Pence’s sister, Wylisha Walton, and Chandler, were staying with Phillips in her half of the duplex.

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<sup>1</sup> Ind. Code § 35-42-1-1.

<sup>2</sup> I.C. § 35-42-5-1.

On the morning of May 20, 2008, Pence, Resnover, and Chandler went to a house on Eugene Street. Pence later left, leaving his cell phone with Chandler. Pence's cell phone number was 317-417-2072.

After Pence left, Resnover and Chandler retrieved Pence's AK-47 and semi-automatic pistol from the abandoned house on Eugene Street. That evening, Chandler, who still had Pence's cell phone, again met with Resnover.

Between 10:00 p.m. and 11:00 p.m, Chandler used Pence's cell phone to call a Domino's Pizza "pizza man." (Tr. 536). Chandler told Resnover that he was going to have the delivery person come to California Street and then "[h]e was going to rob" him. (Tr. 536). After Chandler placed an order with Domino's Pizza, he and Resnover "split up, and went [their] separate ways," with Resnover walking to Eugene Street and Chandler walking "[b]ack to California" Street, near 31<sup>st</sup> Street. (Tr. 537). Resnover took the AK-47 with him, while Chandler kept the pistol.

At approximately 10:21 p.m., Kenneth Graves, a delivery person for a Domino's Pizza located at 501 East 38<sup>th</sup> Street, received an order from a customer identifying himself as "James." (Tr. 618). The customer gave his telephone number as "417-2072" and asked that the order be delivered to "711 West 31<sup>st</sup> off of California." (Tr. 601). Domino's Pizza's caller identification verified that the number from which the person was calling was 417-2072. The order totaled \$51.06. The person placing the order was a "[n]ew customer," having "never called before." (Tr. 602).

Upon receiving the order, Graves refused to make the delivery due to “a gut feeling” because there is “only one way in and one way out on that street.” (Tr. 603). He also became concerned because “customers that order food at this price normally ha[ve] a credit card” and “normally call for their order within an hour to see where their order is”; Domino’s Pizza, however, “didn’t get a call from this order.” (Tr. 604). Given the circumstances, Graves “had this feeling that it was a[n] attempt to robbery [sic].” (Tr. 609).

Sometime after 11:00 p.m., Resnover’s uncle found him walking on Eugene Street and “[t]old [him] to get in the car.” (Tr. 538). Resnover refused and walked “[b]ack to California” Street, where he met Chandler. (Tr. 538). At that point, he and Chandler traded guns “[b]ecause [Resnover] couldn’t run with the AK.” (Tr. 538). Resnover took the pistol because he “was hanging out and [he] felt that [he] needed to protect [him]self.” (Tr. 552).

Resnover and Chandler then went their separate ways again, with Resnover walking “[b]ack to Eugene” Street. (Tr. 540). Shortly thereafter, Resnover continued southwest “towards 29<sup>th</sup> and Martin Luther King” after his “uncle pulled up on [him] again.” (Tr. 540).

At 11:42 p.m., Resnover’s aunt and uncle flagged down Officer Danny Reynolds as he pulled into a gas station at 29<sup>th</sup> and Dr. Martin Luther King. Pointing to Resnover, “who was standing on the north side sidewalk of 29<sup>th</sup> Street directly adjacent to the gas station parking lot,” Resnover’s aunt advised Officer Reynolds that Resnover was her

nephew and that he was a runaway. (Tr. 482). When Officer Reynolds turned to look at Resnover, he “took off running.” (Tr. 483). Officer Reynolds chased him on foot. During the chase, Resnover discarded the pistol. Officer Reynolds apprehended Resnover near 28<sup>th</sup> and Udell Street.

At approximately midnight on May 21, 2008, Oz Karni, a supervisor with U.S.A. Locksmith, sent Ievgen Masliak, a locksmith technician, to “go and unlock a vehicle” at 603 California Street. (Tr. 424). The customer gave his name as James Terrance and his telephone number as 317-417-2072. Masliak, however, could not find the address. U.S.A. Locksmith therefore contacted the purported customer and got a new address. Karni relayed the new address, 603 West 31<sup>st</sup> Street, to Masliak. Karni last spoke with Masliak at 12:19 a.m., when he gave the updated information to him. Karni expected to receive a telephone call from Masliak, informing him that he had finished the job. When he did not hear from Masliak, Karni telephoned Masliak’s cell phone. He also tried calling the customer; however, no one answered.

Later that night, Walton and Phillips awoke to Pence knocking on the front door of 3022 California Street. Pence asked for Chandler because he wanted to get his cell phone back from him. Chandler, however, was not at home. Walton then called Pence’s cell phone. Chandler answered and informed Walton that “he was coming back to the house to bring [Pence’s] phone.” (Tr. 226-27).

While Walton and Pence waited for Chandler, they heard “[l]ike two” gun shots. (Tr. 242). Phillips believed that the gun shots came from 31<sup>st</sup> Street. Approximately five

minutes after hearing the gun shots, Walton “heard somebody run between the house[s].” (Tr. 230). Someone then began pounding on the back door. “[B]y the time [Phillips] g[ot] to the back door,” the person “was at the front door.” (Tr. 264). Phillips opened the front door, letting Chandler in the house; he “looked nervous and scared.” (Tr. 249). “Once he came inside the door, he went straight to the ground.” (Tr. 265). Phillips then noticed police vehicles passing the house.

Chandler was carrying a cell phone; however, it was not Pence’s cell phone. He informed Walton that as he was coming home, he saw “a man that had blood on him already . . . from being shot and he was asking [him] for help.” (Tr. 241). The man asked Chandler to call for help. Chandler claimed that he “grabbed” the man’s cell phone “and he run off with the phone.” (Tr. 241). He told Walton that the man’s shirt had a logo on it. He subsequently threw away the man’s cell phone.

Before throwing away the cell phone, however, Chandler “exchanged the man’s sim card” with his cell phone’s SIM card.<sup>3</sup> (Tr. 243). He then telephoned Walton’s cell phone, to verify that his cell phone worked with the SIM card.

In the meantime, at 12:44 a.m. on May 21, 2008, 911 had received a report of a man shot and on the ground. Records subsequently revealed that the telephone call to 911 originated from the telephone number 317-443-1755, which was the number for Masliak’s cell phone.

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<sup>3</sup> A SIM card is “a card that is inserted into a device (as a cell phone) and that is used to store data (as phone numbers or contact information)[.]” <http://www.merriam-webster.com/dictionary/SIM%20card> (last visited Dec. 10, 2009). “[O]nce the [SIM] card is inserted [into a cell phone] and a battery inserted and powered up, [the SIM card] registers the phone” to the subscriber’s cell phone network. (Tr. 398).

At 12:47 a.m., Officer Shawn Holmes received a dispatch regarding a person shot at 31<sup>st</sup> Street and Clifton Street. The dispatch subsequently relayed that the correct address was in the area of 30<sup>th</sup> Street and California Street, approximately five blocks east of the original address.

Initially, Officer Holmes did not find anything amiss. He therefore patrolled north of the area, turning left onto West 31<sup>st</sup> Street, which is a dead-end street, running parallel to, and south of, I-65. As he turned onto West 31<sup>st</sup> Street, Officer Holmes “found a dead body in the middle of the street.” (Tr. 69). The body was located two houses west from the intersection of West 31<sup>st</sup> Street and California Street, near 607 West 31<sup>st</sup> Street. Officer Holmes noticed that the man’s ankles had been bound with an electrical extension cord, and it appeared that “he’d been shot” in the stomach and chest. (Tr. 84). He also had a “large abrasion to the left side of the forehead.” (Tr. 631). The wounds appeared fresh “because [the blood] hadn’t started thickening up . . . .” (Tr. 85).

The man was wearing jeans and a t-shirt with “a badge shaped logo on the left breast.” (Tr. 630). The logo read, “Locksmith and Emergency . . . .” (Tr. 630). His pockets had been “pulled out,” and the right knee area of the jeans had been torn. (Tr. 630).

During a search of the area, Officer Holmes discovered “lock out tool items” lying next to a white vehicle, which was parked just west of the body. (Tr. 87). The owner of the vehicle, who lived at 611 West 31<sup>st</sup> Street, however, had not called U.S.A. Locksmith for assistance and had not asked anyone to call a locksmith on her behalf.

Officers later identified the victim as Masliak. Officers subsequently discovered his van behind a vacant house at 711 West 31<sup>st</sup> Street, which was the address given to Domino's Pizza for delivery. It was in a dark and secluded area, hidden by trees, weeds, and shrubbery. During a subsequent search and inventory of the van, officers discovered "a spent shell casing" on the front passenger seat. (Tr. 518). The casing was a "7.62 by 39" caliber, the type fired by an AK-47. (Tr. 519). Officers subsequently located Masliak's keys behind 3024 California Street.

Officers later searched the vicinity where they had apprehended Resnover. During their search, they discovered "a hat and a gun behind the house at 822 West 28<sup>th</sup> Street," an area southwest of 31<sup>st</sup> and California Street. (Tr. 167). The gun was a 380 caliber semi-automatic handgun.

At approximately 10:00 a.m. on May 21, 2008, officers with the United States Marshal's Fugitive Task Force arrived at 3022 California Street, after receiving information that Chandler was involved in the shooting and was staying there. Officers found Chandler asleep on the couch. Sergeant Mark Hess placed Chandler under arrest for violating a no-contact order and ordered him to get dressed.

After Chandler dressed, Sergeant Hess asked him if he had "anything else and [Chandler] pointed to some items lying on the table right next to him." (Tr. 307). Among those items was a cell phone, which Chandler had identified as his. Sergeant Hess therefore secured the cell phone since he intended to remove Chandler from the residence.

Sergeant Hess asked Chandler for his cell phone number so that officers could later identify and verify the cell phone as belonging to Chandler once they released it back to him. Chandler, however, could not tell him the number. Sergeant Hess therefore attempted to find the cell phone's number by "look[ing] under 'my info'" on the cell phone. (Tr. 329). He, however, "could not get this phone to operate correctly." (Tr. 329). Therefore, using Chandler's cell phone, Sergeant Hess called his "issued phone to see the caller ID to see what number would pop up." (Tr. 308). When Sergeant Hess called his cell phone, his caller ID showed the number calling it to be 317-443-1755, which was the number that belonged to Masliak's cell phone.

Cell phone records revealed that between 10:07 and 10:17 p.m. on May 20, 2008, several calls were placed from Pence's cell phone to the Domino's Pizza located at 501 East 38<sup>th</sup> Street. Thereafter, calls were exchanged between Pence's cell phone and Walton's cell phone. At 10:32 p.m., a final call to Domino's Pizza was placed from Pence's cell phone.

At 11:48 p.m., a call was made from Pence's cell phone to an Indianapolis locksmith company. At 11:50 and 11:52 p.m., calls were made from Pence's cell phone to U.S.A. Locksmith. A third call was made from Pence's cell phone to U.S.A. Locksmith at 12:05 a.m. on May 21, 2008.

Records for activity on Masliak's SIM card revealed that he and Karni exchanged telephone calls between midnight and 12:08 a.m. on May 21, 2008. Records also showed that a call was made from Masliak's cell phone to Pence's cell phone at 12:11 a.m. on

May 21, 2008. The call was returned at 12:14 a.m. Two additional calls were made from Pence's cell phone to U.S.A. Locksmith at 12:15 a.m. At 12:22 a.m., another call was made from Pence's cell phone to Masliak's cell phone. Records further showed that "all calls going to" Pence's cell phone between 12:40 and 12:48 a.m. and again between 12:52 a.m. and 1:00 a.m. went into voicemail. (Tr. 584).

At 9:08 a.m. on May 21, 2008, a call was placed from Masliak's cell phone to Walton's cell phone. "[T]hat was the same time the [SIM] card powered up on May 21<sup>st</sup>" in Chandler's cell phone. (Tr. 410). Thus, Masliak's SIM card was re-activated on May 21, 2008, after it was placed and used in Chandler's handset. At 10:17 a.m., "the number 443-1755 called 317-281-7507," which number was assigned to Sergeant Hess's cell phone. (Tr. 411). Records for Masliak's cell phone did not reflect any calls to 911, however, because service providers do not bill for calls to 911.

After listening to recordings of the telephone call to 911 reporting a man shot, Detective Jeffrey Patterson identified the caller as Chandler. During an interview with Chandler, Chandler claimed that Resnover had shot Masliak with an AK-47 after attempting to rob him; apparently not realizing that Resnover had been taken into police custody earlier on May 20<sup>th</sup>.

On May 23, 2008, the State charged Chandler with Count I, murder; Count II, felony murder; and Count III, class A felony robbery. On December 23, 2008, the State filed a notice of intent to introduce evidence, "relat[ing] to a planned robbery of

Dominos' [sic] pizza delivery man, Kenneth Graves" pursuant to Indiana Evidence Rule 404(b). (App. 157). The trial court granted the State's motion following a hearing.

On January 23, 2009, Chandler filed a motion to suppress the evidence obtained from the SIM card removed from his cell phone. The trial court denied the motion.

The trial court commenced a four-day jury trial on February 2, 2009. The jury heard testimony from Reslover that Chandler intended to rob a pizza delivery person the night of May 20, 2008. The jury also heard testimony from Graves and Graves' manager regarding the pizza delivery order placed by a customer purportedly named James and giving Pence's cell phone number. The jury further heard testimony from Graves that he believed the order to be suspicious and that he noted on his delivery ticket that someone had been killed and robbed at the delivery location. The trial court also admitted into evidence Graves' delivery ticket from the night of May 20, 2008, which showed the purported customer's name, telephone number, and address.

The jury found Chandler guilty of Count II, felony murder; and Count III, class A felony robbery. The trial court held a sentencing hearing on February 25, 2009. For purposes of sentencing, the trial court merged Count III with Count II and sentenced Chandler to sixty-five years.

### DECISION

Chandler contends that the trial court abused its discretion with respect to two evidentiary issues. He asserts that the trial court improperly admitted "evidence concerning a potential robbery of a Domino's Pizza delivery man pursuant to Indiana

Evidence Rule 404(b)” and improperly admitted “evidence seized from a warrantless search of [his] cell phone.” Chandler’s Br. at 8.

We note that the admission or exclusion of evidence is within the sound discretion of the trial court, and we will reverse the trial court’s determination only for an abuse of that discretion. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the trial court. In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court’s ruling and any unrefuted evidence in the appellant’s favor. As a rule, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. In determining whether an evidentiary ruling affected a party’s substantial rights, we assess the probable impact of the evidence on the trier of fact.

*Redding v. State*, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006) (citations omitted), *reh’g denied*.

#### 1. Testimony

Chandler asserts that the trial court abused its discretion in admitting evidence of the pizza order placed with Domino’s Pizza the night of May 20, 2008. Indiana Evidence Rule 404(b) provides in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

The purpose of this rule is “to prevent the jury from assessing the defendant’s guilt in the present case on the basis of his past propensities.” *Bryant v. State*, 802 N.E.2d 486, 498-99 (Ind. Ct. App. 2004), *trans. denied*. Thus, the State may not admit evidence of prior bad acts where it offers the evidence for the sole purpose of creating a forbidden

inference that the defendant's present charged conduct is in conformity with his prior bad conduct. *Id.* at 499.

Evidence Rule 404(b), however, does not bar evidence of uncharged misconduct “which is ‘inextricably bound up’ with the charged crime . . . .” *Willingham v. State*, 794 N.E.2d 1110, 1116 (Ind. Ct. App. 2003). Furthermore, it “does not bar evidence of uncharged acts that are ‘intrinsic’ to the charged offense.” *Wages v. State*, 863 N.E.2d 408, 411, (Ind. Ct. App. 2007), *trans. denied*.

“Other acts are ‘intrinsic’ if they occur at the same time and under the same circumstances as the crimes charged.” By contrast, the paradigm of inadmissible evidence under Rule 404(b) is a crime committed on another day in another place, evidence whose only apparent purpose is to prove the defendant is a person who commits crimes. “Evidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted.”

*Id.* (internal citations omitted).

When a defendant objects to the admission of evidence on the grounds that it violates Evidence Rule 404(b), we must: (1) determine whether the evidence is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of such evidence against its prejudicial effect. *Wertz v. State*, 771 N.E.2d 677, 683-84 (Ind. Ct. App. 2002). “The trial court has wide latitude in weighing the probative value of evidence against the potentially prejudicial effects of its admission.” *Willingham*, 794 N.E.2d at 1116. We will affirm the trial court's

admission of evidence of prior bad acts or misconduct if it is sustainable on any basis in the record. *Bryant*, 802 N.E.2d at 499.

The evidence concerning the placing of the pizza order is probative of Chandler's motive, preparation, and plan to rob a service worker after having lured him with a fictitious name and to a fictitious address. Furthermore, the pizza order occurred during the same time period and under circumstances similar to those leading up to the crime charged.

Moreover, we do not find that the prejudicial nature of the evidence substantially outweighs its probative value, where it is only prejudicial in that it is highly probative of Chandler's perpetration of the charged offense. *See Willingham*, 794 N.E.2d at 1117. "Thus, the evidence admitted does not rise to the level of unfairly prejudicial." *Id.* We therefore cannot say that the trial court abused its discretion by allowing the evidence pertaining to the pizza order.

Even if the trial court improperly admitted the evidence pertaining to the pizza order, we conclude that any error in the admission of the evidence was harmless. "The improper admission of evidence is harmless error when the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood that the questioned evidence contributed to the conviction." *Wertz*, 771 N.E.2d at 684 (quoting *Headlee v. State*, 678 N.E.2d 823, 826 (Ind. Ct. App. 1997), *trans. denied*).

In this case, there was substantial evidence of Chandler's guilt. Witnesses testified that Chandler had possession of Pence's cell phone the night of May 20, 2008, and the morning of May 21, 2008. Records revealed that telephone calls were made to U.S.A. Locksmith and Masliak's cell phone from Pence's cell phone. Witnesses later observed Chandler in possession of what was later revealed to be Masliak's SIM card. Resnover also testified that he left the AK-47 with Chandler; officers later discovered a spent shell casing from an AK-47 in Masliak's van. In light of this evidence, any error in admitting the evidence regarding the pizza order was harmless.

## 2. Search

Chandler also asserts that the trial court abused its discretion in admitting evidence obtained from the SIM card found in Chandler's cell phone. Specifically, he argues that Sergeant Hess illegally seized and searched his cell phone.<sup>4</sup>

The Fourth Amendment protects persons from unreasonable search and seizure and this protection has been extended to the states through the Fourteenth Amendment. The fundamental purpose of the Fourth Amendment to the United States Constitution is to protect the legitimate expectations of privacy that citizens possess in their persons, their homes, and their belongings. For a search to be reasonable under the Fourth Amendment, a warrant is required unless an exception to the warrant requirement applies. The State bears the burden of proving that a warrantless search falls within an exception to the warrant requirement.

*Taylor v. State*, 842 N.E.2d 327, 330-331 (Ind. 2006) (citations omitted).

A search incident to a lawful arrest is an exception to the Fourth Amendment's warrant requirement. *Fentress v. State*, 863 N.E.2d 420, 423 (Ind. Ct. App. 2007). "A

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<sup>4</sup> Citing to the transcript, Chandler contends that Sergeant Hess removed the SIM card from the cell phone. Sergeant Hess, however, testified that he did not "recall doing that at all, actually." (Tr. 326).

search incident to lawful arrest allows the arresting officer to ‘conduct a warrantless search of the arrestee’s person and the area within his or her immediate control.’” *Id.* at 423-24 (quoting *Wilson v. State*, 754 N.E.2d 950, 956 (Ind. Ct. App. 2001)).

Here, Sergeant Hess had placed Chandler under arrest for violating a no-contact order when he took Chandler’s cell phone. Then, in order to identify the cell phone as Chandler’s by obtaining the cell phone’s number, he used it to call his own cell phone. Because at this time there was probable cause to arrest Chandler, this was a valid search incident to arrest. *See Johnson v. State*, 831 N.E.2d 163, 168 (Ind. Ct. App. 2005) (finding no Fourth Amendment violation where detectives, upon conducting a search incident to an arrest, seized the defendant’s pager and then scrolled through the numbers stored in the pager’s memory), *trans. denied*. Therefore, the trial court did not abuse its discretion in admitting evidence obtained from the cell phone, which Chandler identified as his; was within Chandler’s immediate area; and was used to place a single call in order to verify its number.<sup>5</sup>

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<sup>5</sup> Chandler does not argue that the arrest was unlawful. He also does not refute that the cell phone was within his immediate control. Even if this were not a search incident to an arrest, we would find no abuse of discretion in admitting the evidence. “Within the meaning of the Fourth Amendment, a ‘seizure’ occurs when a state actor meaningfully interferes with an individual’s possessory interest in property, and a ‘search’ occurs when an expectation of privacy that society is prepared to recognize as reasonable is infringed.” *George v. State*, 901 N.E.2d 590, 596 (Ind. Ct. App. 2008) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)), *trans. denied*.

Here, we cannot say that Sergeant Hess meaningfully interfered with Chandler’s possessory interest in the cell phone, where he retrieved the cell phone on behalf of Chandler. We also cannot say that Sergeant Hess’s act of calling his cell phone with Chandler’s cell phone constituted a search, where he did not search the cell phone’s computer memory or contents. *See Smith v. State*, 713 N.E.2d 338, 344 (Ind. Ct. App. 1999) (finding the search and seizure of a cellular phone’s computer memory to be unreasonable under the Fourth Amendment), *trans. denied*.

Affirmed.

MAY, J., and KIRSCH, J., concur.