

March 5, 2017

**By Reg P. Wydeven
Throw a Fitbit**

Last week I wrote about a man in Ohio who was charged with burning his house down. The police decided to arrest him after data from the man's pacemaker did not show that he had an elevated heartrate during the period of time he claimed to have broken his window, packed personal items and tossed them outside, and then escaped the blaze himself.

This isn't the first time a person's biometric data was used in the courtroom. A few years ago I wrote about McLeod Law, LLP, the Canadian law firm that used data from their client's Fitbit in her personal injury lawsuit. Because she was a personal trainer, her Fitbit revealed dramatically reduced physical activity after the accident. Here, the woman voluntarily shared the data from her Fitbit to prove her case.

However, investigators have also learned to use people's biometric data against them.

Last June, Nina Risley traveled from her home in St. Petersburg, Florida, to stay with her boss in Lancaster, Pennsylvania. While there, she called 911 to report that she was raped. The 43-year-old told the police that she woke up around midnight with a home invader on top of her who then pulled her out of bed and raped her.

The Lancaster police could not uncover any evidence that would support her story, such as footprints outside in the snow from boots she said the attacker was wearing, or any sign of snow or tracks inside.

The police asked if she had a personal tracking device. Risley indicated she had a Fitbit Surge, but lost it in the struggle with her assailant. The police, however, uncovered her Fitbit. The data on the device revealed that she was active, awake and walking around the entire night. Investigators concluded that she staged the scene by overturning a chair and planting a knife nearby. As a result, Risley was the one who was charged with misdemeanor counts of making a false report and tampering with evidence.

Law enforcement and legal experts have started to characterize wearable tracking devices as the human body's "black box." They monitor all sorts of data including steps, sleeping habits and sometimes even location with GPS sensors.

"When we have technology like Fitbit we're going to take advantage of that," explained Craig Stedman, Lancaster county district attorney, to The Today Show during an interview. "We're going to have to adapt and use that to help us do our jobs."

Fitbits have also been used in family court. Data from personal tracking devices has been used in divorces, such as one spouse using the other's GPS data to prove they were at their lover's home at a specified time with an elevated heartrate.

According to James T. McLaren, a divorce lawyer in Columbia, S.C., and president of the American Academy of Matrimonial Lawyers, a 2012 survey of divorce lawyers reflected a significant increase in the number of cases using evidence from smartphones and social networking sites.

So if you use a personal tracking device to keep track of your data, just be wary of who else might be monitoring you.

This article originally appeared in the Appleton Post-Crescent newspaper and is reprinted with the permission of Gannett Co., Inc. © 2017 McCarty Law LLP. All rights reserved.