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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALBERTO COLT SARMIENTO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 15-1-04435-6

Brief of Respondent

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Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.	1
1.	Whether defendant's challenge to the presumptively valid search warrants fails, where the warrants are supported by probable cause and sufficiently particular? Even if the warrants are deficient, was any error in the admission of evidence harmless?	1
2.	Whether evidence of a non-victim witness's ineligibility to obtain a U-Visa was admissible at trial, where the evidence failed to establish motivation for the witness to exaggerate or falsify his testimony and was therefore irrelevant? Was any error harmless beyond a reasonable doubt?	1
3.	Whether defendant received ineffective assistance of counsel, where counsel's decision not to request a defense of others instruction from the court was a legitimate tactical decision in light of the evidence presented at trial?	1
4.	Whether the cumulative error doctrine applies where defendant fails to show any error occurred?	1
5.	Whether, viewed in the light most favorable to the State, sufficient evidence supports defendant's conviction for unlawful possession of a firearm, where defendant knowingly transported a firearm in his truck and directed another to use the firearm to commit a crime?	1
B.	STATEMENT OF THE CASE.....	1
1.	PROCEDURE.....	1
2.	FACTS	3

C.	ARGUMENT.....	10
1.	DEFENDANT’S CHALLENGE TO THE PRESUMPTIVELY VALID SEARCH WARRANTS FAILS, WHERE EACH WARRANT WAS SUPPORTED BY PROBABLE CAUSE AND SUFFICIENTLY PARTICULAR.	10
2.	THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF A NON-VICTIM WITNESS’S IMMIGRATION STATUS AND KNOWLEDGE OF THE U-VISA PROGRAM, WHERE THE EVIDENCE WAS IRRELEVANT AND THEREFORE INADMISSIBLE. .	42
3.	DEFENDANT FAILS TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.....	56
4.	DEFENDANT FAILS TO SHOW CUMULATIVE ERROR WHERE NO PREJUDICIAL ERROR OCCURRED.....	66
5.	VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE SUPPORTS DEFENDANT’S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE.....	68
D.	CONCLUSION.....	75

Table of Authorities

State Cases

<i>In re Pers. Restraint of Cross</i> , 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014).....	66
<i>In re Pers. Restraint of Davis</i> , 152 Wn.2d 647, d 745 101 P.3d 1 (2004).....	59
<i>In re Pers. Restraint of Elmore</i> , 162 Wn.2d 236, 257, 172 P.3d 335 (2007).....	58
<i>State v. Anderson</i> , 141 Wn.2d 357, 5 P.3d 1247 (2000).....	69
<i>State v. Banks</i> , 149 Wn.2d 38, 43, 65 P.3d 1198 (2003)	52
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988).....	68
<i>State v. Berg</i> , 181 Wn.2d 857, 867, 337 P.3d 310 (2014).....	69
<i>State v. Besola</i> , 184 Wn.2d 605, 610, 359 P.3d 799 (2015).....	13, 16
<i>State v. Bowen</i> , 157 Wn. App. 821, 828, 239 P.3d 1114 (2010).....	70, 71
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	57
<i>State v. Callahan</i> , 77 Wn.2d 27, 29, 459 P.2d 400 (1969)	70
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	69
<i>State v. Cannon</i> , 120 Wn. App. 86, 90, 84 P.3d 283 (2004).....	68
<i>State v. Cantabrana</i> , 83 Wn. App. 204, 208, 921 P.2d 572 (1996)	71
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	57

<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	69
<i>State v. Chamberlin</i> , 161 Wn.2d 30, 41, 162 P.3d 389 (2007).....	11
<i>State v. Chenoweth</i> , 127 Wn. App. 444, 455, 111 P.3d 1217 (2005).....	11
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	57
<i>State v. Clark</i> , 143 Wn.2d 731, 748, 24 P.3d 1006 (2001).....	12
<i>State v. Collins</i> , 76 Wn. App. 496, 501, 886 P.2d 243 (1995).....	71
<i>State v. Condon</i> , 72 Wn. App. 638, 642-44, 865 P.2d 521 (1993).....	12
<i>State v. Darden</i> , 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).....	42, 43, 44
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	68
<i>State v. Echeverria</i> , 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).....	71
<i>State v. G.M.V.</i> , 135 Wn. App. 366, 371-72, 144 P.3d 358 (2006).....	12
<i>State v. Garcia</i> , 179 Wn.2d 828, 844, 318 P.3d 266 (2014).....	43
<i>State v. Garrett</i> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994).....	65
<i>State v. Greiff</i> , 141 Wn.2d 910, 929, 10 P.3d 390 (2000).....	66
<i>State v. Grier</i> , 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).....	58, 59, 60
<i>State v. Guloy</i> , 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).....	37, 52, 53, 54, 55
<i>State v. Hagen</i> , 55 Wn. App. 494, 499, 781 P.2d 892 (1989).....	70
<i>State v. Harner</i> , 153 Wn.2d 228, 234, 103 P.3d 738 (2004).....	34
<i>State v. Helmka</i> , 86 Wn.2d 91, 93, 542 P.2d 115 (1975).....	12, 13
<i>State v. Herzog</i> , 73 Wn. App. 34, 56, 867 P.2d 648 (1994).....	12

<i>State v. Hieb</i> , 107 Wn.2d 97, 109, 727 P.2d 239 (1986).....	52
<i>State v. Higgs</i> , 177 Wn. App. 414, 425-26, 311 P.3d 1266 (2013).....	16, 17, 33
<i>State v. Hilton</i> , 164 Wn. App. 81, 99, 261 P.3d 683 (2011)	43
<i>State v. Hodges</i> , 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003).....	67
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	68
<i>State v. Homan</i> , 181 Wn.2d 102, 106, 330 P.3d 182 (2014)	69
<i>State v. Hopkins</i> , 113 Wn. App. 954, 958, 55 P.3d 691 (2002).....	10
<i>State v. Ibarra-Cisneros</i> , 172 Wn.2d 880, 885, 263 P.3d 591 (2011)	34
<i>State v. Jeffrey</i> , 77 Wn. App. 222, 227, 889 P.2d 956 (1995)	71
<i>State v. Jones</i> , 168 Wn.2d 713, 720, 230 P.3d 576 (2010)	44
<i>State v. Keodara</i> , 191 Wn. App. 305, 364 P.3d 777 (2015).....	passim
<i>State v. Libero</i> , 168 Wn. App. 612, 616, 277 P.3d 708 (2012).....	34
<i>State v. Maddox</i> , 116 Wn. App. 796, 807–09, 67 P.3d 1135 (2003)	18
<i>State v. Manion</i> , 173 Wn. App. 610, 634, 295 P.3d 270 (2013).....	70
<i>State v. Martinez</i> , 123 Wn. App. 841, 845, 99 P.3d 418 (2004).....	69
<i>State v. McCullum</i> , 98 Wn.2d 484, 495, 656 P.2d 1064 (1983).....	61
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	57, 65
<i>State v. McFarland</i> , 73 Wn. App. 57, 70, 867 P.2d 660 (1994).....	72
<i>State v. McKee</i> , 3 Wn. App.2d 11, 14, 413 P.3d 1049 (2018), <i>reversed on other grounds by</i> 438 P.3d 528 (2019).....	passim

<i>State v. McReynolds</i> , 104 Wn. App. 560, 568-69, 17 P.3d 608 (2001).....	11, 12
<i>State v. Morgan</i> , 78 Wn. App. 208, 212, 896 P.2d 731 (1995).....	71
<i>State v. Neth</i> , 165 Wn.2d 177, 182, 196 P.3d 658 (2008).....	passim
<i>State v. Penn</i> , 89 Wn.2d 63, 66, 568 P.2d 797 (1977)	60, 61
<i>State v. Perrone</i> , 119 Wn.2d 538, 549, 834 P.2d 611 (1992).....	11, 13, 16, 17
<i>State v. Rader</i> , 118 Wash. 198, 203, 203 P.3d 68 (1922)	61
<i>State v. Reid</i> , 40 Wn. App. 319, 325-26, 698 P.2d 588 (1985)	72
<i>State v. Renfro</i> , 96 Wn.2d 902, 909, 639 P.2d 737, <i>cert. denied</i> , 459 U.S. 842 (1982).....	65
<i>State v. Riley</i> , 121 Wn.2d 22, 28, 846 P.2d 1365 (1993)	16, 17, 29, 59
<i>State v. Russell</i> , 125 Wn.2d 24, 92, 882 P.2d 747 (1994).....	43
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	68
<i>State v. Smith</i> , 148 Wn.2d 122, 139, 59 P.3d 74 (2002).....	37
<i>State v. Smith</i> , 155 Wn.2d 496, 502, 120 P.3d 559 (2005)	68
<i>State v. Staley</i> , 123 Wn.2d 794, 798, 872 P.2d 502 (1994).....	70
<i>State v. Stenson</i> , 132 Wn.2d 668, 692, 940 P.2d 1239 (1997).....	15
<i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, <i>review denied</i> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	66
<i>State v. Streepy</i> , 199 Wn. App. 487, 400 P.3d 339 (2017).....	49, 50, 51
<i>State v. Tarter</i> , 111 Wn. App. 336, 341, 44 P.3d 899 (2002).....	11
<i>State v. Terrovona</i> , 105 Wn.2d 632, 648, 716 P.2d 295 (1986).....	12

<i>State v. Thein</i> , 138 Wn.2d 133, 145-46, 977 P.2d 582 (1999).....	11, 12, 23
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	56, 57, 58
<i>State v. Thompson</i> , 169 Wn. App. 436, 495, 290 P.3d 996 (2012)	59
<i>State v. Turner</i> , 103 Wn. App. 515, 521, 13 P.3d 234 (2000)	71, 72, 74
<i>State v. Turner</i> , 18 Wn. App. 727, 729, 571 P.2d 955 (1977)	12
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)	68
<i>State v. Venegas</i> , 155 Wn. App. 507, 520, 228 P.3d 813 (2010).....	67
<i>State v. Walker</i> , 136 Wn.2d 767, 777, 966 P.2d 883 (1998).....	65
<i>State v. Watt</i> , 160 Wn.2d 626, 635, 160 P.3d 640 (2007)	53
<i>State v. Weber</i> , 159 Wn.2d 252, 279, 149 P.3d 646, 660 (2006)	66, 67
<i>State v. Wilcoxon</i> , 185 Wn.2d 324, 335-36, 373 P.3d 224 (2016).....	54
<i>State v. Withers</i> , 8 Wn. App. 123, 504 P.2d 1151 (1972).....	13
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).....	67
Federal and Other Jurisdiction	
<i>Andersen v. Maryland</i> , 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976).....	14
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).....	52
<i>Bloom v. State</i> , 283 So.2d 134, 136 (Fla. Dist. Ct. App. 1973)	16
<i>Chambers v. Mississippi</i> , 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	42
<i>Chapman v. California</i> , 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	53

<i>Delaware v. Van Arsdall</i> , 475 U.S. 673, 684, 106 S. Ct. 1431. 89 L. Ed. 2d 674 (1986).....	43, 52, 53, 54
<i>Franks v. Delaware</i> , 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).....	10
<i>Groh v. Ramirez</i> , 540 U.S. 551, 557-58, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004).....	17
<i>Hendricks v. Calderon</i> , 70 F.3d 1032, 1041 (9th Cir. 1995).....	59
<i>Johnson v. State</i> , 472 S.W.3d 486, 490 (Ark. 2015)	20
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	56
<i>Neder v. United States</i> , 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	52
<i>Riley v. California</i> , 573 U.S. 373, 393-97, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).....	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	56, 57, 58
<i>United States v. Adjani</i> , 452 F.3d 1140, 1150 (9th Cir. 2006).....	15
<i>United States v. Bass</i> , 785 F.3d 1043, 1049 (6th Cir. 2015).....	21, 30
<i>United States v. Blake</i> , 868 F.3d 960, 974 (11th Cir. 2017).....	33
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	56
<i>United States v. Dozier</i> , 844 F.2d 701, 705 (9th Cir. 1988).....	10
<i>United States v. Fitzgerald</i> , 724 F.2d 633, 637 (8th Cir.1983).....	17
<i>United States v. Flores</i> , 802 F.3d 1028, 1044-45 (9th Cir. 2015).....	33

<i>United States v. Gholston</i> , 993 F. Supp. 2d 704, 719 (E.D. Mich. 2014)	26
<i>United States v. Giannetta</i> , 909 F.2d 571, 577 (1st Cir. 1990).....	15
<i>United States v. Giberson</i> , 527 F.3d 882, 887-90 (9th Cir. 2008)	16
<i>United States v. Grimmett</i> , 439 F.3d 1263, 1270 (10th Cir. 2006).....	14
<i>United States v. Hasting</i> , 461 U.S. 499, 508-09, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983).....	54
<i>United States v. Heldt</i> , 668 F.3d 1238, 1267 (D.C. Cir. 1982)	14
<i>United States v. Rude</i> , 88 F.3d 1538, 1552 (9th Cir. 1996)	15
<i>United States v. Spearman</i> , 532 F.2d 132, 133 (9th Cir. 1976).....	12
<i>United States v. Upham</i> , 168 F.3d 532, 535 (1st Cir.1999).....	15
 Constitutional Provisions	
Article I, section 7, Washington State Constitution.....	34
Article, section 22, Washington State Constitution	42
Fourth Amendment, United States Constitution.....	passim
Sixth Amendment, United States Constitution	42, 44, 56
 Statutes	
8 U.S.C. § 1101(a)(15)(U)(i)	46
8 U.S.C. § 1255(m).....	45
8 U.S.C. § 1101(a)(15)(U)(iii)	45
8 U.S.C. § 1184(p)(6)	45
RCW 9.41.040(2)(a)	69

RCW 9.68A.040.....	24
RCW 9.68A.050.....	24
RCW 9.94A.535(3)(aa).....	38
RCW 9A.16.010(1).....	60
RCW 9A.16.020(3).....	60
RCW 9A.16.050.....	60
RCW 9A.32.030.....	19
Rules and Regulations	
C.F.R. § 214.14(14)	46
CrR 3.6.....	passim
ER 401	43
ER 403	43
Other Authorities	
Washington Pattern Jury Instruction – Criminal (WPIC) 133.02.01	69
Washington Pattern Jury Instruction – Criminal (WPIC) 16.02.....	60
Washington Pattern Jury Instruction – Criminal (WPIC) 17.02.....	60

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant's challenge to the presumptively valid search warrants fails, where the warrants are supported by probable cause and sufficiently particular? Even if the warrants are deficient, was any error in the admission of evidence harmless?
2. Whether evidence of a non-victim witness's ineligibility to obtain a U-Visa was admissible at trial, where the evidence failed to establish motivation for the witness to exaggerate or falsify his testimony and was therefore irrelevant? Was any error harmless beyond a reasonable doubt?
3. Whether defendant received ineffective assistance of counsel, where counsel's decision not to request a defense of others instruction from the court was a legitimate tactical decision in light of the evidence presented at trial?
4. Whether the cumulative error doctrine applies where defendant fails to show any error occurred?
5. Whether, viewed in the light most favorable to the State, sufficient evidence supports defendant's conviction for unlawful possession of a firearm, where defendant knowingly transported a firearm in his truck and directed another to use the firearm to commit a crime?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Alberto Colt Sarmiento, hereinafter "defendant," was charged with one count of Murder in the First Degree (Count I), one count of Murder in the Second Degree (Count II), two counts of Assault in the First Degree

(Counts III and IV), and one count of Unlawful Possession of a Firearm in the Second Degree (Count V). CP 27-30.¹ Defendant was charged as an accomplice as to Counts I through IV. *Id.* Counts I through IV also included firearm sentencing enhancements, and all five counts included a gang aggravator. *Id.*

Trial commenced on January 8, 2018. RP 3. Defendant moved to suppress evidence derived from various search warrants, to include defendant's phone and Facebook records. CP 34, 50-61, 76-85, 139-162, 386-477. *See also*, RP 39-47.² The court reviewed the challenged search warrants and accompanying affidavits and denied defendant's motion, ruling, "And we all know, I don't need to see what was found in the search warrant, I need to look at the Affidavit for Probable Cause for the search warrant and see whether there's any flaws with that... Each one of these, I think, is not overbroad and is perfectly appropriate. There's a nexus... So I'm going to deny the motion to suppress." RP 47-49; CrR 3.6 Exhibits 1-7.

The case proceeded to jury trial. The jury found defendant guilty of Manslaughter in the First Degree (lesser included offense to Murder in the

¹ "CP" refers to the Clerk's Papers.

² The verbatim report of proceedings is contained in multiple volumes with consecutive pagination and will be referred to by "RP" followed by the page number. Two volumes – Volumes 6-A and 7-A containing voir dire and opening statements – are paginated separately and will be referred to by "6A RP" or "7A RP" followed by the page number.

First Degree), Murder in the Second Degree, both counts of Assault in the First Degree, and Unlawful Possession of a Firearm. RP 2074-86; CP 252-272. The jury also returned special verdicts finding the gang aggravator and firearm enhancement. *Id.* The court vacated the manslaughter conviction. *See* CP 328-342 (¶ 3.2).

Sentencing was held on March 9, 2018. RP 2091; CP 328-342. The court imposed a total of 730 months confinement, which included an exceptional sentence on the murder conviction. CP 324-327, 328-342; RP 2113-15. Defendant timely appealed. CP 318.

2. FACTS

Eddie Contreras first met defendant around September 30, 2015. RP 814, 826. Contreras observed defendant staring at him and asked if there was a problem. RP 814. Defendant responded in the affirmative, and the two engaged in a fistfight. RP 815-16. They shook hands after the fight, exchanged names, and spoke for a few minutes. RP 817-818. Defendant introduced himself as “Taxer” and identified himself as a Varrio Sureno Lokotes (VSL) gang member. RP 819, 832. Contreras told defendant he represented 18th Street, another gang. RP 819-20.

A week or two after the fight, defendant sent Contreras a friend request on Facebook and Contreras accepted. RP 824. Contreras’ Facebook name was “Boxer Contreras;” defendant’s name was

“TooxLokote Akataxer.” RP 832. Defendant proceeded to initiate conversations with Contreras via Facebook. RP 829, 832, 838, 843. The conversations started off friendly but became more intense over time. RP 829. Defendant began to suspect that Contreras was not really an 18th Street gang member. *See* Exhibit 98 at 1-2. On October 27, 2015, defendant sent Contreras a message asking, “WATS a chongo.” RP 845; Exhibit 32. “Chongo” is a derogatory term for “monkey.” RP 845-46, 1739-40. Contreras responded by asking defendant if he was being disrespectful and if there was a problem. RP 848; Ex. 32. Defendant wrote back, “Nah I’m askin...So it’s disrespect.” RP 848; Ex. 32. Defendant proceeded to question whether Contreras was from California and whether he was a Sureno gang member. RP 848-56; Ex. 32.

A few minutes later, defendant messaged Contreras asking, “U tell someone to call...From yaks...They said westside and hung up.”³ RP 857. Contreras responded with an insult: “Yea Deez nuts.”⁴ RP 858; Ex. 32. Defendant complained to others on Facebook about Contreras’ comment. Ex. 98 at 3. On November 1, 2015, defendant messaged Contreras challenging him to another fight. RP 859; Ex. 32. Although Contreras accepted, the fight did not materialize that day. RP 859-60, 865.

³ “Yaks” meaning Yakima. RP 857.

⁴ “Nuts” meaning testicles. RP 858.

Defendant messaged Contreras again on November 2nd, and the two agreed to meet that night at the Community Health Center in Salishan to fight. RP 865-70. The fight was intended to be fists only, no weapons. RP 870, 887; Ex. 32.

Just prior to the planned fight, defendant, Juan Zuniga, and Trino Martinez were at Steven Gamez's residence. RP 966-67. Gamez, Zuniga, and Martinez were all gang members affiliated with the Southside Criminals. RP 962-66, 1795. Defendant expressed his anger and frustration to the group regarding a disrespectful individual (Contreras) who talked about putting his balls in defendant's mouth. RP 1009-10. *See also*, RP 1030-34 (defendant's Facebook communications with Gamez regarding a "tall fool" who "started shit"); Ex. 98 at 4-5. Defendant also indicated the individual falsely claimed to be part of 18th Street. RP 1010-11. As they were talking, Martinez pulled out a gun and passed it back and forth with Zuniga. RP 1013-15, 1017. Defendant saw the gun. RP 1020. Defendant, Martinez, and Zuniga talked about "putting in work," meaning work for the gang. RP 1010, 1016-17, 1028. The three left Gamez's residence with the gun and drove off in defendant's black truck. RP 974, 976, 1008-09, 1024.

Contreras was hanging out with friends Elijah Crawford and Isaac Fogalele that night. RP 812-13, 871-72. He decided to bring both

Crawford and Fogalele along to the fight so they could keep an eye out and jump in if necessary. RP 772, 872-73. The three drove to the fight location but left after defendant failed to appear. RP 768, 873-74. Shortly thereafter, Contreras received a photo from defendant of the Community Health Center, so Contreras, Crawford and Fogalele drove back to the fight location. RP 875, 885-87.

When they arrived, defendant was standing outside of his parked truck. RP 770-72, 890-91. The three got out of Contreras' van, and as Contreras started walking he heard defendant say, "You talking shit, huh?" RP 872, 892-93. At the same time, a male wearing all black with a bandana over his face came running towards them and started shooting at Contreras and his friends. RP 782-84, 892-96. Defendant just stood there as if "he knew what was going on." RP 910-11, 1612-13. Contreras started running and heard multiple gunshots. RP 895, 897. Fogalele attempted to seek cover inside the van but was hit by a bullet. RP 782, 787. The bullet traveled through his shoulder and cheek, stopping only a few inches from Fogalele's brain. RP 789. Crawford was also hit by a bullet and died at the scene. RP 472, 556-57, 1147, 1149, 1156-57.

Police responded to the scene. *See* RP 553-59, 573-74. Contreras was screaming and appeared animated; he relayed to police the circumstances of the fight and said the gunman starting shooting at them.

RP 577-86. Nine shell casings were recovered from the scene. RP 630. The Washington State Patrol crime lab later processed the casings and determined that all nine were fired from the same gun. RP 1218-19, 1228-29. The gun used in the shooting was never recovered. RP 1686.

Contreras spoke with detectives later that night and described the two individuals involved in the shooting: the male shooter and “Taxer” (defendant). RP 899, 1483-92. Contreras attempted to show detectives defendant’s Facebook page on his phone, but it appeared Contreras had been blocked and no longer had access. RP 899-900, 1492-94. Contreras then showed police his Facebook communications with defendant; he also gave police his phone. RP 1494-95; Ex. 34. Contreras was able to identify defendant through photos. RP 900-01, 1497-99; Ex. 36. Police subsequently confirmed defendant’s identity. RP 1501-02. A warrant was issued for defendant’s arrest. RP 1614.

After the shooting, defendant fled the area and stayed with his uncle, Raymundo Gomez, at his uncle’s bakery in Centralia. RP 1304-10. Gomez subsequently learned of the warrant for defendant’s arrest pertaining to the homicide. RP 1313-16. Gomez confronted defendant and asked him if he had done it. RP 1330. Defendant admitted he planned the shooting with his friends. RP 1330-31, 1336-37, 1339. Gomez called police a few days later and reported defendant’s location. RP 1312-13,

1332-34. Police arrested defendant inside the bakery on November 16, 2015. RP 1388-1400. Two cell phone were recovered from the scene: one located in the storage area where defendant was found hiding, and another wrapped in aluminum foil and stashed in the freezer. RP 1239-42, 1403-04. The phone wrapped in aluminum foil was identified as defendant's. RP 1241, 1311, 1404. Police later obtained search warrants for the two phones. RP 1624-26; CrR 3.6 Exhibit 1.

Police also located defendant's truck and searched the truck pursuant to a warrant. RP 683-88, 944-46, 1617-23. Inside they recovered a backpack belonging to Zuniga. RP 687-88, 1623. Zuniga became a person of interest after police located his backpack and found a Facebook message sent to defendant after the shooting wherein Zuniga admitted he left his backpack in defendant's truck. RP 1617; Ex. 98 at 6. *See also*, RP 1616 (police obtained search warrant for defendant's Facebook records); CrR 3.6 Exhibit 3. Martinez also became a person of interest after police retrieved Facebook records and observed photos of defendant and Martinez together. RP 1615-16. Martinez appeared to match the description of the shooter. *Id.* Police obtained search warrants for Zuniga's and Martinez's Facebook records. RP 1631-32.

The Facebook and phone messages revealed the following:
defendant's interest in elevating the presence of VSL in Tacoma;

defendant messaged Martinez the night before the murder “Got work manana I’m mad ese...fuk those lames from 18...I’m mad wtf they think they are VSL and SSC RUN IT...They startin shit we end it;” Martinez messaged defendant the words “KILLKILLKILL;”after the murder Zuniga messaged Martinez “Be home foo” and sent a picture of a News Tribune article identifying defendant as a suspect; Martinez responded with, “What the fuck foo he got cout;” defendant claimed to be in Canada; and Zuniga messaged defendant after the shooting, “[R]emember this rule no snitching who ever goez down first is taken it all.” RP 1641-44, 1660-61, 1665, 1668-69, 1673-77; Ex. 80, 81, 82, 83A, 98. Police determined Zuniga was the shooter. RP 1710.

Defendant elected not to testify at trial. Instead, he called Juan Zuniga as a witness. Zuniga admitted that he and Martinez were members of the Southside Criminals street gang and defendant was a member of VSL. RP 1795-96. He confirmed that he, Martinez and defendant were at Steven Gamez’s residence on November 2nd. RP 1802-04. The three of them left in defendant’s truck. RP 1812-13. Zuniga sat “shotgun” and held a firearm. RP 1815-16. Zuniga was told it was time to earn his “stripes.” RP 1857. They drove to the fight location and Zuniga put a bandana over his face. RP 1818-20, 1830. After the van pulled up and three individuals got out, defendant signaled Zuniga and Zuniga opened fire. RP 1822,

1830, 1863-65, 1930-31. Zuniga claimed he thought the three individuals were rival gang members and he “panicked.” RP 1817, 1822, 1831. He also claimed it was not a planned shooting. RP 1823, 1910. However, Zuniga admitted that he pleaded guilty to murder and entered into a plea agreement with the State. RP 1893-94, 1933; Ex. 100.

C. ARGUMENT.

1. DEFENDANT’S CHALLENGE TO THE PRESUMPTIVELY VALID SEARCH WARRANTS FAILS, WHERE EACH WARRANT WAS SUPPORTED BY PROBABLE CAUSE AND SUFFICIENTLY PARTICULAR.

A criminal defendant bears the burden of establishing the unreasonableness of a search warrant by a preponderance of the evidence. *State v. Hopkins*, 113 Wn. App. 954, 958, 55 P.3d 691 (2002); *United States v. Dozier*, 844 F.2d 701, 705 (9th Cir. 1988) (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). In determining whether there was probable cause for issuance of a search warrant, a trial court’s review is limited to the four corners of the warrant and supporting affidavit. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The appellate court reviews the trial court’s probable cause and particularity determinations de novo, giving deference to the magistrate’s determination. *Id.* The court considers only the information contained in the affidavit supporting probable cause. *Neth*, 165 Wn.2d at 182.

While the degree of particularity required depends on the nature of the materials sought and the facts of each case, the warrant and supporting affidavit are both tested in a commonsense, non-hyper technical manner with great deference given to the issuing court's determination of probable cause with all doubts resolved in favor of the warrant's validity. *State v. Keodara*, 191 Wn. App. 305, 313, 364 P.3d 777 (2015) (citing *State v. Perrone*, 119 Wn.2d 538, 549, 834 P.2d 611 (1992)); *State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007); *State v. Chenoweth*, 127 Wn. App. 444, 455, 111 P.3d 1217 (2005); *State v. Tarter*, 111 Wn. App. 336, 341, 44 P.3d 899 (2002). A search warrant is entitled to a presumption of validity. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595, 607 (2007).

Probable cause exists if the affidavit sets forth circumstances sufficient to establish a reasonable inference the defendant is probably involved in criminal activity and evidence of the crime can probably be found in the place to be searched. *State v. McReynolds*, 104 Wn. App. 560, 568-69, 17 P.3d 608 (2001); *see also, State v. Thein*, 138 Wn.2d 133, 145-46, 977 P.2d 582 (1999); *State v. Keodara*, 191 Wn. App. 305, 364 P.3d 777 (2015). In determining whether such a nexus exists, courts are entitled to draw reasonable inferences from the circumstances described in the affidavit. Those inferences are given great deference by a reviewing

court. *State v. Clark*, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001); *Thein*, 138 Wn.2d at 146, 149 (citing *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)); *State v. G.M.V.*, 135 Wn. App. 366, 371-72, 144 P.3d 358 (2006); *State v. Herzog*, 73 Wn. App. 34, 56, 867 P.2d 648 (1994); *State v. Condon*, 72 Wn. App. 638, 642-44, 865 P.2d 521 (1993); *McReynolds*, 104 Wn. App. at 569. Direct evidence of a particular item's involvement in a crime is not required. *Id.*; *United States v. Spearman*, 532 F.2d 132, 133 (9th Cir. 1976). Where officers executing a warrant find evidence not described in the warrant and not constituting contraband or instrumentalities of crime, the officers may seize the evidence if it will aid in a particular apprehension or conviction, or has a sufficient nexus with the crime under investigation. *State v. Terrovona*, 105 Wn.2d 632, 648, 716 P.2d 295 (1986); *State v. Turner*, 18 Wn. App. 727, 729, 571 P.2d 955 (1977).

The Fourth Amendment protects privacy interests against an unreasonable search and seizure by requiring that a search warrant describe with particularity the place to be searched and the things to be seized. *State v. McKee*, 3 Wn. App.2d 11, 14, 413 P.3d 1049 (2018), *reversed on other grounds by* 438 P.3d 528 (2019). The requirements of particularity are met if the substance to be seized is described with “reasonable particularity” which, in turn, is to be evaluated in light of “the

rules of practicality, necessity and common sense.” *Perrone*, 119 Wn.2d at 546-47 (citing *State v. Withers*, 8 Wn. App. 123, 504 P.2d 1151 (1972)).

“The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate’s authorization, and prevention of the issuance of warrants on loose, vague or doubtful bases of fact.” *State v. Besola*, 184 Wn.2d 605, 610, 359 P.3d 799 (2015) (citing *Perrone*, 119 Wn.2d at 545). The degree of particularity required depends on the nature of the materials sought and the circumstances of each case. *Perrone*, 119 Wn.2d at 547 (citing *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)). Therefore, where search warrants are concerned, a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit. A generic term or general description is not per se a violation of the particularity requirement. A generic or general description may be sufficient if probable cause is shown and a more specific description is impossible. *Perrone*, 119 Wn.2d at 616.

The search of a smartphone creates unique issues as it is well accepted that smartphones are minicomputers. They have immense storage capacity, collecting in one place many distinct types of information such as bank statements, emails, videos, pictures, and location. This

information can span over years. The reconstruction of the materials obtained from a cellphone can result in providing insight into one's private life, which cannot be gained from a single document or photo. Further, the "apps" on cellphones provide detailed information into one's private life. *Riley v. California*, 573 U.S. 373, 393-97, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

Due to the complex nature of computers and smartphones alike, the courts have consistently held, "[A] computer search may be as extensive as reasonably required to locate items described in the warrant." *United States v. Grimmett*, 439 F.3d 1263, 1270 (10th Cir. 2006). Few computers are dedicated to a single purpose; rather, they are well known to perform a variety of functions. Almost every hard drive encountered by law enforcement will contain records that have nothing to do with the investigation. The United States Supreme Court recognizes some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those authorized to be seized. *Andersen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). Exposure to innocuous private information while searching a computer is no different than equally lawful exposure to innocuous private information while searching a home for documentary evidence. See *United States v. Heldt*, 668 F.3d 1238, 1267 (D.C. Cir. 1982); *United*

States v. Rude, 88 F.3d 1538, 1552 (9th Cir. 1996); *United States v. Giannetta*, 909 F.2d 571, 577 (1st Cir. 1990) (“Courts have regularly held that in searches for papers, the police may look through notebooks, journals, briefcases, file cabinets, files and similar items and briefly peruse their contents to determine whether they are among the documentary items to be seized”); *United States v. Upham*, 168 F.3d 532, 535 (1st Cir.1999) (“a search of a computer and co-located disks ... is not inherently more intrusive than the physical search of an entire house for a weapon or drugs”).

Courts interpreting the particularity requirement recognize in reality people rarely keep files accurately labeled to reflect their incriminating content. *See, e.g., United States v. Adjani*, 452 F.3d 1140, 1150 (9th Cir. 2006) (“Computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of [the defendant's] labeling of the files documenting [his] criminal activity. The government should not be required to trust the suspect’s self-labeling when executing a warrant.”). This is why generic classifications of computer records is permissible where they cannot be more particularly described due to the absence of specific information about their form. *See State v. Stenson*, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997). Particularity simply requires the

device searched to be a logical repository for the information described in the warrant. See *United States v. Giberson*, 527 F.3d 882, 887-90 (9th Cir. 2008).

Sufficient particularity can be achieved through reference to a narrowly drafted criminal statute that unambiguously limits the search to evidence of the cited crime within the places identified by the warrant. *Besola*, 184 Wn.2d at 614; *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). Such references avoid particularity problems by preventing police from expanding the scope of the authorized search according to subjective notions of the crime under investigation. *Perrone*, 119 Wn.2d at 553-55. Particularity can also sometimes be achieved where the balance of the warrant's language clarifies vaguely described terms. *Perrone*, 119 Wn.2d at 554.

A warrant is "overbroad" if either unsupported by probable cause or insufficiently particular. *State v. Higgs*, 177 Wn. App. 414, 425-26, 311 P.3d 1266 (2013). An overbroad warrant may be cured by the affidavit for purposes of meeting the particularity requirement of the Fourth Amendment when the warrant expressly refers to the affidavit and incorporates it with "suitable words of reference." *Riley*, 121 Wn.2d at 29 (quoting *Bloom v. State*, 283 So.2d 134, 136 (Fla. Dist. Ct. App. 1973)); *Groh v. Ramirez*, 540 U.S. 551, 557-58, 124 S. Ct. 1284, 157 L. Ed. 2d

1068 (2004). The “particularity requirement serves the dual functions of ‘limit[ing] the executing officer’s discretion’ and ‘inform[ing] the person subject to the search what items the officer may seize.’” *Higgs*, 177 Wn. App. at 426 (quoting *Riley*, 121 Wn.2d at 29). A sufficiently definite affidavit, attached and incorporated into the warrant, may thus satisfy the particularity requirement and cure an overbroad warrant.⁵

Moreover, even if a search warrant is overbroad or insufficiently particular, “[u]nder the severability doctrine, ‘infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant’ but does not require suppression of anything seized pursuant to valid parts of the warrant.” *Perrone*, 119 Wn.2d at 556 (quoting *United States v. Fitzgerald*, 724 F.2d 633, 637 (8th Cir.1983)). The court examines severability looking at five requirements:

- (1) the warrant must lawfully have authorized entry into the premises;
- (2) the warrant must include one or more particularly described items for which there is probable cause;

⁵ Defendant inaccurately claims that attachment and incorporation are required for a magistrate to make a finding of probable cause. *See* Brief of Appellant at 24-25, 35-36, 38 (“That affidavit, however, was not incorporated by reference into the warrant...For this reason, the affidavit cannot be relied on to find probable cause or cure overbreath in the warrant.”), 43. Again, in determining whether there was probable cause for issuance of a search warrant, a trial court’s review is limited to the four corners of the warrant and supporting affidavit. *Neth*, 165 Wn.2d at 182. And the reviewing court considers only the information contained in the affidavit supporting probable cause. *Id.* Attachment and incorporation are only required for purposes of curing overbreath. This makes sense considering the dual function of the particularly requirement as outlined above. Defendant’s inaccurate argument should therefore be rejected. This Court must necessarily review the search warrant affidavits in its de novo review for probable cause.

- (3) the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole;
- (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant (i.e., while searching for items supported by probable cause and described with particularity); and
- (5) the officers must not have conducted a general search, i.e., a search in which they flagrantly disregarded the warrant's scope.

State v. Maddox, 116 Wn. App. 796, 807–09, 67 P.3d 1135 (2003).

The defendant here challenges multiple different search warrants, claiming each one is constitutionally defective. Each search warrant will be addressed in turn below.

a. Warrant for Cell Phones.

Defendant claims the warrant authorizing the search of the HTC and LG phones lacked probable cause and was otherwise overbroad. Brf. App. at 21. *See* CrR 3.6 Exhibit 1. On November 17, 2015, Superior Court Judge Jerry Costello signed a search warrant and accompanying affidavit authorizing a search of the following evidence on the black LG smartphone and white HTC smartphone seized by law enforcement:

Any and all stored data, to include but not limited to, assigned handset number, call details, images, sound files, text and multimedia messages, voice and sound files, music files, web and internet history, sim and microSD content, proprietary and secondary memory data to include deleted data, related to communications between co-conspirators and/or participants in the homicide and the deceased.

CrR 3.6 Exhibit 1. Both the warrant and accompanying affidavit specified the crime under investigation as “Murder 1st Degree, RCW 9A.32.030.”

Id.

Review of the search warrant affidavit demonstrates the warrant was supported by probable cause. The affidavit established the following:

- Probable cause to believe defendant and the unidentified shooter had conspired to ambush Eddie Contreras and company when they arrived for the planned fistfight, as defendant stood waiting for the three men when they arrived, and defendant said “you talking shit” at which time a male with a hood and blue bandana over his face ran at them and began shooting.
- Contreras’ friends Elijah Crawford and Isaac Fogalele were both shot. Crawford died at the scene and Fogalele suffered a gunshot wound to his shoulder and face.
- Defendant and Contreras had engaged in a fightfight the month prior.
- Defendant and Contreras became “friends” on Facebook.
- Defendant and Contreras used Facebook messaging⁶ to communicate with each other.
- Defendant and Contreras had arranged the subsequent fistfight and set the terms through Facebook messaging.
- Defendant and Contreras had been communicating in the days before the shooting and on the day of the shooting through Facebook messaging.
- Defendant had accessed his Facebook profile shortly after the murder to either close his account or block Contreras’ access to his page.
- Contreras identified defendant via a photo, and police were later able to confirm defendant’s identity.
- Fourteen days after the murder, defendant was arrested and found in possession of two phones, a black LG smartphone and white HTC smartphone.

⁶ Facebook Messenger is a text messaging and video chat application.

- When defendant was arrested, he was witnessed trying to hide the black LG smartphone in the attic crawlspace.
- The white HTC smartphone was wrapped in aluminum foil.
- Defendant's uncle identified the white HTC smartphone as belonging to defendant.

CrR 3.6 Exhibit 1. The affiant, Detective Rock, also stated the following,

Due to the fact that cell phones are often used by co-conspirators to plan a crime, take photos of the crime, and often used directly before and after the crime to communicate (text or calls) and the fact we know Colt Sarmiento was texting the intended victim just before the homicide I am requesting this warrant to view the contents/data of the phones.

Id.

This information was more than sufficient for a judge to find a nexus to defendant's cell phones. Defendant apparently used a phone to communicate via a messaging application with the intended victim. He was using that application just before the shooting and after the shooting. Because defendant "was working with at least one other person when the homicide was committed, it is reasonable to infer that the cell phone that was in his possession was used to communicate with others regarding the shootings before, during, or after they occurred." See *Johnson v. State*, 472 S.W.3d 486, 490 (Ark. 2015). Defendant's efforts to hide one phone and wrap the other phone in aluminum foil further fostered the assessment that these phones contained evidence.

In *United States v. Bass*, 785 F.3d 1043, 1049 (6th Cir. 2015), Bass was the subject of an identity theft investigation and “the affidavit explained that Bass was suspected of crimes in which ‘cell phones were frequently used by conspirators to text or call each other during the times that the fraudulent activity was taking place.’” The affidavit also noted that Bass had been using his phone at the time of his arrest. *Id.* The Sixth Circuit considered this information sufficient to establish a nexus to the cell phone. *Id.* The court also provided the following in rejecting an overbreadth challenge to the warrant:

Federal courts, however, have “rejected most particularity challenges to warrants authorizing the seizure and search of entire personal or business computers,” *United States v. Richards*, 659 F.3d 527, 539 (6th Cir. 2011), because “criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity [such that] a broad, expansive search of the [computer] may be required.” *Id.* at 538 (quoting *United States v. Stabile*, 633 F.3d 219, 237 (3rd Cir. 2011)).

Here, the warrant authorized the search for any records of communication, indicia of use, ownership, or possession, including electronic calendars, address books, e-mails, and chat logs. At the time of the seizure, however, the officers could not have known where this information was located in the phone or in what format. Thus, the broad scope of the warrant was reasonable under the circumstances at that time.

Id. at 1049-50.

Similarly here, the affidavit explained the “cell phones are often used by co-conspirators to plan a crime, take photos of the crime, and often used directly before and after the crime to communicate[.]” Defendant had been using his phone immediately before and after the shooting, and was handling a phone at the time of his arrest. At the time police seized the phones, they could not have known where this information was located in the phones or in what format. As a result, the scope of the warrant was reasonable under the circumstances at the time.

Defendant relies on *Keodara* and *McKee* to argue the warrant was insufficiently particular, but both of those cases are distinguishable from the warrant in this case. In *Keodara*, the defendant was suspected in a homicide and a cell phone was found in his car when he was arrested for an unrelated incident five weeks later. 191 Wn. App. at 309. The search warrant affidavit for the phone gave no evidence that Keodara had used the phone and instead simply provided the following broad generalization:

It is this Officer’s belief that there is significant evidence contained within the cell phone seized. Based off of my training and experience I know it to be common for gang members to take pictures of themselves where they pose with firearms. Gang members also take pictures of themselves prior to, and after they have committed gang related crimes. Additionally, it appears likely there is evidence of firearms contained within said electronic devices. I believe there is evidence of gang affiliation contained within their electronic devices, as this shooting was gang involved. Additionally, criminals often text each

other or their buyers photographs of the drugs intended to be sold or recently purchased. Gang members will often take pictures of themselves or fellow gang members with their cell phones which show them using drugs.

Id. at 309-11.

Division One found this affidavit insufficient. As the court explained: “Without evidence linking Keodara’s use of his phone to any illicit activity, we find the affidavit to be insufficient under the Fourth Amendment. Under *Thein*, more is required for the necessary nexus than the mere possibility of finding records of criminal activity.” *Keodara*, 191 Wn. App. at 316. The court also noted a further concern as to the warrant’s overbreadth: “[T]he warrant’s language also allowed Keodara’s phone to be searched for items that had no association with any criminal activity and for which there was no probable cause whatsoever. There was no limit on the topics of information for which the police could search.” *Id.* Despite the warrant’s overbreadth, the court found the error harmless beyond a reasonable doubt. *Id.* at 318.

In *McKee*, the defendant used his cell phone to take nude pictures of a 16-year-old girl and video recordings of the two engaged in sexual intercourse. 3 Wn. App. at 15-16. The girl’s family took defendant’s cell phone, observed the illicit photographs and video clips, and turned the phone over to police. *Id.* at 16. Police subsequently submitted an

application and affidavit in support of a warrant to search the defendant's phone and investigate the crimes of "Sexual Exploitation of a Minor RCW 9.68A.040" and "Dealing in depictions of minor engaged in sexually explicit conduct RCW 9.68A.050." *Id.*

The court issued a search warrant, authorizing police to obtain the following evidence from McKee's cell phone: "Images, video, documents, text messages, contacts, audio recordings, call logs, calendars, notes, tasks, data/[I]nternet usage, any and all identifying data, and any other electronic data from the cell phone showing evidence of the above listed crimes." *Id.* at 18-19. The warrant also authorized the police to conduct a "physical dump" of the memory of the cell phone for examination. *Id.* at 19. The *McKee* court found the search warrant violated the particularity requirement of the Fourth Amendment. *Id.* at 29. The court explained,

The warrant in this case was not carefully tailored to the justification to search and was not limited to data for which there was probable cause. The warrant authorized the police to search all images, videos, documents, calendars, text messages, data, Internet usage, and "any other electronic data" and to conduct a "physical dump" of "all of the memory of the phone for examination." The language of the search warrant clearly allows search and seizure of data without regard to whether the data is connected to the crime. The warrant gives the police the right to search the contents of the cell phone and seize private information with no temporal or other limitation...The warrant allowed the police to search general categories of data on the cell

phone with no objective standard or guidance to the police executing the warrant. The language of the search warrant left to the discretion of the police what to seize. We hold the search warrant violated the particularity requirement of the Fourth Amendment.

Id. at 29.

Unlike in *Keodara*, the affidavit in this case provided evidence linking defendant's use of his phone to his criminal activity (i.e., murder). The warrant's language specifically limited the topics of information for which the police could search – data “related to communications between the co-conspirators and/or participants in the homicide and the deceased.” CrR 3.6 Exhibit 1. Therefore, the warrant did not allow defendant's phone to be “searched for items that had no association with any criminal activity and for which there was no probable cause whatsoever.” *See Keodara*, 191 Wn. App. at 316. The warrant here did not suffer from overbreadth.

Unlike in *McKee*, the warrant here did not authorize the search and seizure of data without regard to whether the data was connected to the crime. In *McKee*, the warrant allowed police to “search the contents of the cell phone and seize private information with no temporal *or* other limitation.” 3 Wn. App.2d at 29 (emphasis added). Here, on the other hand, the warrant supplied a limitation – again, police could only search and seize data related to communications between the co-conspirators

and/or participants in the murder and the deceased. A temporal limitation was not required given the other limitation provided.

Defendant claims the warrant was capable of being narrowed to search for communications with named co-conspirators. Brf. App. 33. This argument fails, because the co-conspirators were unknown and therefore could not be named.⁷ The warrant did, however, narrow the search for communications with the unknown co-conspirators. The search of defendant's cell phones was intended to help "reveal evidence shedding light on the identities of the multiple participants and their possible pre-planning and coordination of criminal activity." *See United States v. Gholston*, 993 F. Supp. 2d 704, 719 (E.D. Mich. 2014).

The presumptively valid warrant in this case is supported by probable cause and is sufficiently definite to satisfy the particularity requirement. The trial court's finding of the same should be affirmed.

b. Warrants for Phone Accounts.

Defendant next claims the three search warrants for defendant's phone accounts also lacked probable cause and were otherwise overbroad.

⁷ Defendant argues that police already knew the names of Trino Martinez and Jose Salinas as potential co-conspirators as shown by a search warrant obtained November 12, 2015. Brf. App. 33. Defendant is inappropriately asking this Court to look outside the four corners of the warrant and supporting affidavit. *See Neth*, 165 Wn.2d at 182. Moreover, that warrant affidavit did not claim either Martinez or Salinas were known co-conspirators. *See* CrR 3.6 Exhibit 4.

Brf. App. 34. On November 5, 2015, police obtained a search warrant for the following evidence related to their murder investigation:

1) Account and subscriber information to include account holder, account comments, associated phone numbers to include (but not limited to), the below listed cellular numbers, billing preferences, numbers called, numbers received, numbers forwarded, voice mail content, password and or reset passwords for voice mail, on-line back up data (Wireless Backup), web accounts, AIM related accounts, or any other instant messages, emails, stored photos, video, and any and all credit information that was necessary to open the account with **T-Mobile number 253-226-5262 from October 1st, 2015 through November 4th, 2015.**

[2]) All Short Message Service (SMS), Multimedia Message Service (MMS) content, delivery logging that has been stored and retained for **T-Mobile number 253-226-5262 from October 1st, 2015 through November 4th, 2015.**

[3]) The cellular towers, antenna, or any other connectivity data or information, including Call Origination/Termination Location, Switch location, MDN, Called #, CPN, SZR and the Physical Address of Cellular Site, to include the sector of the cell site...Any and all GPS or any other precise location information, propriety software, or other equipment that stores, processes or facilitates with such tower requests, to include but not limited to the side of tower and location of the target phone at the time of such request that is available related to **T-Mobile number 253-226-5262 from October 1st, 2015 through November 4th, 2015.**

CrR 3.6 Exhibit 2. On November 9, 2015, police also obtained search warrants for the same evidence associated with “**Sprint number 253-737-0200 from October 1st, 2015 through November 9th, 2015**” and “**Metro PCS /T-Mobile numbers 253-248-5833 and 253 398-4394 from**

October 1st, 2015 through November 9th, 2015.” CrR 3.6 Exhibits 6 and 7. Each warrant listed the crime under investigation and relevant statute.

All three search warrant affidavits contained the same background information regarding the circumstances of the shooting on 11/2/15 and Contreras’ Facebook messaging with defendant. *See* CrR 3.6 Exhibits 2, 6, 7. The affidavit regarding the search warrant for number (253) 226-5262 established that in 2015, defendant had provided that number to police as his own. A records check further revealed the number was assigned by T-Mobile and that it had been assigned to defendant since at least 2011. CrR 3.6 Exhibit 2. The affidavits regarding the other two search warrants established that defendant’s mother, Natalia Colt Flores, provided police with three cell phone numbers that she had recently used to communicate with defendant: (253) 737-0200, (253) 248-5833, (253) 398-4394. CrR 3.6 Exhibits 6, 7. All three affidavits further explained that since Contreras used a messaging app to communicate with defendant, the requested call detail records could be used to confirm the messages. And, the connectivity data could be used to confirm times and locations of the parties involved the incident.⁸ CrR 3.6 Exhibits 2, 6, 7.

⁸ CrR 3.6 Exhibit 2 also explained that the call detail records of the -5262 number could provide phone calls and messages between the suspect and potential co-conspirators.

Defendant claims the warrants were not supported by probable cause, because there was no factual description which supported the belief that evidence in the phone accounts was material to the investigation of murder. He also claims there was no nexus between the crime and the phone accounts. Defendant completely ignores the information contained in the search warrant affidavits. Again, as noted above, this Court reviews the search warrant affidavit to determine probable cause. *Neth*, 165 Wn.2d at 182. Attachment and incorporation of the affidavit into the search warrant is only required when a party seeks to cure an overbroad warrant. *See Riley*, 121 Wn.2d at 29.

Just like the affidavit for defendant's cell phones (CrR 3.6 Exhibit 1), the affidavits for the cell phone accounts established that defendant communicated with the intended victim, Contreras, via the Facebook messaging app. They communicated in the days leading up to the shooting. They communicated regarding the anticipated fistfight. It appeared defendant blocked Contreras from Facebook or shut down his page after the shooting. Defendant appeared to have at least one other co-conspirator to the murder (i.e., the shooter). Defendant had previously provided the -5262 number to police and a records check confirmed the number was assigned to defendant. Defendant's mother provided the -0200, -5833 and -4394 numbers to police and indicated they were

recently used by defendant. The affiants detailed the relevance of the requested information to the murder investigation (to confirm the messages, confirm the times and locations of the parties involved, and identify potential co-conspirators). *See also, Bass*, 785 F.3d at 1050. The search warrants were supported by probable cause and demonstrated a nexus between the criminal activity (murder), the phone accounts, and the requested evidence.

Defendant also claims the warrants are overbroad because their language “clearly allows search and seizure of data without regard to whether the data is connected to the crime.” Brf. App. at 37 (*quoting McKee*, 3 Wn. App.2d at 29). This claim fails, because the warrants provided a temporal limitation. *See McKee*, 3 Wn. App.2d at 29 (warrant overbroad because it allowed police to search the defendant’s phone and seize private information “with no temporal or other limitation.”). Here, the November 5th warrant provided a time limitation of October 1st, 2015 through November 4th, 2015, and the November 9th warrants provided a time limitation of October 1st, 2015 through November 9th, 2015. CrR 3.6 Exhibits 2, 6, 7. The October 1st, 2015 date corresponds with the time period in which Contreras and defendant engaged in their first fistfight. The warrants were sufficiently particular and should be upheld.

c. Warrant for Defendant's Facebook Records.

Defendant next challenges the search warrant for his Facebook records. Brf. App. 38. On November 5, 2015, police obtained a search warrant for the following:

1) Records containing the following information on **Facebook User Profiles** from October 1st, 2015, to November 5th, 2015:
<https://www.facebook.com/beto.sarmiento.146?fref=ts>
Facebook ID : 157164841304317

1. User Expanded Subscriber Content (known as Neoprint), User Photoprint, all User Contact Information including secondary email address names, User "friends" list, User IP Logs showing IP address at sign up including date and time, contents of "wall" messages, contents of users private messages in the users account including sent and deleted messages if any[.]

CrR 3.6 Exhibit 3. The warrant again cited the crime under investigation and the relevant statute. *Id.* The affidavit in support of the search warrant detailed the nature of Facebook, its capabilities and services, and defined the unique Facebook terms "User Neoprint," "User Photoprint," and "User Contact Info." *Id.*

Defendant argues the warrant is not supported by probable and once again falsely claims the affidavit cannot be relied on to find probable cause. Brf. App. 38-40. This Court can and should be looking to the search

warrant affidavit.⁹ *Neth*, 165 Wn.2d at 182. The affidavit again clearly established defendant communicated with Contreras, the intended victim of the shooting, via Facebook. Defendant's name on Facebook was TooxLokote Akataxer (aka "Taxer"). They arranged the fistfight and set the terms through Facebook. Defendant either blocked Contreras or shut down his Facebook page after the shooting. The affidavit provided the circumstances of the shooting, including the presence of a co-conspirator (i.e., the unknown shooter). Police were able to access TooxLokote Akataxer's public Facebook page and noted the user id name Beto Sarmiento. Police were able to find the name Alberto Colt Sarmiento through databases and confirmed that defendant and "Taxer" were the same person. The affidavit also included the following from affiant Detective Rock:

Due to the fact that Eddie and Taxer communicated through Facebook page TooxLokote Akataxer [URL provided] to set up the supposed fight which led to the shooting, that Colt Sarmiento may have used the Facebook page to communicate with co-conspirators, and the fact that IP addresses may help place Colt Sarmiento at the scene as well as help locate him now I am requesting this warrant.

CrR 3.6 Exhibit 3.

⁹ Every search warrant affidavit at issue in this case was signed by the issuing magistrate, thus showing the magistrate reviewed each affidavit for purposes of finding probable cause. *See* CrR 3.6 Exhibits 1-7.

This information was more than sufficient for the issuing judge to find a nexus to defendant's Facebook account. Defendant cannot credibly contend the presumptively valid search warrant lacked probable cause. The search warrant was supported by probable cause, because the affidavit provided a nexus between the criminal activity and the items to be seized and between the items to be seized and the place to be searched. *Higgs*, 177 Wn. App. at 426.

Defendant's overbreadth argument also fails, because the warrant provided a temporal limitation (October 1st, 2015, to November 5th, 2015) and provided evidence linking defendant's use of Facebook to his criminal activity. This case is therefore distinguishable from *McKee* and *Keodara*. See *McKee*, 3 Wn. App.2d at 29; *Keodara*, 191 Wn. App. at 316. The warrant allowed the State to search only the Facebook account associated with defendant's name and authorized only the seizure of evidence related to defendant's commission of first degree murder from the time period of October 1, 2015, to November 5, 2015. The warrant further limited the types of data requested. The warrant was not overbroad. See *United States v. Flores*, 802 F.3d 1028, 1044-45 (9th Cir. 2015) (rejecting overbreadth challenge to search warrant for the defendant's Facebook account); *United States v. Blake*, 868 F.3d 960, 974 (11th Cir. 2017) (finding a temporal limitation "would have undermined any claim

that the Facebook warrants were the internet-era version of a ‘general warrant.’”).

Defendant also complains that “[a]lthough the warrant contains a temporal period, the amount of data disgorged in response to the warrant is enormous.” Brf. App. at 42. Provided the warrant was provided by probable cause and sufficiently particular, the amount of data recovered is irrelevant. Here, the search warrant for defendant’s Facebook records was supported by probable cause and sufficiently definite. This Court should affirm.

d. Warrants for the Facebook Records of Martinez and Salinas.

Finally, defendant claims the search warrants for the Facebook records of Martinez and Salinas lacked probable cause and were otherwise overbroad.¹⁰ Brf. App. 43-44. On November 12, 2015, police obtained a search warrant for the following:

1) Records containing the following information on **Facebook User Profiles** from **October 1st, 2015, to November 12th, 2015:**

¹⁰ Defendant also asserts he has standing to challenge these warrants “because his communications are in the Facebook records that were seized and searched.” Brf. App. 44. Generally, standing to challenge a search or seizure under the Fourth Amendment and article I, section 7 requires that a defendant have a legitimate expectation of privacy in the place searched or item seized. *State v. Libero*, 168 Wn. App. 612, 616, 277 P.3d 708 (2012). Although defendant’s standing claim is certainly questionable, the State did not challenge standing below and will therefore address the merits of defendant’s argument. See *State v. Harner*, 153 Wn.2d 228, 234, 103 P.3d 738 (2004) (“The issue of standing is waived if not presented to the trial court and is, therefore, not reviewable on appeal”); *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263 P.3d 591 (2011).

<https://www.facebook.com/crimixales.baxgixg>
and
<https://www.facebook.com/profile.php?id=100009625448483>

1. User Expanded Subscriber Contest (known as Neoprint), User Photoprint, all User Contact Information including secondary email address names, User “friends” list, User IP Logs showing IP address at sign up including date and time, contents of “wall” messages, contents of users private messages in the users account including sent and deleted messages if any[.]

CrR 3.6 Exhibit 4. On November 17, 2015, police obtained a search warrant for the same evidence pertaining to the following account:

<https://www.facebook.com/profile.php?id=100010695454028>. CrR 3.6

Exhibit 5. According to the search warrant affidavits, these Facebook accounts belonged to Jose Salinas and Trino Martinez. CrR 3.6 Exhibits 4, 5. The warrants cited the crime under investigation (first degree murder) and relevant statute. *Id.*

The search warrant affidavits established a sufficient nexus to the Facebook accounts. The affidavits outlined the following pertinent information:

- Defendant used Facebook to communicate with the intended victim and to lure him to the ambush.
- Defendant had two acquaintances, Martinez and Salinas, who both matched the physical description of the shooter.
- Martinez used Facebook to communicate with defendant.

- Defendant, Martinez, and Salinas were close associates. This was evidenced by more than their friend status on Facebook. This was also reflected by their joint arrests in gang, gun, and drug cases close in time to the murder. It was further reflected by their photos together. It was also reflected in Martinez publically communicating with defendant over Facebook.
- Shortly before the murder, defendant told another gang associate (Martinez) on Facebook that “they had some new enemies”; Martinez posted a comment and a picture of a gun in response; Martinez matched the physical description of the shooter; and shortly after the shooting, Martinez posted pictures on Facebook with him brandishing firearms and wearing a bandana over his face just as the shooter had done.
- Martinez posted pictures of himself posing with different firearms and gesturing with gang signs.
- Police believed defendant may have corresponded with gang members prior to and after the homicide.

CrR 3.6 Exhibits 4, 5. The warrants were supported by probable cause to believe evidence related to the homicide might be found in Martinez’s and Salinas’s Facebook records. Defendant’s particularly argument fails for the same reasons outlined in the preceding section regarding defendant’s Facebook records (analysis from section C.1.c hereby incorporated). Again, this Court should affirm the validity of the warrants.

- e. Even if this Court were to find that the search warrants lacked probable cause and/or sufficient specificity, there was overwhelming untainted evidence of the defendant's guilt, making any error harmless.

Courts apply a harmless error analysis when the trial court admits evidence that is a product of an invalid warrant. *State v. Keodara*, 191 Wn. App. 305, 317, 364 P.3d 777 (2015). Admission of evidence obtained in violation of the federal or state constitution is an error of constitutional magnitude. *Id.* at 317. An error of constitutional magnitude can be harmless if the reviewing court is convinced beyond a reasonable doubt that “any reasonable jury would have reached the same result without the error.” *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). The court must determine whether the “untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). The State bears the burden of proving that the error was harmless beyond a reasonable doubt. *Id.* at 425.

Here, any reasonable jury would have reached the same result without the phone and/or Facebook records. Defendant was convicted of murder in the second degree (regarding Elijah Crawford), two counts of assault in the first degree (regarding Eddie Contreras and Isaac Fogalele),

and one count of unlawful possession of a firearm in the second degree. All counts included a gang aggravator pursuant to RCW 9.94A.535(3)(aa).

It was uncontested that Elijah Crawford died as a result of a gunshot wound. RP 463, 556-57, 1152-53, 1156-57. Juan Zuniga admitted that he pulled the trigger and shot Crawford (i.e., he assaulted Crawford with a firearm). RP 1822, 1830, 1842. Zuniga also admitted that he pleaded guilty to murder. RP 1933. Defendant conceded that Zuniga committed murder. RP 2006-08, 2028. The only question that remained, therefore, was whether defendant acted as Zuniga's accomplice to the murder. *See* CP 205-251 (Instructions No. 8, 22). The evidence in this regard was overwhelming.

Eddie Contreras testified at trial. He identified defendant in open court. RP 813-14. Contreras detailed his initial fistfight with defendant, their subsequent Facebook communications,¹¹ and their plan for the follow-up fightfight on November 2nd. RP 814-16, 824-25, 831-71;

¹¹ Contreras provided his Facebook messages to police. RP 830-31. *See* Exhibits 32, 34. Defendant describes Exhibit 32 as defendant's Facebook messages with Contreras. Brf. App. at 45. The record instead indicates that Exhibit 32 is Contreras' own Facebook records. *See* CP 380-385 (Exhibit 89: DVD – Facebook records; “Boxer” Contreras MD#24); Exhibit 32 (described as MD#24 Facebook Messages Boxer Contreras Eddie Contreras). *See also*, RP 829-31. It is also important to note that defendant argues Exhibit 82 is subject to suppression. *See* Brf. App. 45. Exhibit 82 consists of Zuniga's Facebook records. *See* RP 1631-32, 1583; Ex. 82; CP 380-85 (Exhibit 88: DVD – Facebook records; Juan Zuniga MD#20). Defendant did not challenge the search warrant for Zuniga's Facebook records below and does not challenge the warrant on appeal. Therefore, suppression of Exhibit 82 is not required.

Exhibits 32, 34. He described how their communications became intense. RP 829. Contreras made a comment to defendant about “Deez nuts,” meaning testicles. RP 858; Exhibits 32, 34. Defendant was the one who challenged Contreras to another fight. RP 859-60. They agreed to use fists only, no weapons. RP 870, 887. When Contreras and his companions arrived at the location of the planned fight, defendant was standing outside of his truck. Defendant said something to the effect of “you talking shit.” RP 892-93. Contreras immediately knew something was not right. *Id.* At the same time defendant made his comment, a male wearing a bandana over his face came running down the hill and started firing multiple shots at Contreras and his friends. RP 893-96. Defendant just stood there as the shooting happened and did not duck for cover. RP 910-12. It appeared defendant “knew what was going on.” RP 911. In other words, defendant and Zuniga ambushed Contreras and his friends.

Right before the shooting, defendant was at Steven Gamez’s residence. RP 973. Defendant was angry, saying he had a beef with someone who talked about putting his balls in defendant’s mouth. RP 1009. Defendant felt disrespected. RP 1010. Defendant also felt the individual was “false claiming.” RP 1010-11. It was during this conversation that Martinez pulled out a gun. RP 1012-15, 1017. Defendant and his companions talked about “putting in work,” meaning gang work.

RP 1010, 1016-17. Defendant admitted to his uncle, Raymundo Gomez, that he planned the shooting with his friends. RP 1331, 1336-37, 1339. Zuniga testified that he started firing after being given a signal by defendant. RP 1863-65, 1884-86, 1931. Overwhelming evidence thus established that defendant was an accomplice to second degree murder.

The same analysis applies to the first degree assault convictions. *See* CP 205-251 (Instructions No. 8, 25, 26). Zuniga assaulted Contreras and Fogalele with a firearm. Fogalele was struck by a bullet, which entered his shoulder and lodged into his cheek, stopping only a couple of inches from his brain. RP 787-89. Contreras felt the shooter was trying to kill him and heard bullets flying by as he ran. RP 895, 897. The shooter's actions demonstrated an intent to inflict great bodily harm. And, for the reasons set forth above, defendant was an accomplice to Zuniga's actions. Overwhelming evidence necessarily leads to a finding of guilt.

The Facebook and phone records were unnecessary in convicting defendant of unlawful possession of a firearm. Defendant stipulated he could not lawfully possess a firearm. Exhibit 11; RP 1696. The testimony of witnesses established that defendant drove his black truck on November 2, 2015. RP 924, 930-31, 939, 955, 966-67, 974, 1008-09, 1621, 1812-13. Defendant saw the firearm at Steven Gamez's residence before the shooting and may have handled it. RP 976, 1017, 1020, 1876-77.

Defendant, Zuniga, and Martinez left Gamez's residence with the gun. RP 976. Zuniga sat in the front passenger seat of the truck with the gun while defendant drove. RP 1815-17, 1857. Defendant saw the shooter, Zuniga, with the gun, RP 1912. Defendant signaled Zuniga to start shooting. RP 891-94, 1863-65, 1884-86, 1937-38. Defendant stood there as Zuniga fired the gun at Contreras, Fogalele, and Crawford. RP 910-11. Fogalele was struck by a bullet, and Crawford died from his gunshot wound. RP 787-89, 1156-57. Bullet casings were recovered from the scene. RP 558, 630, 633, 1226-29. Zuniga got back into defendant's truck after the shooting. RP 1835-38. Overwhelming evidence established that defendant at least constructively possessed the firearm.

Finally, as to the gang aggravator, it was uncontested that defendant was a member of the Varrio Sureno Lokotes (VSL) gang. Defendant identified himself as a VSL gang member to Contreras. RP 819. Others knew defendant to be a VSL gang member. RP 967, 1342, 1795-96. The shooter, Zuniga, was a member of the Southside Criminals. RP 1169-70, 1795. Right before the shooting, defendant and his companions talked about "putting in work," meaning work for the gang. RP 1010, 1016-17, 1028, 1189. *See also*, RP 1729-30. Putting in work is important for one to elevate his status within the gang. RP 1189. Zuniga wanted to elevate his status within the gang. RP 1189, 1801. Zuniga was

handed the gun and told to earn his “stripes.” RP 1857. He felt he earned his stripes by firing the gun. RP 1868-70. As noted above, defendant was an accomplice to defendant’s actions. Overwhelming evidence established defendant or an accomplice committed the offenses with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership.

The untainted evidence against defendant was overwhelming. Any reasonable jury would have reached the same result without the claimed error. Therefore, any error in admitting the phone and/or Facebook records was harmless beyond a reasonable doubt, and defendant’s convictions should be affirmed.

2. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF A NON-VICTIM WITNESS’S IMMIGRATION STATUS AND KNOWLEDGE OF THE U-VISA PROGRAM, WHERE THE EVIDENCE WAS IRRELEVANT AND THEREFORE INADMISSIBLE.

The right to confront and cross-examine witnesses is guaranteed by both the federal and state constitutions. U.S. Const. amend 6; Const. art I, § 22. However, that right is not absolute. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

“The scope of such cross examination is within the discretion of the trial court.” *State v. Russell*, 125 Wn.2d 24, 92, 882 P.2d 747 (1994). See *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (trial courts “retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things...prejudice...or only marginal[] relevan[ce].”). “[A] court’s limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion.” *Darden*, 145 Wn.2d at 619. A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

A trial court is within its sound discretion to deny cross-examination when the evidence sought is vague, argumentative, or speculative. *Darden*, 145 Wn.2d at 620-21. The right to cross-examine is also limited by general considerations of relevance under ER 401 and balancing under ER 403. *Id.* at 621. Facts are relevant if they have any tendency to make the existence of any consequential fact more or less probable. ER 401. The proponent of the evidence bears the burden of establishing relevance and materiality. *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011).

Courts review a claim under the Sixth Amendment involving the right to present a defense or to confront witnesses through a three-step test. First, the evidence that a defendant desires to introduce “must be of at least minimal relevance.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Darden*, 145 Wn.2d at 622). Second, if the defendant establishes the minimal relevance of the evidence sought to be presented, the burden shifts to the State “to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). Third, the State’s interest in excluding prejudicial evidence must be balanced against the defendant’s need for the information sought, and relevant information can be withheld only if the State’s interest outweighs the defendant’s need. *Id.* “[T]he more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” *Darden*, 145 Wn.2d at 619.

Although the admission or exclusion of evidence is generally subject to review for abuse of discretion, *see Darden*, 145 Wn.2d at 619, the Supreme Court has held that a claim regarding the denial of a defendant’s Sixth Amendment rights is reviewed de novo. *See State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Here, defendant claims that “[e]xclusion of evidence that the State’s witness, Raymundo Gomez, knew about the U-Visa immigration benefit violated Sarmiento’s constitutional right to present a defense...[and] right to confront the witnesses against him through cross-examination.” Brf. App. at 51. This claim fails for the reasons set forth below.

A U-visa permits *victims* of certain crimes to lawfully reside in the United States for a period of four years, which period may be extended upon certification that the victim’s continued “presence in the United States is required to assist in the investigation or prosecution of such criminal activity.” *See* 8 U.S.C. §§ 1101(a)(15)(U)(iii), 1184(p)(6). If the crime victim is physically present in the United States for three years following the receipt of a U-visa, his status may be adjusted to that of a lawful permanent resident. *See* 8 U.S.C. § 1255(m).

To meet the qualifications for a U-visa, an applicant must demonstrate that (1) he has suffered substantial physical or mental abuse as the result of having been the *victim* of qualifying criminal activity; (2) he possesses information concerning the qualifying criminal activity; (3) he has been helpful, is being helpful, or is likely to be helpful to authorities in investigating or prosecuting the qualifying criminal activity; and (4) the criminal activity violated the laws of the United States or

occurred in the United States. 8 U.S.C. § 1101(a)(15)(U)(i) (emphasis added). *See also*, C.F.R. § 214.14(14) (“Victim of qualifying criminal activity generally means an alien who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity.”), (b) (eligibility for U-1 nonimmigrant status).

In this case, witness Raymundo Gomez was not the victim of defendant’s crimes. Rather, he was a witness with limited information pertaining to defendant’s whereabouts after the shooting and defendant’s admissions regarding his plan for the fight with Contreras. *See generally*, RP 1297-1318, 1330-43. Gomez did not qualify for a U-Visa and therefore had no motivation to fabricate his testimony. Cross-examining Gomez regarding his immigration status and his ineligibility for a U-Visa could not possibly be considered relevant in assessing his credibility.

Defendant argues that “[w]hether Gomez actually qualified as a victim for purposes of the U-Visa does not control relevancy...[r]ather Gomez’s state of mind was what matter.” Brf. App. at 62. However, not only was Gomez ineligible for a U-Visa as a matter of law (i.e., because he was not the victim of the criminal activity), but Gomez also subjectively believed he did not qualify for U-Visa immigration benefits.

The parties questioned Gomez regarding his knowledge of the U-Visa program outside the presence of the jury. *See* RP 1322-29. The following exchange occurred:

[State]: ...Do you know what a U Visa is?

[Gomez]: Not very much, no.

[State]: Have you ever gone to anyone, an attorney, an office, immigration office, to seek a Visa of any type to stay in the United States?

[Gomez]: I did see an attorney, but it had nothing to do with that case; it was for something else.

[State]: When did you see that attorney?

[Gomez]: Last Friday.

[State]: Did the subject of your immigration status, was that part of the reason that you were talking to the attorney?

[Gomez]: No.

[State]: However, did it come up?

[Gomez]: It did.

[State]: And did that attorney talk to you about visas and whether you were eligible for any related to this case that we're involved in?

[Gomez]: Yes. But, no, he didn't speak about that. *What he said was that this case does not qualify me for a visa of any kind.*

[State]: Why were you talking about this case at all with the attorney?

[Gomez]: Because it came out in the conversation when she said why I was visiting her and then I said my concerns are my children in Mexico. That's what I told her...My fear is that my wife's family would hurt my children that are there or even me...If there was no opportunity for me to stay here...I would like to go with my children.

[State]: In the time that you've been in the United States, which is, as I understand it, 11 years, do you have a permanent residence status or anything, legal status, I'll call it, that allows you to be here?

[Gomez]: No.

...

[Gomez]: *I haven't spoken to anyone about a U – a U Visa.*

...

[Defense]: You went to see that lawyer to discuss immigration issues, correct?

[Gomez]: Correct.

[Defense]: And you believed, or at least asked, that testifying in this case, cooperating as a witness, could benefit you in the ability to get a visa?

[Gomez]: *I don't qualify for anything. Whether or not I testify, it's useless to me.*

[Defense]: That's because you went to speak to a lawyer about that?

[Gomez]: No...I did go to see a lawyer, but I did not go specifically to speak on this subject.

[Defense]: But you did speak about this subject?

[Gomez]: Correct, yes.

[Defense]: Because you were curious to know whether it would help you in your immigration status?

[Gomez]: It came from that attorney to ask me about that and I answered.

RP 1322-27. *See also*, 1327-29, 1375-84 (arguments of counsel). There was no evidence presented that Gomez ever applied or intended to apply for a U-Visa. *See* RP 1377, 1384. The trial court ruled that defense could

not cross-examine Gomez regarding his immigration status and knowledge of the U-Visa, noting,

So it was clear to me – I don't know what his understanding was, but his understanding now is clearly there's no benefit to him testifying for his visa status. I knew before there wasn't. He's not the victim of anything yet, right? So how is this relevant?

...I'm not going to allow this in, in cross-examination at this point.

RP 1327-28. The court also noted that Gomez's testimony during the offer of proof was not inconsistent with the transcript of his prior interview as suggested by defense. *See* RP 1327-28.

In *State v. Streepy*, 199 Wn. App. 487, 400 P.3d 339 (2017), the court held that evidence of the complaining victim's immigration status was irrelevant and thus inadmissible in that case. There, the defendant violently assaulted the victim, J.G., who was not a U.S. citizen or a lawful permanent resident. *Streepy*, 199 Wn. App. at 490-93, 498. The State moved to exclude evidence regarding J.G.'s immigration status and knowledge of the U-Visa. *Id.* at 493, 498. J.G. testified outside the presence of the jury that she first heard of the U-Visa program after the defendant's arrest; she had not filled out a U-Visa application or contacted immigration to go forward with a U-Visa application; and she did not intend to apply for a U-Visa, because she subjectively believed she was

lawfully in the United States based on her DACA status. *Id.* at 498-99.

The trial court excluded the evidence, finding the risk of prejudice far outweighed the minimal relevancy of the evidence. *Id.* at 499.

On appeal, the court found that the “trial court’s characterization of the evidence as ‘minimally relevant’ was generous. To the contrary, evidence of J.G.’s immigration status was not at all relevant under these circumstances.” *Id.* at 499. J.G. was not aware of the U-Visa program until after she call 911 and spoke with police and therefore could not have been motivated to falsely accuse the defendant in order to obtain a U-Visa. *Id.* at 499. There was no indication that J.G. planned to testify in a manner that differed from her statements to police, and thus “there was no logical connection between J.G.’s testimony and her learning of the U visa program.” *Id.* at 499-500. And, J.G. subjectively believed she was lawfully in the United States and therefore had no immigration incentive to exaggerate or falsify her testimony.¹² *Id.* at 500. Given the above, the court held that evidence of J.G.’s immigration status was irrelevant and therefore inadmissible at trial. *Id.* at 500-01.

¹² “Whether J.G. *actually* resided in the United States lawfully was immaterial. Rather, it was J.G.’s *subjective belief* that was determinative. Because J.G. herself *believed that* she resided in the United States lawfully, she had no motivation to provide false or exaggerated testimony for purposes of avoiding deportation or securing a U visa.” *Streepy*, 199 Wn. App. at 500 (emphasis in original).

Streepy applies to this case.¹³ Here, Gomez reported defendant's location to police in 2015. He did not meet with an immigration attorney until 2018, and when he did, it was not to seek out information regarding a U-Visa. Rather, the attorney brought up the U-Visa during their meeting and informed Gomez that he did not qualify for the program. There is no indication Gomez ever applied for or intended to apply for a U-Visa. In fact, Gomez testified that he did not even know much about the visa program. *See* RP 1322. By the time Gomez was interviewed by the parties and testified at trial, he was [correctly] informed that he did qualify for the U-Visa program.

Gomez subjectively believed that he did not qualify for a U-Visa and could not obtain an immigration benefit by testifying. His subjective belief is determinative. Because Gomez himself believed he was ineligible for a U-Visa, he "had no motivation to provide false or exaggerated testimony for purposes of avoiding deportation or securing a U visa."

Streepy, 199 Wn. App. at 500. The trial court properly excluded the irrelevant evidence regarding Gomez's immigration status, where he was legally ineligible for a U-Visa and subjectively believed he was ineligible for the same. As a result, this Court should affirm defendant's convictions.

¹³ The unpublished and out-of-state cases cited by defendant are distinguishable in that those cases involved an actual U-Visa application or [potential] intent to submit a U-Visa application on behalf the *victim* of the crime or the victim's qualifying family member.

- a. Any error was harmless beyond a reasonable doubt.

Even if the trial court erred in excluding evidence of Gomez's immigration status and knowledge of the U-Visa program, any error was harmless. "[M]ost constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). See also, *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003) ("most constitutional errors are presumed to be subject to harmless error analysis."). Both federal and state law recognize that violations of the confrontation clause, in particular, are subject to harmless error analysis. See *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to...harmless-error analysis."); *State v. Hieb*, 107 Wn.2d 97, 109, 727 P.2d 239 (1986) ("We...reaffirm our decision that a violation of the confrontation clause...may constitute harmless error."); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) ("It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless.").

An error of constitutional magnitude is deemed harmless if the appellate court is able to say “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Accord *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *Guloy*, 104 Wn.2d at 425. Under the “overwhelming untainted evidence” test, as adopted by the court in *Guloy*, the appellate court “looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *Guloy*, 104 Wn.2d at 426. The State bears the burden of proving harmless error. *Id.* at 425.

Where the trial error involves a confrontation clause violation that denies a defendant the opportunity to impeach a witness for bias, the reviewing court must ask whether, “assuming that the damaging potential of the cross-examination were fully realized,” the error was nonetheless harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 684.

Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.

Van Arsdall, 475 U.S. at 684. Accord *State v. Wilcoxon*, 185 Wn.2d 324, 335-36, 373 P.3d 224 (2016).

The harmless error doctrine recognizes that a defendant is not entitled to a perfect, error-free trial, for such a trial does not exist. *United States v. Hastings*, 461 U.S. 499, 508-09, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983). Thus, “it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.” *Hastings*, 461 U.S. at 509. An otherwise valid conviction should not be set aside if, based on its review of the entire record, the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have found guilt absent the error. *Van Arsdall*, 475 U.S. at 681; *Guloy*, 104 Wn.2d at 425.

Here, any error in excluding evidence of Gomez’s immigration status and ineligibility for a U-Visa was harmless beyond a reasonable doubt. Gomez was of minor importance in the State’s case. Gomez testified that he brought defendant down to his bakery in Centralia, allowed him to stay there, and eventually contacted police. RP 1304-16, 1332-34. This was corroborated by the testimony of Officer Adam Haggerty, who contacted Gomez and located defendant at the bakery. RP 1388-1400. Gomez also testified that defendant admitted he wanted a rematch of a fist fight with a particular individual, and that defendant and

his friends planned to start shooting if anything happened at the fight. RP 1330-31, 1336-39. Defendant did not however, tell Gomez about what actually happened during the incident. RP 1340. Defendant's statements to Gomez were corroborated by the testimony of Eddie Contreras regarding the planned fight and defendant's behavior at the shooting; Steven Gamez regarding defendant's anger with Contreras, the gun, and discussions of wanting to "go put in work"; Juan Zuniga regarding the plan for the fight and defendant's signal; and defendant's Facebook messages with Contreras and others regarding Contreras' alleged disrespect.

Additionally, the trial court noted that defense was able to cross-examine Gomez about his inconsistent statements. RP 1383-84. And, the State's overall case – which included eyewitness/victim testimony, testimony from Steven Gamez regarding defendant's demeanor and statements prior to the shooting, evidence of defendant's flight, and defendant's own Facebook communications – was strong. The untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *See Guloy*, 104 Wn.2d at 426. Any error was harmless, and defendant's convictions should be affirmed.

3. DEFENDANT FAILS TO ESTABLISH
INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors,

the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also*, *Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694.

When evaluating an ineffective assistance argument, the utmost deference must be given to counsel’s tactical and strategic decisions. *In re*

Pers. Restraint of Elmore, 162 Wn.2d 236, 257, 172 P.3d 335 (2007). A fair assessment of trial attorney performance requires “every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 690. The defendant bears the burden of establishing the absence of any “conceivable” legitimate strategy or tactic explaining counsel’s performance to rebut the strong presumption that counsel’s performance was effective. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *Thomas*, 109 Wn.2d 225-26.

Here, defendant claims his attorney was ineffective for failing to request a defense of others instruction at trial.¹⁴ *See* Brf. App. at 67. Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the petitioner must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012). To show prejudice, petitioner must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have been different. *Grier*, 171 Wn.2d at 34. "Generally, choosing a particular defense is a strategic decision 'for which there is no correct answer, but only second guesses.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 745 101 P.3d 1 (2004) (quoting *Hendricks v. Calderon*, 70 F.3d 1032, 1041 (9th Cir. 1995)). Legitimate trial strategy and tactics

¹⁴ Defendant also claims ineffective assistance of counsel based on trial counsel's failure to argue that the search warrant affidavits could not be considered to find probable cause if not attached and incorporated into the warrants. Brf. App. 47-50. Counsel was not ineffective for failing to make this argument. The argument is an inaccurate statement of the law. As argued above, a trial court's review for probable cause is limited to the four corners of the warrant and supporting affidavit. *Neth*, 165 Wn.2d at 182. Attachment and incorporation of the affidavit into the warrant is only required when attempting to cure an overbroad warrant. *Riley*, 121 Wn.2d at 29. The trial court did not find that any of the warrants suffered from overbreadth; therefore, there was no need to make the incorporation/attachment argument. Defendant's ineffective assistance of counsel claim accordingly fails.

cannot form the basis of a finding of deficient performance. *Grier*, 171 Wn.2d at 33.

Homicide is justifiable when committed in the lawful defense of the slayer or of any other person in the slayer's presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished. RCW 9A.16.050. *See also*, Washington Pattern Jury Instruction – Criminal (WPIC) 16.02.

The use of force is lawful when a person reasonably believes he is about to be injured, or by another lawfully aiding him, in preventing or attempting to prevent an offense against the person and when the force is not more than necessary. RCW 9A.16.020(3). *See also*, Washington Pattern Jury Instruction – Criminal (WPIC) 17.02. RCW 9A.16.010(1) defines “necessary” to mean that “no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.”

The use of force to defend a third party is justified to the same extent that it is justified if the actor were defending himself. *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977). In *Penn*, the court held that for such use of force to be justified, the following elements apply: (1) that the

actor would be justified in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect, (2) that under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force, and (3) that the actor believes that his intervention is necessary to protect the other person. *Penn*, 89 Wn.2d at 66. The “apprehension of danger as perceived by the actor [must] be reasonable under the circumstances.” *Id.*

Here, defense wisely chose not to request defense of others instruction from the court. First, Juan Zuniga had already pleaded guilty to first degree murder and attempted first degree murder and admitted the same during trial. RP 1933; Exhibit 100. “Murder in any form is the felonious killing of a human being. It is a killing without justification or excuse.” *State v. Rader*, 118 Wash. 198, 203, 203 P.3d 68 (1922). *See also, State v. McCullum*, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983) (“There can be no intent to kill within the first degree murder statute unless a defendant kills ‘unlawfully’”). Thus, Zuniga had already acknowledged that as a matter of law, his actions were neither justifiable nor lawful. How, when the shooter admitted that his actions were not lawful, could defense counsel then argue that despite his guilty plea,

Zuniga's decision to shoot at Contreras, Crawford, and Fogalele was in lawful defense of defendant?

Second, Zungia testified that he wanted to move up and become captain in his gang, and to do that he needed to "earn his stripes." RP 1795, 1801, 1862, 1865, 1939. *See also*, RP 1868 (after the shooting Zuniga referred to himself as a "big G" meaning big gangster). He knew defendant had planned to meet others for a fist fight at that location. RP 1818, 1824, 1827-28. Zuniga admitted that he did not need to use deadly force that night, because the three individuals, who appeared unarmed, were running away as he opened fire. RP 1830, 1863, 1884-85, 1926, 1928.

During closing argument, defense counsel painted Zuniga as a cold-blooded killer who opened fire on Contreras, Crawford, and Fogalele in order to elevate his own status within his gang. *See also*, 7A RP 27 (defense opening statement). Zuniga acted on his own, and therefore defendant was not an accomplice to Zuniga's criminal behavior. Defense counsel argued the following:

The State wants you to believe that Alberto Colt Sarmiento is a murderer, and he is not. *Juan Zuniga is a killer*. [RP 2006.]

...

Juan Zuniga is on trial too, Don't you forget that...Because Juan has one obligation: To testify consistent with his statement deemed to be truthful, to comply with this, the

plea agreement...One of the things that you will see is the weight on this young man's shoulders. For if the prosecutor deems him truthful, as he told you, he gets 21 years. And if the prosecution deems *the shooter, the killer, the murderer*, untruthful, he gets – in his words – life. [RP 2007-08.]

...

Juan is young. Juan is high. Juan is tough. Juan has been in shoot-outs before. *Juan's a wild kid*. [RP 2010.]

...

Who's moving up the ladder? Who wants to be captain? Who sends out a list of the SSC, the Southside Criminales, to the most senior gang member? Juan Zuniga does. And he's moved up that list nicely...After this, I'm Big G now. That's Juan Zuniga...*Juan does things for Juan's reasons. Juan isn't looking out for anybody*. And if you want to know what a troubled young man he was, that night after he got done killing an innocent Elijah Crawford, shooting an innocent Isaac Fogalele and shooting at an innocent Eddie Contreras, he went home and you know what he did? He fell asleep. His head hit the pillow and he got in eight hours of sleep. Most of us, we have somebody [*sic*] disturbing in our lives, our heads can't hit the pillow. We toss and turn at night. We pray. We ask for guidance. Juan Zuniga gets a good eight hours of shut eye. Unbelievable. Now, granted it could also be because he was heavily intoxicated and coming down off cocaine. Could be. *He's certainly not a troubled man by what evil, evil things he did*. Not troubled at all. [RP 2011-12.]

...

That night, Juan Zuniga thought he was being a brave, tough guy by taking out guys that were, he believed, in a rival gang[.] [RP 2013.]

...

Juan isn't interested in protecting other people. Juan is interested in protecting Juan. [RP 2015.]

...

There's one Jury Instruction that for us means everything, and that's the instruction on accomplice liability. Whether you believe that what Juan Zuniga did was create a grave risk of death or whether his reckless conduct ended the life of Elijah Crawford or whether it was Assault 1 or Assault 2

or Murder 2 predicated on Assault 2, things only matter if you believe that Alberto Colt Sarmiento, beyond a reasonable doubt, is an accomplice to the crime. Not a crime, the specific crime. You see, *Juan is the shooter and is the killer. And if this case were a trial on Juan Zuniga, this would be an easy case.* [RP 2028.].

...
Your reasonable doubt is Juan Zuniga in every way, whether you read them one way or another. Because nowhere – nowhere is there evidence that my client made an agreement with Juan to do this at all. And even Juan acknowledges that, even Juan does...*Because there was no plan to do what Juan did.* [RP 2032.].

...
I do want to say something else about Juan, the young upcoming captain who wanted to be a captain...He wanted to be the leader. And he did things for his reasons, and he didn't need to be told anything. Juan has already earned his stripes. He's already shot at people, and he wanted to be the Big G...Juan Zuniga was on a plain all of his own and needed no encouragement or assistance to shoot another person. *He did this on his own.* [RP 2034-35.]

(Emphasis added.) Any theory of lawful defense of others would be inconsistent with the theory actually argued to the jury: that Zuniga was the lone killer, the lone murderer, who opened fire in order to “earn his stripes” within the gang, and that defendant was not an accomplice to such self-centered criminal activity.¹⁵ Counsel argued the only reasonable defense based on the evidence.

Here, defense counsel pursued a legitimate trial strategy of general denial of accomplice liability in not requesting a defense of others

¹⁵ See also, RP 2014-15 (defense counsel argues that defendant was the “loose end” that could tie Zuniga, Martinez, Gamez, and the Southside Criminales to the shooting).

instruction. The fact that this strategy was ultimately unsuccessful does not establish ineffective assistance of counsel. “While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.” *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737, *cert. denied*, 459 U.S. 842 (1982). Counsel is presumed to be effective, and petitioner must show an absence of legitimate strategic reasons to support his counsel’s challenged conduct. *McFarland*, 127 Wn.2d at 335-36. *See State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if ‘the actions of counsel complained of go to the theory of the case or to trial tactics.’” (quoting *Renfro*, 96 Wn.2d at 909)). In light of the evidence adduced at trial, including evidence that Zuniga had already pleaded guilty to murder, an attorney could reasonably decide that petitioner’s best defense was a general denial of accomplice liability. Moreover, there was no credible evidence that Zuniga had an objectively reasonable fear of imminent danger necessitating his use of force when he opened fire on an unarmed group of people who were running away. *See State v. Walker*, 136 Wn.2d 767, 777, 966 P.2d 883 (1998). Defendant’s attorney provided effective assistance, and defendant fails to show an absence of legitimate strategic reasons to support his attorney’s

conduct. Defendant's claim of ineffective assistance of counsel accordingly fails.

4. DEFENDANT FAILS TO SHOW CUMULATIVE ERROR WHERE NO PREJUDICIAL ERROR OCCURRED.

“The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.” *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014). “Cumulative error may warrant reversal even if each error standing alone would otherwise be considered harmless.” *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646, 660 (2006) (citing *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)). Defendant bears the burden of showing multiple trial errors and the accumulation of prejudice that affected the outcome of the trial. *In re Cross*, 180 Wn.2d at 690. If no prejudicial error occurred, then the cumulative error doctrine does not apply. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred”). Moreover, “[t]here is no prejudicial error under the cumulative error rule if the evidence is overwhelming against a defendant.” *In re Cross*, 180 Wn.2d at 691.

Under the cumulative error doctrine, a defendant may be entitled to relief if a trial court were to commit multiple, separate harmless errors. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). In such cases, each individual error might be deemed harmless, whereas the combined effect could be said to infringe on the right to a fair trial. *Id.* (citing *Weber*, 159 Wn.2d at 279, and *State v. Hodges*, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003)). The cumulative error doctrine “does not apply where the errors are few and have little or no effect on the outcome of the trial.” *Weber*, 159 Wn.2d at 279. “The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary.” *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009).

The first requirement for cumulative error is multiple, separate errors. Defendant has not sustained his burden as to this requirement. In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at his trial, much less that there was an accumulation of it. Moreover, the evidence against defendant was overwhelming. Defendant is not entitled to relief under the cumulative error doctrine.

5. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE SUPPORTS DEFENDANT'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are considered equally reliable. *Id.* at 201; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

A person is guilty of unlawful possession of a firearm in the second degree if he knowingly has a firearm in his possession or control and he has previously been adjudicated guilty as a juvenile of a felony. See Washington Pattern Jury Instruction – Criminal (WPIC) 133.02.01; CP 205-251 (Instruction No. 31). See also, RCW 9.41.040(2)(a); *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (unlawful possession of firearm requires proof of knowing possession). Here, defendant stipulated that he had previously been adjudicated guilty as a juvenile of a felony offense and was not permitted by law to possess a firearm. RP 1696;

Exhibit 11. Thus, the only remaining issue is defendant's claim that there was insufficient evidence to support that he had actual or constructive possession of the firearm used by Zuniga to kill Elijah Crawford and assault Isaac Fogalele and Eddie Contreras on November 2, 2015.

Defendant's claim fails, because the State presented sufficient evidence that defendant had dominion and control over the firearm.

Possession of a firearm may be either actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270 (2013). Actual possession occurs when the firearm is in the actual physical custody of the person charged with possession and may be proved by circumstantial evidence. *Manion*, 173 Wn. App. at 634. Constructive possession occurs when the firearm is not in actual, physical possession, but the person charged with possession has dominion and control over the firearm. *Staley*, 123 Wn.2d at 798 (citing *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). While mere proximity to a firearm is not enough to establish dominion and control, the State need not prove exclusive control. *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010). One can be in constructive possession

jointly with another person. *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731 (1995).

Constructive possession “can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.” *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). A vehicle is considered “premises” for purposes of determining constructive possession. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). “[D]ominion and control over [the] premises raises a rebuttable inference of dominion and control over the [contraband].” *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). To determine whether a defendant had constructive possession of a firearm, the court examines the totality of the circumstances touching on dominion and control. *State v. Jeffrey*, 77 Wn. App. 222, 227, 889 P.2d 956 (1995). No single factor is dispositive. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995).

Courts have found sufficient evidence of constructive possession, and dominion and control, where the defendant was the driver/owner of the vehicle where contraband was found. *See Bowen*, 157 Wn. App. at 828 (holding that defendant had constructive possession over a gun and drugs in a vehicle when he was the owner, driver, and sole occupant of the vehicle); *Echeverria*, 85 Wn. App. at 780, 783 (holding that the driver of a

borrowed car, with multiple passengers, had constructive possession of a gun that was in plain view partially under the driver's seat because he knew it was there and had the ability to take actual possession); *State v. McFarland*, 73 Wn. App. 57, 70, 867 P.2d 660 (1994) (holding there was sufficient evidence of constructive possession because the defendant "knowingly transported [the guns] in his car."); *Turner*, 103 Wn. App. at 518 (holding "where the owner/operator of a vehicle has dominion and control of a vehicle and knows a firearm is inside the vehicle, there is sufficient evidence of constructive possession of a firearm"); *State v. Reid*, 40 Wn. App. 319, 325-26, 698 P.2d 588 (1985) (evidence that defendant knew weapons were in his car sufficient to send issue to jury on question of actual or constructive possession of a deadly weapon).

In *Turner*, this Court found sufficient evidence to support a conviction for unlawful constructive possession of a firearm. 103 Wn. App. at 524. A friend claimed the gun was his, not Turner's; but evidence showed that Turner sat in close proximity to the gun in his truck, that he knew of its presence in the backseat, that he was able to reduce it to his own possession, and that he owned and drove the truck in which the rifle was found. *Turner*, 103 Wn. App. at 521-22, 13 P.3d 234. This Court stated:

[W]here there is control of a vehicle and knowledge of a firearm inside it, there is a reasonable basis for knowing constructive possession, and there is sufficient evidence to go to the jury. In this case, there was even more to convict Turner, the proximity of the firearm, the extended duration of the time the firearm was in the truck, and that Turner did nothing to reject the presence of the firearm in the truck.

Id. at 524.

Here, defendant drove the black truck on November 2, 2015. RP 966-67, 974, 1008-09, 1812-13. *See also* RP 924, 1621 (truck registered to defendant's mother); 930-31, 935, 955 (truck sold to defendant by a relative; defendant drove the truck). Defendant saw the firearm at Steven Gamez's residence before the shooting and may have handled it. RP 976, 1017, 1020, 1876-77. Defendant, Zuniga, and Martinez left Gamez's residence with the gun. RP 976. Zuniga sat in the front passenger seat of the truck with the gun while defendant drove. RP 1815-17, 1857. Defendant saw the shooter, Zuniga, with the gun, RP 1912. Defendant signaled Zuniga to start shooting. RP 891-94, 1863-65, 1884-86, 1937-38. *See also*, RP 1331, 1336-39 (defendant admitted that he and his friends planned the shooting). Defendant stood there as Zuniga fired the gun at Contreras, Fogalele, and Crawford. RP 910-11. Fogalele was struck by a bullet, and Crawford died from his gunshot wound. RP 787-89, 1156-57. Bullet casings were recovered from the scene. RP 558, 630, 633, 1226-29.

Zuniga got back into defendant's truck after the shooting and went home.
RP 1835-38.

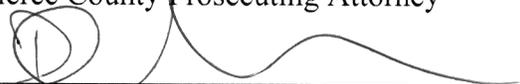
Taken in the light most favorable to the State, the evidence here, as in *Turner*, established that (1) defendant was in control of the vehicle on November 2, 2015; (2) defendant saw, and perhaps handled, the firearm that night; (3) defendant directed his passenger, Zuniga, to shoot at Eddie Contreras and company, thereby demonstrating his knowledge that the firearm was in his vehicle and his ability to direct another to use the firearm to commit a crime (i.e., defendant had a degree of control over the firearm); and (4) defendant failed to "reject the presence of the firearm in the truck." *Turner*, 103 Wn. App. at 524. Thus, sufficient evidence supports defendant's conviction for unlawful possession of a firearm in the second degree, and his conviction should be affirmed.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests this Court affirm defendant's convictions.

DATED: May 15, 2019

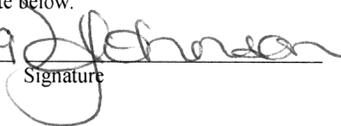
MARY E. ROBNETT
Pierce County Prosecuting Attorney



BRITTA ANN HALVERSON
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WSB # 44108

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efile} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/15/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 15, 2019 - 2:55 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v Alberto Colt Sarmiento, Appellant
Superior Court Case Number: 15-1-04435-6

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