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COA NO. 51589-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALBERTO COLT SARMIENTO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann van Doorninck, Judge

REPLY BRIEF OF APPELLANT

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A. **ARGUMENT IN REPLY**

1. **THE SEARCH WARRANTS ARE OVERBROAD, REQUIRING SUPPRESSION OF EVIDENCE OBTAINED FROM THEM.**

a. **An affidavit not attached and incorporated into the warrant cannot cure an overbreadth problem, which means it cannot be used to supply probable cause.**

The State does not dispute the affidavits for the various warrants challenged on appeal were not attached *and* incorporated into the warrants. However, it seeks to draw a sharp division between the probable cause determination and the overbreadth determination in claiming an unincorporated affidavit can still be used to establish probable cause even though it cannot be used to cure overbreadth. Brief of Respondent (BOR) at 10, 17 n.5. The State's position is infirm. The probable cause determination is part and parcel of the overbreadth analysis. The two inquiries are inseparable. When an affidavit is not incorporated into the warrant, it cannot be used to supply probable cause.

The Fourth Amendment and article I, section 7 "impose two requirements for search warrants that are 'closely intertwined.'" State v. Higgs, 177 Wn. App. 414, 425, 311 P.3d 1266 (2013), review denied, 179 Wn.2d 1024, 320 P.3d 719 (2014) (quoting State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992)). First, a warrant must be supported by probable cause, which requires "a nexus both between criminal activity

and the item to be seized and between the item to be seized and the place to be searched." Id. at 425-256 (citing State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999)). Second, a search warrant must be sufficiently particular, which means "sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." Higgs, 177 Wn. App. at 426 (quoting State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997)).

Of significance to Sarmiento's argument on appeal, "[a] warrant is 'overbroad' if either requirement is not satisfied." Higgs, 177 Wn. App. at 426 (citing State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004)). "Therefore, a warrant can be overbroad 'either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist.'" Higgs, 177 Wn. App. at 426 (quoting Maddox, 116 Wn. App. at 805). "Further, a warrant will be found overbroad if some portions are supported by probable cause and other portions are not." Higgs, 177 Wn. App. at 426 (citing Maddox, 116 Wn. App. at 806). In this manner, the probable cause determination is intertwined with the overbreadth determination.

Sarmiento argues in part that the warrants are overbroad because they do not show probable cause to seize the things and search the

locations at issue. "A properly issued warrant 'distinguishes those items the State has probable cause to seize from those it does not,' particularly for a search of computers or digital storage devices." State v. Keodara, 191 Wn. App. 305, 314, 364 P.3d 777 (2015) (quoting State v. Askham, 120 Wn. App. 872, 879, 86 P.3d 1224 (2004)).

The warrants here do not establish the requisite nexus between the place to be searched and the suspected criminal activity. "A warrant may be overbroad and, therefore, violate the particularity requirement if it authorizes police to search persons or seize things for which there is no probable cause." State v. Garcia, 140 Wn. App. 609, 622, 166 P.3d 848 (2007). "To avoid overbreadth, there must be 'a sufficient nexus between the targets of the search and the suspected criminal activity.'" Id. at 622-23 (quoting State v. Carter, 79 Wn. App. 154, 158, 901 P.2d 335 (1995)). Courts thus look to whether the required nexus for showing probable cause exists in assessing overbreadth challenges. Garcia, 140 Wn. App. at 622-23; Carter, 79 Wn. App. at 158, 161; State v. Constantine, 182 Wn. App. 635, 646, 330 P.3d 226 (2014). For example, the fact that a warrant lists generic classifications does not necessarily result in an impermissibly broad warrant, "[b]ut blanket inferences and generalities cannot substitute for the required showing of 'reasonably specific underlying circumstances that establish evidence of illegal activity will likely be found in the place

to be searched in any particular case." Keodara, 191 Wn. App. at 313 (quoting Thein, 138 Wn.2d at 147-48).

The affidavits cannot be used to supply the probable cause nexus and thereby cure the overbreadth problem because they are not incorporated into the warrants. "[A]n affidavit may only cure an overbroad warrant where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with 'suitable words of reference.'" State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993) (quoting Bloom v. State, 283 So.2d 134, 136 (Fla. Dist. Ct. App. 1973)). "[B]oth an attachment and suitable words of reference are necessary for an affidavit to cure an overbroad warrant." State v. Higgins, 136 Wn. App. 87, 92, 147 P.3d 649 (2006).

Consistent with case law, the State observes attachment and incorporation are "required for purposes of curing overbreadth." BOR at 17 n.5. But then it argues that the reviewing court must consider the affidavit to determine whether probable cause supports the warrant, even if the affidavit is not incorporated into the warrant. BOR at 10, 17 n.5. This analytical pivot is unsound.

An overbreadth violation occurs when the warrant authorizes the search and seizure of something for which there is no probable cause. Higgs, 177 Wn. App. at 426; Garcia, 140 Wn. App. at 622; Keodara, 191

Wn. App. at 313. When that happens, attachment and incorporation of the affidavit into the warrant may cure the overbreadth problem, i.e., cure the lack of probable cause in the warrant. Higgins, 136 Wn. App. at 92; see United States v. Blakeney, 942 F.2d 1001, 1026 (6th Cir. 1991) ("Were we to find that the warrant failed to pass the express incorporation rule, then, in the absence of the August 19 affidavit, the warrant was not supported with probable cause.").

What the State seeks to do is rely on the unincorporated affidavit to show probable cause at the outset and then conclude there is no overbreadth problem in need of curing, such that it is irrelevant that the affidavit was not incorporated. This represents an impermissible end run around the incorporation requirement as the means to cure an overbreadth problem. If an *unincorporated* affidavit could be properly relied on to establish probable cause, there would be no need to cure the overbreadth problem associated with lack of probable cause by relying on an *incorporated* affidavit. The rule of incorporation becomes meaningless.

Whether the requisite nexus for showing probable cause exists is an intrinsic part of the overbreadth analysis. The State does not get the benefit of relying on an affidavit that is not incorporated into the warrant to show the requisite nexus because only incorporated affidavits are capable of curing overbreadth. The State's defense of the warrants in this

case is warped by its unsound analytical position that the unincorporated affidavits can be used to show the warrants are not overbroad.

The State cites State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) for the proposition that, in determining whether probable cause supports issuance of a search warrant, review is limited to the four corners of the warrant and supporting affidavit. BOR at 10, 17 n.5. Neth did not involve an overbreadth challenge and did not involve an affidavit that was not incorporated into the warrant. The issue here was not addressed in Neth. "In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Cases that fail to specifically address or decide an issue are not precedent on the issue. In re Elec. Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

Even assuming the unincorporated affidavits could be used in determining whether a probable cause nexus exists, the warrants are still overbroad. The following analysis of the warrants accepts this assumption for the sake of argument and then shows why the warrants remain constitutionally defective.

b. The warrant for the phones is overbroad.

The warrant for the phones is overbroad for multiple reasons. First, the warrant authorized a search for communications between Sarmiento and co-conspirators/participants in the homicide in the absence of a specific factual basis in the affidavit showing any such communications were to be found on the phones. The warrant thus authorized a search for a category of evidence for which there was no probable cause to search. This is an overbreadth violation. Higgs, 177 Wn. App. at 426.

The warrant allowed police to search for evidence "related to communications between co-conspirators and/or participants in the homicide and the deceased." Pre-trial Ex. 1, warrant at 1. As the basis for searching for evidence of communications between "co-conspirators and/or participants in the homicide," the affidavit recites: "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 (texts or calls) and the fact that 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." Pre-trial Ex. 1, affidavit at 3.

Based on the affidavit, there is probable cause to search for texts between Sarmiento and Contreras because the affidavit elsewhere sets forth Contreras's description of Facebook Messaging, including when they

occurred in relation to the shooting. Pre-trial Ex. 1, affidavit at 2-3. The affidavit, however, does not establish a probable cause nexus between the phones and communications with co-conspirators. The only basis for seeking evidence of co-conspirator communications is based on the affiant's generalized belief that cell phones are often used by co-conspirators to communicate. That is not good enough.

"The affidavit must be based upon more than mere suspicion or personal belief that evidence of the crime will be found at the place to be searched." State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). A warrant to search for evidence in a particular place must therefore be based on more than generalized belief of the supposed practices of the type of criminal involved. Thein, 138 Wn.2d at 147-48. Rather, the warrant must contain specific facts tying the place to be searched to the crime. Id. "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." Id. at 147.

In Thein, the affidavit contained generalized statements of belief, based on officer training and experience, about drug dealers' common habits, particularly that they kept evidence of drug dealing in their residences. Id. at 138-39. The affidavit expressed the belief that such evidence would be found at the suspect's residence. Id. at 139. The Court

held such generalizations do not establish probable cause to support a search warrant for a drug dealer's residence because probable cause must be grounded in fact. Id. at 146-47.

In Nordlund, the State failed to demonstrate probable cause to search the defendant's computer for evidence of sexual assault where the affidavits supporting the search warrants contained only generalized statements about the habits of sex offenders, such as in the affiant's "'experience and training[,] sex offenders often keep notes, newspaper clippings, diaries and other memorabilia of their crimes,' and that such items had been found on suspects' computers in other sexual assault cases." State v. Nordlund, 113 Wn. App. 171, 181, 183-84, 53 P.3d 520 (2002).

In Jackson, the Supreme Court rejected an allegation in the affidavit that perpetrators return to the scene of the crime as the kind of generalization that cannot by itself support probable cause: "the statement about criminals returning to the scene of the crime, if accepted, would substitute for specific facts and circumstances establishing probable cause. The statement also suggests that probable cause to attach a tracking device to a suspect's vehicle would automatically follow in any case where the criminal activity might involve more than one location." Id. at 267.

As in Thein, Nordlund, and Jackson, the affiant's generalized belief about the supposed practices of the type of criminal involved — not even supported by a boilerplate assertion that the belief was based on training and experience — is insufficient to establish a nexus between the evidence sought and the place to be searched. There is no specific factual basis for believing evidence of co-conspirators communication on phones took place, let alone that such evidence would be found on these two phones. If the detective's statement were accepted as establishing probable cause, then probable cause would follow in every case where there are multiple suspects and one of the suspects has a cell phone. That type of reasoning was condemned in Jackson, and it should be condemned here as the kind of rationale that would swallow privacy protections.

The State relies on an Arkansas case and two federal cases for its argument that the search of the phones for evidence of co-conspirator communications was fair game. BOR at 20-21, 26. United States v. Bass, 785 F.3d 1043, 1049 (6th Cir. 2015) is distinguishable because the affidavit in that case provided a factual basis for the nexus in stating "that Bass and his co-conspirators frequently used cell phones to communicate." The detective in Sarmiento's case did not make any such statement in his affidavit, instead relying on the type of generalization that Washington courts have condemned as insufficient to establish nexus.

Johnson v. State, 2015 Ark. 387, 472 S.W.3d 486, 490 (Ark. 2015) and United States v. Gholston, 993 F. Supp. 2d 704, 718-19 (E.D. Mich. 2014), in deeming the defendant's possession of a cell phone and evidence of an accomplice sufficient to establish probable cause to search the phone, should be disregarded because their reasoning contradicts the more stringent nexus standard employed by Washington courts.

Keodara is instructive. In that case, the warrant to search a cell phone was overbroad because it was based upon an officer's generalized statements about gang members using their cell phones to take and store photos of illegal activity. Keodara, 191 Wn. App. at 315-16. Keodara was a multiple suspect case. Three men approached a bus stop on foot. Id. at 309. One of them had a gun and demanded money from the group at the bus stop. Id. The gunman, later identified as the defendant, fired on the group. Id. Following apprehension, police obtained a warrant for the defendant's cell phone based on the officer's belief, set forth in the affidavit, that gang members commonly use cell phones in connection with their criminal activity. Id. at 309-10.

Keodara rejected this attempt to forge a nexus between the criminal activity and the phone. "Under Thein, more is required for the necessary nexus than the mere possibility of finding records of criminal activity." Id. at 316. "[B]lanket statements about what certain groups of

offenders tend to do and what information they tend to store in particular places" is insufficient to establish probable cause. Id.

The Arkansas and federal district court cases cited by the State cannot be reconciled with Keodara. In Sarmiento's case, the affidavit relies on a similar blanket generalization that co-conspirators often use phones to communicate with one another. The State seeks to distinguish Sarmiento's case from Keodara on the ground that the phone in Keodara was not connected to any criminal activity for which there was probable cause, whereas here a phone was used to communicate with Contreras, the intended victim. BOR at 25. This is a difference, but the overbreadth problem remains. The affidavit shows Sarmiento used a phone in connection with the crime in that it contains a specific factual basis for showing he used a phone to communicate with Contreras via Facebook messaging. The only item of evidence for which there was probable cause to believe it would be found on the phones is the text communication between Sarmiento and Contreras. The warrant should have been limited to a search for that evidence.

The warrant, however, authorized a search for co-conspirator communications even though there was no nexus established between such communications and the phones. That, by itself, establishes the cell phone warrant is overbroad. A warrant is overbroad when it "describes,

particularly or otherwise, items for which probable cause does not exist." Higgs, 177 Wn. App. at 426 (quoting Maddox, 116 Wn. App. at 805). And a warrant is overbroad "if some portions are supported by probable cause and other portions are not." Higgs, 177 Wn. App. at 426. The portion of the warrant authorizing a search for co-conspirator communications is not supported by probable cause and is therefore overbroad.

To the extent the phrase "participants in the homicide" used in the warrant is any different from "co-conspirators," then the search for communications with such participants is lacking in probable cause for the same reasons. Except it is worse. The detective set forth his generalized belief that co-conspirators often use cell phones to communicate but said nothing about whether he believed mere participants in a homicide often use cell phones to communicate. Pre-trial Ex. 1, affidavit at 3. The basis for searching for participant communications is thus even less than for searching for co-conspirator communications.

Consider also that the warrant authorizes a search for communications with "the deceased." Pre-trial Ex. 1, warrant at 1. Contreras is not the deceased. So this language in the warrant does not authorize search for communications with Contreras. Crawford is the deceased, but the affidavit does not allege there were any communications

between Sarmiento and Crawford. Nor does the affidavit allege there was any such communication with Fogalele, the other person who was shot.

The overbreadth problem goes deeper. The court's handwritten interpolation of data "related to communications between co-conspirators and/or participants in the homicide and the deceased" does not act as any kind of effective limitation because of the language preceding it. Pre-trial Ex. 1, warrant at 1. The warrant authorizes the search and seizure of "any and all stored data, *including but not limited to . . .*" Id. In other words, the warrant authorized the search and seizure of the described communications but was not limited to that category of evidence. Warrants have been struck down on overbreadth grounds when they authorize computer searches where no limiting principle could be discerned, such as when the warrant permits a search of "any and all information, data, devices, programs, and other materials." United States v. Christie, 717 F.3d 1156, 1164-65 (10th Cir. 2013) (internal quotation marks omitted) (quoting United States v. Otero, 563 F.3d 1127, 1132-33 (10th Cir. 2009)).

The State claims no temporal limitation for the search of the phones was required. BOR at 26. "Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad." United States v. Abboud, 438 F.3d 554, 576

(6th Cir. 2006) (quoting United States v. Ford, 184 F.3d 566, 576 (6th Cir. 1999)); see United States v. Kow, 58 F.3d 423, 427 (9th Cir. 1995) (finding warrant overbroad where "[t]he government did not limit the scope of the seizure to a time frame within which the suspected criminal activity took place"); United States v. Diaz, 841 F.2d 1, 4-5 (1st Cir. 1988) (finding warrant overbroad because it "included permission to seize records . . . [before the date] when the first instance of wrongdoing mentioned in the affidavit occurred"). A lack of temporal limitation encourages "rummaging," which the particularity requirement is designed to guard against. Abboud, 438 F.3d at 576.

The State nonetheless maintains no temporal limitation was needed because the warrant was limited to data related to communications between co-conspirators, participants in the murder and the deceased. BOR at 25-26. But, as argued above, the warrant did not provide any real limitation because it authorized the search and seizure of the entire content of the phones, "including but not limited to" the designated communications. Pre-trial Ex. 1, warrant at 1. "[C]onformance with the particularity requirement eliminates the danger of unlimited discretion in the executing officer's determination of what to seize." Perrone, 119 Wn.2d at 549. A warrant cannot be said to provide clear parameters to the executing officer when the parameters themselves are so wide open that

they essentially provide no effective limitation at all. "[O]fficers conducting searches (and the magistrates issuing warrants for those searches) cannot simply conduct a sweeping, comprehensive search of a computer's hard drive." United States v. Riccardi, 405 F.3d 852, 862 (10th Cir. 2005) (quoting United States v. Walser, 275 F.3d 981, 986 (10th Cir. 2001)). "As an irreducible minimum, a proper warrant must allow the executing officers to distinguish between items that may and may not be seized." United States v. Leary, 846 F.2d 592, 602 (10th Cir. 1988). When a warrant provides no meaningful limitation on what can be seized and searched, it is an overbroad warrant. Id. at 602-03.

Another particularity defect in the warrant is that suspected co-conspirators are not named in the warrant, thereby failing to limit the parameters of the search to communications with those individuals. By the time the warrant for the phones issued on November 17, police already knew the names of Trino Martinez and Jose Salinas as potential co-conspirators, as shown by the warrant that police obtained for the Facebook accounts of Martinez and Salinas on November 12.¹ Pre-trial Ex. 4, affidavit at 3-4. Police were capable of identifying co-conspirators with particularity in the phone warrant but did not do so. This violated the

¹ The Facebook warrant and affidavit were filed in the clerk's office on December 1, but the affidavit was signed, and the warrant issued, on November 12.

command that the warrant be made as specific as possible. See VonderAhe v. Howland, 508 F.2d 364, 369 (9th Cir. 1974) ("searches deemed necessary should be as limited as possible.").

The State asserts the affidavit naming Martinez and Salinas did not expressly identify them as co-conspirators. BOR at 26, n.7. That is technically true but a commonsense reading of the affidavit demonstrates the detective's belief that those two men were involved in the crime. They are described as matching the description of the shooter. Pre-trial Ex. 4, affidavit at 4. They were considered to be co-conspirators.

The State also claims the detective's knowledge of Martinez and Salinas is irrelevant because the detective did not name them in the affidavit for the phone warrant and that a search for unnamed co-conspirators was good enough. BOR at 26, n.7. This claim fails.

A description in the warrant may be valid "if it is as specific as the circumstances and the nature of the activity under investigation permits." Perrone, 119 Wn.2d at 547. Accordingly, a generic or general description of the things to be seized may be sufficient if probable cause is shown and "a more specific description is impossible" with the information known to law enforcement at the time. Id. The question for any court, then, is what information is known to law enforcement at the time the warrant was

issued? The next question is how is it to be determined what law enforcement knew at the time?

A court cannot determine whether it was impossible for the affiant to include a more detailed description if the circumstances for assessing impossibility are not in the affidavit. If the affidavit omits circumstances pertinent to determining whether the police really are being as specific as the investigation permits, what is a reviewing court to do? The State would have the police be able to insulate their warrants from overbreadth oversight simply by failing to include information in the affidavit that shows the warrant could have been more particular. Courts need to be able to assess all the circumstances to determine whether a warrant could have been made more specific. That is the only workable rule. In United States v. Klein, 565 F.2d 183, 186, 188, n.5 (1st Cir. 1977), for example, the reviewing court considered the government attorney's representations at oral argument as a basis for determining what law enforcement knew at the time, even though such information was not contained in the affidavit, to conclude the particularity defect in the warrant could have been remedied.

Here, another affidavit for another warrant shows police knew the names of two suspected co-conspirators at the time the detective sought the warrant for the phones. Pre-trial Ex. 4, affidavit at 3-4. This Court

need not turn a blind eye to what the detective indisputably knew at the time he sought the warrant for the phones. The State cites no authority that what law enforcement knew at the time the warrant was issued is limited to what is contained in the affidavit for that warrant in the context of an overbreadth challenge.

It will also be noted that if the State is correct in arguing the determination of probable cause is divorced from the overbreadth analysis, then the State is now hoisted on its own petard. Review of probable cause is limited to the four corners of the supporting affidavit. Neth, 165 Wn.2d at 182. The rule does not apply to determining whether a warrant fails to satisfy the particularity requirement in an overbreadth challenge. Neth is not an overbreadth case. The State cites no case where the four corners rule was applied to an overbreadth challenge. See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

The State does not even address the fact that neither Contreras nor the other victims of the shooting, Fogalele and Crawford, were identified by name in the warrant. As shown by the affidavit, police knew the identity of the deceased at the time. Pre-trial Ex. 1, affidavit at 1. It was

Crawford, but he is not named in the warrant. Pre-trial Ex. 1, warrant at 1-2. Police knew the identity of the living victims of the shooting, Contreras and Fogalele. Pre-trial Ex. 1, affidavit at 1. But they are not named in the warrant either. Again, the warrant lacks particularity because the search authorized by the warrant could have been narrowed to communications with the victims named in the affidavit. The affidavit was not incorporated into the warrant, however, so it cannot cure the overbreadth problem. Riley, 121 Wn.2d at 29; Higgins, 136 Wn. App. at 92. A warrant is overbroad when an affidavit shows information capable of limiting the search was available but police failed to put that information into the warrant. United States v. Fuccillo, 808 F.2d 173, 176-77 (1st Cir. 1987); Millender v. Cty. of Los Angeles, 620 F.3d 1016, 1026-27 (9th Cir. 2010), rev'd on other grounds sub nom. Messerschmidt v. Millender, 565 U.S. 535, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012).

The State cites Perrone, 119 Wn.2d at 616, and Stenson, 132 Wn.2d at 692, for the proposition that a generic description of the data to be seized can meet the particularity requirement. BOR at 13, 15. But in those cases, the warrant incorporated the affidavit. Perrone, 119 Wn.2d at 542-43; Stenson, 132 Wn.2d at 696. McKee recognizes the ability of generic descriptions to pass constitutional muster are reduced when the affidavit is not incorporated. State v. McKee, 3 Wn. App.2d 11, 28 n.12,

413 P.3d 1049 (2018), rev'd in part on other grounds, 193 Wn.2d 271, 438 P.3d 528 (2019).

The State says sufficient particularity can be achieved through reference to a criminal statute. BOR at 16. Precedent makes clear that statutory citation to the offense being investigated does not automatically render a warrant sufficiently particular. See McKee, 3 Wn. App. 2d at 25-26 (identifying the crimes under investigation as a violation of certain statutes did not satisfy the particularity requirement). "It is not enough that the warrant makes reference to a particular offense; the warrant must 'ensure that the search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.'" Cassady v. Goering, 567 F.3d 628, 636 (10th Cir. 2009) (quoting Voss v. Bergsgaard, 774 F.2d 402, 404 (10th Cir. 1985)).

Further, "a warrant must identify the specific offense for which the police have established probable cause" and "the warrant must specify the 'items to be seized by their relation to designated crimes.'" United States v. Galpin, 720 F.3d 436, 445-46 (2d Cir. 2013) (quoting United States v. Williams, 592 F.3d 511, 519 (4th Cir. 2010)). Here, the general reference to "Murder 1st degree RCW 9A.32.030" authorized search and seizure of items for which there was no probable cause. Pre-trial Ex. 1, warrant at 1. In Higgins, the warrant was overbroad in part because the general citation

to the second degree assault statute authorized search of evidence not only for one of the alternative means of committing that crime supported by probable cause but also for evidence based on other alternative means of committing the crime for which there was no probable cause. Higgins, 136 Wn. App. at 93.

The same dynamic presents itself here. First degree murder, like second degree assault, is an alternative means crime. RCW 9A.32.030(1)(a)-(c); State v. Fortune, 77 Wn. App. 628, 630, 893 P.2d 670 (1995), aff'd, 128 Wn.2d 464, 909 P.2d 930 (1996). The affidavit may have established probable cause that a first degree murder had been committed, but there was no probable cause for at least one of the alternative means of committing that crime: that Sarmiento caused someone's death during the commission or attempted commission of robbery, rape, burglary, arson or kidnapping. RCW 9A.32.030(1)(c). The broad reference to RCW 9A.32.030 allowed police to search for evidence of robbery, rape, burglary, arson or kidnapping, none of which had anything to do with the actual crime under investigation.

Looming over the overbreadth analysis is the specter that searches of computer-based data are especially vulnerable to abuse, especially if the courts provide no meaningful check on such searches. "Where a search warrant authorizing a search for materials protected by the First

Amendment is concerned, the degree of particularity demanded is greater than in the case where the materials sought are not protected by the First Amendment." Perrone, 119 Wn.2d at 547. "Where presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field." Zurcher v. Stanford Daily, 436 U.S. 547, 564, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

Cell phones are computers with immense storage capacity. Riley v. California, 573 U.S. 373, 393, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). For searches involving computers, courts must "closely scrutinize compliance with the particularity and probable cause requirements." Nordlund, 113 Wn. App. at 182. Once the government has obtained authorization to search a computer's memory, "the government may claim that the contents of every file it chose to open were in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant." Galpin, 720 F.3d at 447. There is a serious risk that every warrant for electronic information will become, in effect, a general warrant. Id. (citing United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010)). "This threat demands a heightened sensitivity to the particularity requirement in the context of digital searches." Id.

But the State's proposed approach does just the opposite. By essentially arguing that all computer searches require law enforcement to search everything on the computer, the State relaxes rather than heightens the particularity requirement. Where protection against general warrants is needed most, the particularity requirement practically collapses. That is the outcome if the State's argument is embraced.

The State treats the immense capacity of a cell phone to render the intimate details of a person's life in fine grained detail not as a warning to tread carefully but rather a golden opportunity to delve into every nook and cranny of a person's life in search of inculpatory evidence. BOR at 13-14. According to the State, law enforcement must examine everything in the cell phone to figure out whether it is relevant to the investigation, and in this regard, such inspection is no different than searching a home for documentary evidence. BOR at 14. There is a difference. "The potential for privacy violations occasioned by an unbridled, exploratory search of a hard drive is enormous. This threat is compounded by the nature of digital storage. Where a warrant authorizes the search of a residence, the physical dimensions of the evidence sought will naturally impose limitations on where an officer may pry." Galpin, 720 F.3d at 447. Such limitations are largely absent in the digital realm. Id.

The U.S. Supreme Court likewise recognizes "there is an element of pervasiveness that characterizes cell phones but not physical records." Riley, 573 U.S. at 395. "[T]he data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different." Id. Thus, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." Id. at 396-97.

The State says people do not keep digital files accurately labeled to reflect their incriminating content. BOR at 15. That may be true in some cases due to the nature of the crimes, such as those involving child pornography, United States v. Schesso, 730 F.3d 1040, 1046 (9th Cir. 2013), and financial misconduct, Bass, 785 F.3d at 1050. The asserted justification loses force when applied to street-level crimes such as the one at issue here.

In People v. Herrera, 357 P.3d 1227, 1229 (Colo. 2015), a case involving sexual assault of a child, the warrant authorized the police to search the defendant's cell phone for text messages between the defendant and a particular person. The police, however, opened a text message

folder with someone else's name. Id. The search was not justified by the plain view exception "because there was no evidence that [the defendant] might have mislabeled the folders." Id. at 1233. "The mere, abstract possibility that he might have done so" was not enough. Id. "If we were to hold that any text message folder could be searched because of the abstract possibility that it might have been deceptively labeled . . . we would . . . be faced with a limitless search." Id.

The same rationale applies to the phones at issue here. Nothing in the affidavit so much as suggests a concern that the data files to be found on the phones had been manipulated. Moreover, there are ways to identify the type of file at hand and from that determine whether it is probable that it will contain the type of evidence for which there is probable cause to search. "With the computers and data in their custody, law enforcement officers can generally employ several methods to avoid searching files of the type not identified in the warrant: observing files types and titles listed on the directory, doing a key word search for relevant terms, or reading portions of each file stored in the memory." United States v. Carey, 172 F.3d 1268, 1276 (10th Cir. 1999). If police are looking for text messages, for example, they can look to the extension attached to text message files and limit the search accordingly. Even those courts that refuse to rigorously apply the particularity requirement for computer searches

recognize a search can be limited in this way. See United States v. Grimmett, 439 F.3d 1263, 1267 (10th Cir. 2006) (in a child pornography case, after noting "we have adopted a somewhat forgiving stance when faced with a 'particularity' challenge to a warrant authorizing the seizure of computers," agent's search for image files with files extensions such as ".jpg," ".mpg," ".bmp," and ".gif." prevented the search from becoming an exploratory rummaging). If police are looking for communications with co-conspirators, participants in the homicide, or "the deceased," there is no probable cause to believe they will be found in every single kind of data file that the phone holds, such as the "images, sound files, . . . music files, [and] web and internet history" authorized by the warrant. Pre-trial Ex. 1 at 4.

Even where there is a legitimate concern that a file extension has been changed, law enforcement still has the capability to narrow the search parameters without inspecting the content of every file. See United States v. Perez, 712 Fed. Appx. 136, 138 (3d Cir. 2017) (unpublished)² ("a forensic team duplicated the computer's hard drive, then ran software that scanned the entire drive and catalogued all of its contents by file type. The scan checked for mismatches of file extensions and file contents —

² The opinion is attached as appendix A.

e.g., assessing whether an image file had been saved in a .doc format to obscure its true content").

Even if the entire content of the phone needed to be seized, the entire content of the phone did not need to be searched. Detective John Bair testified at trial that there can be parameters for searching phones based on nexus or probable cause range, but police were given no parameters in searching these phones and simply obtained all the data from them. RP 1292-93. Pursuant to the warrants, police used Cellebrite software to extract the entire content of the phones, with no limitation. RP 1264, 1269-72, 1287-89; Ex. 66, 67. The detective explained that once the extraction report is created, it is turned over to a case agent whose responsibility is to go through the report to identify pertinent evidence. RP 1271. This was not a targeted search and seizure. This was a general rummaging through Sarmiento's private information.

c. The warrants for the phone accounts are overbroad.

The warrants for the phone accounts are overbroad for much the same reasons. Pre-trial Ex. 2, 6, 7. Unlike the warrants for the physical phones, the warrants for the phone accounts provide a temporal limitation. The State seizes on this difference. BOR at 30. But the temporal limitation itself does not save these warrants from being overbroad.

The problem of authorizing police to search for evidence for which there is no probable cause endures. There is no probable cause to search for evidence of communications with co-conspirators, yet the warrants, in authorizing a total search of the phone accounts, permit the police to search for items for which there is no probable cause. This is an overbreadth violation. Higgs, 177 Wn. App. at 426. One of the affidavits, which was not incorporated into the warrant, states that the affiant "believes that CDRs of this number may provide phone calls and messages between the suspect and potential co-conspirators." Ex. 2, affidavit at 4. This unsupported belief is insufficient to show a probable cause nexus. Jackson, 150 Wn.2d at 265; Keodara, 191 Wn. App. at 316.

In one way the phone account warrants are even broader. The physical phone warrants at least purported to authorize a search for communications with co-conspirators, participants in the homicide, and the deceased. Pre-trial Ex. 1, warrant at 1. That purported limitation is infirm for reasons argued above, but at least the language was in that warrant. The phone account warrants contain no such language. Instead they authorize search for the totality of information contained in the accounts without regard to whether such information is linked to communications with the people involved with the crime. Pre-trial Ex. 2, warrant at 1-3; Pre-trial Ex. 6, warrant at 1-2; Pre-trial Ex. 7, warrant at 1-

3. The problem of authorizing a search for all data in the phone account, which makes the warrant an impermissible general warrant, remains. Again, the affidavits were not incorporated into the warrants by suitable words of reference so they cannot be relied on to cure overbreadth in the warrant. Higgins, 136 Wn. App. at 92.

The phone account warrants also suffer from lack of particularity in that police had information available to them that more specifically described the evidence they were looking for, but such information was not presented in the warrant. Millender, 620 F.3d at 1026-27. As with the physical phone warrant, police knew the names of the victims, but they were not included in the warrants as a guide for searching for communications with them.

The warrants list the general crime of first degree murder, RCW 9A.32.030, as the crime being investigated. Pre-trial Ex. 2, warrant at 1; Pre-trial Ex. 6, warrant at 1; Pre-trial Ex. 7, warrant at 1. But as argued in relation to the physical phone warrant, the general citation to a criminal statute does not avoid an overbreadth problem when the citation covers a means of committing the crime for which there is no probable cause, the warrant permits a search of the entire contents of the account, and the warrant is otherwise riddled with overbreadth defects. McKee, 3 Wn. App. 2d at 25-26; Higgins, 136 Wn. App. at 93.

d. The warrant for Sarmiento's Facebook records is overbroad.

The warrant for Sarmiento's Facebook records is overbroad for much the same reasons as the warrants for the physical phones and phone accounts are overbroad. Pre-trial Ex. 3.

Taking the affidavit into account, there is no probable cause to search for evidence of communications with co-conspirators or participants in the homicide in the Facebook records. The affidavit merely states the detective's belief that Sarmiento "may have used the Facebook page to communicate with co-conspirators." Pre-trial Ex. 3, affidavit at 3. There is no specific factual basis presented in the affidavit to support the belief. Jackson, 150 Wn.2d at 265. There is not even an expression of a generalized belief that co-conspirators often use phones to communicate with one another about the crime, which itself would be insufficient anyway. Keodara, 191 Wn. App. at 316. The warrant, in authorizing a total search of the Facebook records, permits the police to search for items for which there is no probable cause. This is an overbreadth violation. Higgs, 177 Wn. App. at 426.

On the other hand, the affidavit shows a factual basis for reasonably believing that Sarmiento communicated with Contreras via Facebook. Pre-trial Ex. 3, affidavit at 2-3. But that brings up another

particularity problem. The warrant does not mention Contreras by name. Pre-trial Ex. 3, warrant at 1-2. The warrant does not limit the search and seizure to records involving Contreras. "The difference between a valid warrant and an overbroad warrant lies in whether the government could have phrased the warrant more specifically." United States v. Le, 173 F.3d 1258, 1275 (10th Cir. 1999). The Facebook warrant suffers from lack of particularity because police had information available to them that more specifically described the evidence for which they had probable cause but did not include the information in the warrant. Millender, 620 F.3d at 1026-27. The affidavit is not incorporated into the warrant so it cannot be relied on to cure overbreadth. Higgins, 136 Wn. App. at 92.

In fact, the warrant does not even purport to limit a search to communications with those involved in the shooting. Instead, there is carte blanche authorization for the entire Facebook record. To avoid an overbreadth violation, Facebook warrants must be limited in scope. United States v. Irving, 347 F. Supp. 3d 615, 624 (D. Kan. 2018). Facebook warrants that allow an officer "to search virtually every aspect of Defendant's Facebook account" are constitutionally infirm. Id. "Facebook searches can be limited to specific information." Id. That was not done here. A Facebook records custodian testified at trial that Facebook tailors what it produces based on the request it receives. RP

1594. For example, if the request is for Facebook Messenger communications, then Facebook will just turn over those communications. RP 1594. Here, law enforcement made no such tailored request. The warrant, instead, allowed police to search everything associated with the account.

It is true that the Facebook warrant in Irving, in addition to not limiting the scope of the contents to be searched, also contained no time limitation. Irving, 347 F. Supp. 3d at 624. The State asserts the overbreadth challenge fails because the Facebook warrant contains a temporal limitation of October 1, 2015 to November 5, 2015. BOR at 33. Still, one need only look at the amount of data produced during this period to realize the temporal limitation does not save the warrant from overbreadth. There are over 2400 pages of Facebook material for the 36-day period at issue. RP 238, 241; Ex. 85 (entirety of disclosed Facebook records; identified but not admitted into evidence at trial). This fact is not, as the State asserts, irrelevant. BOR at 34. It illustrates, in a concrete manner, the hollowness of a 36-day temporal duration as any sort of meaningful check on the breadth of the search entailed for that period. Sarmiento invites this Court to examine Exhibit 85 to gain a firsthand understanding of the sheer amount of data that the warrant authorized police to sift through.

The warrant lists the general crime of first degree murder, RCW 9A.32.030, as the crime being investigated. Pre-trial Ex. 3, warrant at 1. But as argued in relation to the other warrants, the simple citation to a criminal statute does not avoid an overbreadth problem when the citation covers a means of committing the crime for which there is no probable cause, the warrant permits a search of the entire contents of the account, and the warrant otherwise suffers from overbreadth defects. McKee, 3 Wn. App. 2d at 25-26; Higgins, 136 Wn. App. at 93.

e. The warrants for the Facebook records of Martinez and Salinas are overbroad.

The warrants for the Facebook accounts associated with Martinez and Salinas are overbroad for much the same reasons that the warrant for Sarmiento's Facebook record is overbroad. Pre-trial Ex. 4, 5. The affidavits, neither of which were incorporated into the warrant, contain much the same recitation of evidence that is set forth in the affidavit for Sarmiento's Facebook record. Compare Pre-trial Ex. 4, affidavit at 1-4; Pre-trial Ex. 5, affidavit at 1-4 with Pre-trial Ex. 3, affidavit at 1-3. The language of the warrants is mostly the same, except that they seek the Facebook records for Martinez and Salinas. Compare Pre-trial Ex. 4, warrant at 1-2; Pre-trial Ex. 5, warrant at 1-2 with Pre-trial Ex. 3, warrant at 1-2. Thus, the same overbreadth problems plaguing the warrant for

Sarmiento's Facebook record are the same problems plaguing the warrants for the Facebook records associated with Martinez and Salinas.

"To establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). There is no probable cause to believe these records contained communications with Sarmiento or other co-conspirators concerning the crime because there is no factual basis to show the nexus.

The affidavit for each warrant states the detective's belief that Sarmiento "may have corresponded with gang associates prior to or after the homicide. It is believed that Alberto Cold Sarmiento may have corresponded with Trino Valentino Martinez and Jose Salinas as these two seem to be his closest friends and both match the physical description of the shooter in this incident." Pre-trial Ex. 4, affidavit at 4-5; Pre-trial Ex. 5, affidavit at 4. The fact that they appeared to be his closest friends does not mean they used Facebook to communicate with one another. There is no specific factual basis to show they did. And even if there was, there is still no specific factual basis to show they used Facebook to communicate *about the crime*. The warrants, in authorizing a total search of these Facebook records, permit the police to search for items for which there is

no probable cause. This is an overbreadth violation. Higgs, 177 Wn. App. at 426.

The warrants are also insufficiently particular because, while the affidavits name Sarmiento, Salinas, Martinez and Contreras, Pre-trial Ex. 4, affidavit at 3-5; Pre-trial Ex. 5, affidavit at 2-4, the warrants themselves authorize a search of the entire Facebook record without limiting the search to communications with these people. Pre-trial Ex. 4, warrant at 1-2; Pre-trial Ex. 5, warrant at 1-2. These Facebook warrants suffer from lack of particularity because police had information available to them that more specifically described the evidence for which they had probable cause but did not include the information in the warrant. Millender, 620 F.3d at 1026-27. The affidavits are not incorporated into the warrants so they cannot be relied on to cure overbreadth. Higgins, 136 Wn. App. at 92.

Further, these warrants do not purport to limit a search to communications with those involved in the shooting. And while it is conceivable that police could be looking for other kinds of evidence associated with the crime, such as photos of the crime scene or evidence of Sarmiento, Salinas and Martinez associating as gang members, the warrants do not purport to limit the search in this manner either. There is a general recitation of the crime under investigation, but that is not good

enough to guard against an impermissible exploratory rummaging. McKee, 3 Wn. App. 2d at 25-26; Cassady, 567 F.3d at 636.

The warrants list the general crime of first degree murder, RCW 9A.32.030, as the crime being investigated. Pre-trial Ex. 4, warrant at 1; Pre-trial Ex. 5, warrant at 1. But as argued in relation to the other warrants, the citation to a criminal statute does not avoid an overbreadth problem when the citation covers a means of committing the crime for which there is no probable cause, the warrant permits a search of the entire contents of the account, and the warrant is otherwise poisoned by overbreadth defects. McKee, 3 Wn. App. 2d at 25-26; Higgins, 136 Wn. App. at 93.

f. The exclusionary rule requires suppression of evidence obtained from the invalid warrants.

The State does not dispute that evidence from Exhibits 32 (Sarmiento's Facebook messages with Contreras), 70 (photo of gun on HTC phone), 80 (Sarmiento's Facebook records), 81 (Sarmiento's phone messages), 83A (Martinez's Facebook account), 84A (Sarmiento's Youtube searches recovered from black LG phone), 91/91A (Sarmiento's Facebook messages), 96 (Sarmiento's Facebook message) and 98 (summary of evidence) must be suppressed if the warrants are overbroad.

The State does not agree that Exhibit 82, which consists of messages pulled from Zuniga's Facebook account, must be suppressed

because the warrant for Zuniga's Facebook records was not challenged below or on appeal. BOR at 38 n.11. The State overlooks the breadth of the exclusionary rule under article I, section 7, which requires that evidence obtained directly or indirectly from an unlawful search or seizure must be suppressed under the fruit of the poisonous tree doctrine. State v. Mayfield, 192 Wn.2d 871, 889-90, 434 P.3d 58 (2019). Suppression is mandated when there is a "proximate causal connection between official misconduct and the discovery of evidence." Id. at 891. Zuniga became a person of interest only after law enforcement reviewed Sarmiento's Facebook records produced from the invalid warrant. RP 1617, 1623, 1626. Police exploited their knowledge of the contents of Sarmiento's Facebook records by seeking out Zuniga and subsequently procuring his records. There is a causal connection between the illegal search involving Sarmiento's Facebook records and the discovery and subsequent search of Zuniga's records. The evidence found in Exhibit 82 is fruit of the poisonous tree and must also be suppressed.

g. The error is not harmless beyond a reasonable doubt.

The last question is whether the constitutional error affected the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The constitutional harmless error standard is "stringent." State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015). The test is not

whether the untainted evidence *could* lead to a finding of guilty. The untainted evidence must be so overwhelming that it "necessarily" leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). The conviction must be deemed inevitable regardless of the error.

The State argues the error is harmless. BOR at 37-42. The State's harmless error argument, however, looks like a sufficiency of evidence argument, where the defendant is deemed to admit the truth of the State's evidence and all reasonable inferences are drawn in favor of the State and most strongly against the defendant. See State v. Dreewes, 192 Wn.2d 812, 822, 432 P.3d 795 (2019) (describing sufficiency of evidence standard); State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017) (same).

Sufficiency of the evidence is analyzed under a more deferential standard of review than is harmless error. State v. Greer, 62 Wn. App. 779, 790 n.5, 815 P.2d 295 (1991). Harmless error analysis "does not turn on whether there is sufficient evidence to convict without the inadmissible evidence." State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014) (addressing non-constitutional error); see State v. Hudlow, 182 Wn. App. 266, 287, 331 P.3d 90 (2014) ("Although we rule that the untainted evidence was not strong enough to overcome the harmless error analysis,

we disagree with Thomas Hudlow that the evidence, after excluding the inadmissible hearsay, was not sufficient to convict him.").

The issue here is not whether the evidence was sufficient to establish that Sarmiento committed each offense but whether the evidence convinces this Court beyond a reasonable doubt "that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The State contends the evidence was so overwhelming that Sarmiento acted as Zuniga's accomplice to the murder and assaults that the jury would necessarily have convicted on those counts without the tainted evidence. BOR at 38. For example, the State cites to testimony from Contreras that Sarmiento just stood there as the shooting happened and did not duck for cover, as if he "know what was going on." BOR at 39. From this, the State believes that the jury would necessarily have inferred that Sarmiento "ambushed" Contreras and his friends. BOR at 39. Ambush is one inference to draw from this evidence. But it is not the only one. Another available inference is that Sarmiento, surprised by Zuniga's sudden gunfire, was too shocked to move in the moment. Commonsense tells us that different people will exhibit a range of different reactions to sudden gunfire. Ducking or running away is not the only reaction a person

who did not set up the shooting can be expected to have. The flaw in the State's harmless error argument is that it takes evidence susceptible to differing interpretations and draws the interpretation in the light most favorable to the State.

The State points to the testimony of Raymundo Gomez and Steven Gamez as evidence that Sarmiento was an accomplice to premeditated murder and firearm assaults committed by Zuniga. Their testimony, however, does not necessarily lead to a finding of guilt on these crimes in the absence of the evidence that should have been suppressed. As pointed out in the opening brief, Gomez's claim that Sarmiento confessed to setting up the shooting was subject to doubt. Gomez had credibility issues because of the delayed disclosure to police and an opportunity to tailor his claim based on what he heard in the courtroom. RP 1333-35, 1362-63. He also gave inconsistent accounts of what Sarmiento supposedly told him. RP 1339, RP 1362, 1367, 1385-86, 1397.

Gamez's testimony, meanwhile, was not the overwhelming force that the State tries to make it out to be. His testimony was inconsistent. At one point, Gamez said Sarmiento had an issue with Contreras because he was "false claiming," i.e., posing as being from the 18th Street neighborhood when he really wasn't. RP 1011. But he also testified that Sarmiento was mad at Contreras because the latter disrespected him in

referring to Sarmiento's genitals, and that Sarmiento was not mad because the guy was posing as a gang member. RP 1009-10, 1178-79, 1082. At Gamez's residence before the shooting, Martinez said something about "putting in work" for the gang. RP 1010, 1016-17. But they did not say what was going to happen. RP 1019. And Gamez did not think Sarmiento was going along with Zuniga and Martinez to put in "work." RP 1078-79.

Zuniga, meanwhile, denied that Sarmiento planned the shooting. RP 1859, 1882, 1886, 1910. He testified that Sarmiento did not tell him to shoot at the people he was there to fight or encourage him to do so. RP 1917. Zuniga fired the gun because he thought Sarmiento needed protection from attack, mistakenly believing he was being surrounded by rival gang members. RP 1817, 1822-23, 1869, 1910, 1920, 1950. Zuniga denied going over there to shoot somebody and denied that he was told to shoot. RP 1859. He "just reacted in the moment." RP 1882. The evidence was not so overwhelming that the jury necessarily would have found Sarmiento guilty as an accomplice to premediated murder and the assaults derived from the shooting.

Whether the improperly admitted evidence is cumulative of properly admitted evidence is one factor to consider in a harmless error analysis. Driggs v. Howlett, 193 Wn. App. 875, 903, 371 P.3d 61 (addressing improper admission of evidence under non-constitutional standard),

review denied, 186 Wn.2d 1007, 380 P.3d 450 (2016). Improper admission of cumulative evidence can still prejudice the outcome. It depends on the facts of the case. Id. at 904. In Thomas v. French, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983), for example, an improperly admitted hearsay letter was cumulative of respondents' trial testimony but its admission was not harmless because it served to reinforce the credibility of respondents' statements. Here, the evidence that should have been suppressed bolstered and lent credibility to inculpatory trial testimony from Gomez and Gamez regarding Sarmiento's role in the affair.

The communications between Sarmiento and Contreras contained in Exhibit 34 were provided by Contreras to police and so would have been properly admitted despite the error involving the warrants. But those communication provide no insight into whether Sarmiento was planning to shoot Contreras and his friends. The tainted evidence from the warrants supplies fodder for an inculpatory theory of what Sarmiento planned to do and why he did it.

Much of the gang evidence and its relation to the shooting, as well as a good deal of evidence related to the firearm possession charge, derived from the phone and Facebook records. See Ex. 98 (summary of evidence). The evidence clearly shows Sarmiento identified as a gang member, but it is less clear what his motivation was in interacting with

Contreras on the night in question. Was it because he wanted to teach a poseur a lesson or was it because Contreras made a dumb reference to genitals? The phone and Facebook records provided fertile ground for the argument that the shooting was gang motivated.

The phone and Facebook records also provided fodder for the State's unlawful possession of firearm charge. Sarmiento's opening brief advances a sufficiency of evidence challenge to this conviction. Even if the evidence was sufficient to convict, it was less than overwhelming on the possession element of the offense. Whether Sarmiento handled the gun in more than a passing and monetary manner, and whether he knew of its presence in the vehicle he drove to the encounter with Contreras, is at least open for debate. RP 1810-11, 1876-77, 1912. The phone and Facebook records established a closer connection between Sarmiento and the gun. The trial prosecutor argued the phone and Facebook communications showed Sarmiento possessed a firearm. RP 1965-66, 2001-02. On appeal, the State reverses course and says this evidence was unnecessary, seeking to downplay its importance. BOR at 40. The position taken by trial counsel undermines the State's divergent position taken on appeal. Gower, 179 Wn.2d at 857.

Witnesses who do not present well on the stand may be doubted by jurors. Biases can be harbored, testimony manipulated. Memories fade.

Details of what happened or what was said become forgotten or misremembered. The jury may wonder about the veracity of witness testimony accordingly. But documentary evidence of the kind at issue here — evidence that never should have been presented to the jury because it was obtained as a result of unlawful search and seizure — is qualitatively different. It represents the participants' words and actions in real time, free of distorting circumstance. That is why it was so damaging to the defense case.

The constitutional harmless error standard requires the reviewing court to view the evidence from the standpoint of a reasonable jury and consider how the error may have affected its resolution of the factual issues before it. The inferences the State wishes to draw are not necessary inferences. Rather, there are competing inferences, and those are for the jury to decide. The danger is that the jury drew inferences unfavorable to Sarmiento because it was influenced by evidence that should have been suppressed.

Even for non-constitutional errors, "[w]hen the reviewing court is unable to know what value the jury placed on the improperly admitted evidence, a new trial is necessary." Driggs, 193 Wn. App. at 903. Not all constitutional errors require reversal. But this one does. The State cannot

overcome the presumption of prejudice. All the convictions, and the special gang verdicts, must be reversed.

B. CONCLUSION

For the reasons stated above and in the opening brief, Sarmiento requests reversal of the convictions and enhancements.

DATED this 12th day of July 2019

Respectfully Submitted,

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APPENDIX A

712 Fed.Appx. 136

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7. United States Court of Appeals, Third Circuit.

UNITED STATES of America

v.

Javier PEREZ, Appellant

No. 16-3365

Argued May 10, 2017

(Filed: October 18, 2017)

Synopsis

Background: Following denial of his motion to suppress, 2015 WL 3498734, defendant was convicted in the United States District Court for the Eastern District of Pennsylvania, No. 2-14-cr-00611-001, Jan E. DuBois, J., of possession of child pornography, and he appealed.

Holdings: The Court of Appeals, Restrepo, Circuit Judge, held that:

[1] agents' execution of search warrant was not overbroad, and

[2] district court did not abuse its discretion in allowing government to present graphic evidence of child pornography to jury.

Affirmed.

West Headnotes (2)

[1] Searches and Seizures

☞ Places, persons, and things within scope of warrant

Law enforcement agents' execution of search warrant authorizing search and seizure of all computer equipment at specified physical address was not overbroad, where agents duplicated computer's hard drive, then ran software that scanned entire drive, catalogued all of its contents by file type, checked for mismatches of file extensions and file contents, and checked images against databases of known child pornography, then used results of forensic scan to guide human search of web browsing history, email, photos and videos, and files specifically identified as pertaining to missing and exploited children. U.S. Const. Amend. 4.

1 Cases that cite this headnote

[2] Criminal Law

☞ Necessity and scope of proof

District court did not abuse its discretion in allowing government to present graphic evidence of child pornography to jury in prosecution for possession of child pornography, even though defendant offered to stipulate to all elements except identity. Fed.Rules Evid.Rule 403.

Cases that cite this headnote

*137 On Appeal from the United States District Court for the Eastern District of Pennsylvania, (D.C. No. 2-14-cr-00611-001), District Judge: Honorable Jan E. DuBois

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Before: AMBRO, RESTREPO, and COWEN, Circuit Judges.

OPINION *

RESTREPO, Circuit Judge.

Javier Perez appeals from his conviction of possession of child pornography, arguing that the initial motion to suppress evidence recovered in a general search of his computer was denied in error, and that the Government's presentation of child pornography evidence at trial—although Perez offered to stipulate to every element except identity—unduly prejudiced the jury. For the reasons that follow, we will affirm.

I

Because we write for the benefit of the parties, we set out only the facts necessary for the discussion that follows. In October 2013, an FBI agent discovered a user of a common peer-to-peer file-sharing network sharing a video of child pornography. The *138 FBI subsequently subpoenaed the user's internet service provider for the account information corresponding to the internet protocol ("IP") address in question, and discovered that the account belonged to Perez, located at a residence in Philadelphia. Using the child pornography that the agent had discovered being shared by a user at that IP address, the FBI obtained a warrant authorizing a search and seizure of all computer equipment at that physical address.

In executing the warrant, the FBI discovered that five people lived in the residence, including an individual who repaired computers out of the home. Among the five residents and the computer repair business, the home contained 130 computers and digital storage items, all of which the FBI seized. The only items ultimately found to contain child pornography came from the basement in which Perez resided.

To guide the subsequent human-conducted search of the desktop computer recovered from Perez's basement space, a forensic team duplicated the computer's hard drive, then ran software that scanned the entire drive and catalogued all of its contents by file type. The

scan checked for mismatches of file extensions and file contents—e.g., assessing whether an image file had been saved in a .doc format to obscure its true content—and also checked images against databases of known child pornography. Agents used the results of the forensic scan to guide a human search of web browsing history, email, photos and videos, and files specifically identified as pertaining to missing and exploited children. The human search involved some limits; with respect to emails, for example, agents looked at metadata first and subsequently looked at message content if the metadata prompted additional questions. With respect to pictures and videos, agents looked at thumbnails first and then viewed expanded versions if the thumbnail seemed to involve responsive material. The human search, however, included an inspection of the entire web history, including browsing, search queries, bookmarks, and social media usage.

Having discovered a number of images and videos of child pornography, as well as internet browsing and search history that indicated the user of the computer had sought out such images, the Government charged Perez with numerous offenses. In advance of trial, he indicated that he planned to dispute only the identity of the person who had engaged in the conduct at issue—noting that, because the basement did not even have a door, anyone could have accessed the computer—and offered to stipulate to all non-identity elements of the crimes, including that the media files were sexually explicit and contained minor children. The Government declined the stipulation, and presented child pornography to the jury after the District Court overruled Perez's objections on the basis of undue prejudice. The jury ultimately convicted Perez of possession, but not distribution.

II¹

The Fourth Amendment prohibits "[g]eneral warrants" that would allow "exploratory rummaging in a person's belongings." *Andresen v. Maryland*, 427 U.S. 463, 479, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). To guard against such general warrants, courts require "particularity," which "prevents the seizure of one thing under a warrant describing another." *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927). Particularity *139

has three components: “First, a warrant must identify the specific offense for which the police have established probable cause. Second, a warrant must describe the place to be searched. Third, the warrant must specify the items to be seized by their relation to designated crimes.” *United States v. Galpin*, 720 F.3d 436, 445-46 (2d Cir. 2013) (citations omitted). Ultimately, the particularity requirement intends that “nothing is left to the discretion of the officer executing the warrant.” *Marron*, 275 U.S. at 196, 48 S.Ct. 74.

Courts—including our own—have struggled to adapt Fourth Amendment search doctrines designed for physical spaces to digital contexts. *Riley v. California*, — U.S. —, 134 S.Ct. 2473, 2493, 189 L.Ed.2d 430 (2014). Adapting the particularity requirement to searches of digitally stored information presents one example of that problem. For one thing, the place to be searched encompasses much more information in a search of digital storage than in one of physical space, which appears to allow the plain view exception to undercut the warrant requirement. Putting all information on a digital storage device that can hold data “roughly equal to 16 billion thick books,” *United States v. Ganas*, 824 F.3d 199, 218 (2d Cir. 2016), in plain view whenever law enforcement officers have a valid warrant to search for something that may exist in the storage substantially expands the aggregate quantity of material encompassed by the exception. Conversely, because of individuals’ ability to “hide, mislabel, or manipulate files,” *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011), “there may be no practical substitute for actually looking in many (perhaps all)” files and locations during a search of digital storage. *Id.* at 239.

To the extent that some courts have tried to address this tension, results have been mixed. In 2009, the Ninth Circuit issued an en banc opinion with five principles to guide Magistrate Judges in issuing or approving warrants for digital storage spaces. *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009) (en banc) (“*CDT II*”). Notably, the Ninth Circuit reissued the opinion about a year later as a per curiam opinion, which differed little except that it moved the guidance protocols to a (non-binding) concurrence. *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc) (per curiam) (“*CDT III*”); *id.* at 1179-80 (Kozinski, C.J., concurring). As a result, subsequent Ninth Circuit panels have upheld

broad warrants authorizing searches of all of a target’s digital storage devices and media despite the “absence of precautionary search protocols.” *United States v. Schesso*, 730 F.3d 1040, 1043 (9th Cir. 2013).

Rejecting an attempt to jettison the plain view exception in the digital storage context, the Seventh Circuit “simply counsel[s] officers and others involved in searches of digital media to exercise caution to ensure that warrants describe with particularity the things to be seized and that searches are narrowly tailored to uncover only those things described.” *United States v. Mann*, 592 F.3d 779, 786 (7th Cir. 2010). The Sixth Circuit has described computer searches as a “unique problem,” but it has declined to impose “a specific search protocol,” instead applying “the Fourth Amendment’s bedrock principle of reasonableness on a case-by-case basis.” *United States v. Richards*, 659 F.3d 527, 538 (6th Cir. 2011). The Tenth Circuit has suppressed incriminating digital evidence of child pornography discovered by an agent searching a computer for evidence of drug sales, declining to apply the plain view exception to the contents of digital files (as opposed to the files themselves). *140 *United States v. Carey*, 172 F.3d 1268, 1273 (10th Cir. 1999). Two years later, however, the same Court declined to suppress child pornography discovered by an agent who “proceeded to rummage through the hard drive for more images of child pornography despite the fact that he did not possess a warrant to conduct such a search,” because it was “persuaded the search was reasonable.” *United States v. Walser*, 275 F.3d 981, 987 (10th Cir. 2001).

Factual circumstances often complicate the problem. Often, as here, the initial search is undertaken by a computer program rather than a human. Searches of digitally stored data often implicate the rights of other individuals not included in the warrant—which happens more often and to more people with the increased prevalence of cloud storage. Leaving aside the intermingling of responsive and non-responsive data of a named individual, cloud storage often intermingles the data of an individual named in the warrant with the data of an individual not even under suspicion. *See CDT III*, 621 F.3d at 1166; *see also Richards*, 659 F.3d at 552 (6th Cir. 2011) (Nelson Moore, J., concurring in the judgment); *see also Schesso*, 730 F.3d at 1049.

Federal courts have yet to strike a tenable doctrinal balance between protecting the constitutional rights of

criminal suspects whose digital storage law enforcement agents intend to investigate and the practical challenges facing those same agents seeking specific information in the proverbial digital haystack. Neither has Congress struck a statutory balance nor the Executive branch via regulation. We do not attempt to do so today.

* * *

We “review[] the District Court’s denial of a motion to suppress for clear error as to the underlying factual findings and exercise[] plenary review of the District Court’s application of the law to those facts.” *United States v. Perez*, 280 F.3d 318, 336 (3d Cir. 2002). In the absence of statutes and doctrine that better address rapidly evolving technology, the manner of searching digital storage is circumscribed by objective reasonableness rather than specific search protocols. *Stabile*, 633 F.3d at 239.

[1] Here, Perez did not argue that the law enforcement agents exceeded the scope of the warrant, nor could he have. Unlike cases of agents exceeding the scope of a warrant authorizing a search for evidence of one type of criminal activity by rummaging for evidence of other types of activities, the warrant here specifically described the target of the search. Perez did not argue even that the initial computer scan—by which law enforcement agents preliminarily scanned the entire contents of the hard drive—was unreasonable. Instead, he merely argued overbreadth as to the execution of the warrant, and would have preferred that the agents searched the digital storage in a particular order. As the agents stayed within the scope of the warrant and employed a search protocol guided by an initial scan whose propriety Perez does not dispute, the District Court did not err in denying the motion to suppress.

Footnotes

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

1 We have jurisdiction under 28 U.S.C. § 1291.

III

[2] Perez, as noted, also disputes the District Court’s decision to allow the Government to present graphic evidence of child pornography to the jury. We review a District Court’s determination after engaging in a Rule 403 balancing for abuse of discretion. *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992). Perez argues that, because he disputed only identity, the Government’s refusal to accept his stipulation and presentation of child pornography amounted to undue prejudice. Recent precedent *141 forecloses this line of argument. “The government is entitled to prove its case free from a defendant’s preference to stipulate the evidence away.” *United States v. Finley*, 726 F.3d 483, 492 (3d Cir. 2013). *Finley* arose in the same factual circumstances as here—a defendant in a child pornography case offered to stipulate to all elements except identity—and is binding on subsequent panels. Perez himself recognizes this, allowing that “precedent of this Court is presently to the contrary,” Appellant’s Br. at 18, and merely asks to preserve the issue for certiorari or collateral review. Perez may consider the issue preserved, and we affirm the District Court.

IV

For the foregoing reasons, we will affirm the District Court’s denial of Perez’s motion to suppress and its decision to allow the Government to present evidence of child pornography at trial.

All Citations

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