SUPREME COURT No. _____
COA No. 84713-9-I
(consolidated with No. 86011-9-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DARRIUS MONTRELL GALOM,

Petitioner.

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

The Honorable Brian McDonald, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Darrius Galom is the petitioner.

B. COURT OF APPEALS DECISION

Galom requests review of the decision in State v. Darrius Montrell Galom, Court of Appeals No. 84713-9-I (consolidated with No. 86011-9-I) (slip op. filed December 16, 2024).

C. ISSUES PRESENTED FOR REVIEW

1. Did defense counsel provide ineffective assistance in failing to timely investigate and call an expert witness at trial to explain how post-traumatic stress disorder affected Galom, where such testimony would have been helpful to the jury in deciding whether the State disproved Galom's self-defense claim?

2. The prosecutor elicited evidence and argued to the jury that Galom never called the police and that he would have done so if he believed he had acted lawfully. Did the

prosecutor impermissibly use Galom's prearrest silence as substantive evidence of guilt?

3. Did the court err in admitting evidence that Galom traveled to Indiana after the shooting to show consciousness of guilt, where Galom had an innocent reason for going there?

4. Were the search warrants for Galom's Snapchat records and cell phone invalid, and did the court err in failing to suppress evidence derived from them, because the supporting affidavits did not establish probable cause to believe evidence of the crime would be found in the places to be searched, the warrants were overbroad, and they constitute unlawful general warrants?

5. Did a combination of errors create an unfair trial under the cumulative error doctrine?

D. STATEMENT OF THE CASE

When Darrius Galom was 16 years old, "Trusty" and his associates from the Playboy Sureños gang robbed

him at gunpoint, threatened his life, and shot up his house. 2RP 726-42. Later, Trusty and his associates chased Galom as he walked home from school, asking his girlfriend "you ready to see your boyfriend die today?" 2RP 743. Galom heard that Trusty had killed somebody before. 2RP 763. Galom was the target of gun violence on other occasions, including getting shot a week before the incident at issue in this case. 2RP 749-55, 758-61.

Turning to that incident, Trusty and his gang associates, including Jared Miramontes, were at a park in Burien on April 20, 2020. 2RP 643-47. Galom, his friend, Jennifer Soto, and Soto's friend, all 18 years old, were at the park as well. 2RP 290, 345, 722-26, 764, 767-68. An altercation ensued. 2RP 274-92.

A video without sound shows Galom and his companions walking across the park toward the playground when they encounter the group. Ex. 27; 2RP 402-06, 409-12. One member of the group walks towards

Galom and they bump fists. Ex. 27. Others in the group stand up and quickly move toward Galom. Galom retreats backwards. One of them, later identified as Miramontes, walks toward Galom as he continues to back up. Galom draws a gun and fires, striking Miramontes, who falls to the ground. The others disperse. Galom moves around a playground apparatus and raises his arm with a gun in his hand in the general direction of the departing group. Galom then turns and raises his arm, though the playground apparatus blocks a view of Galom's hand, in the general direction of Miramontes. Ex. 27. A different video registers the sound of three gunshots. Ex. 16; 2RP 110. The synchronized video registers the sound of a second gunshot when Galom raises his arm toward the group leaving the scene and a third gunshot when Galom raises his arm in the general direction of Miramontes. Ex. 35.

The State charged Galom with first degree assault committed against Miramontes (count 1), second degree assault against an unidentified other (count 2), and second degree assault against Miramontes (count 3). CP 100-01.

Galom testified that he feared for his life, given what Trusty had done to him in the past. 2RP 779. Trusty looked angry and his associates were confrontational and threatening as they converged on him. 2RP 779-784. Trusty said "I'm gonna pop this n-." RP 783. The others had their guns partially out of their pockets. 2RP 789-90. Galom thought they were about to shoot him. 2RP 784. Miramontes came at him with a knife or metal object in his hand. 2RP 785-87, 828. Galom shot Miramontes because he feared for his life. 2RP 786, 788, 810-11, 836. When Trusty and the others took off, Galom fired another shot to scare them off. 2RP 789-92, 829-30. Galom denied firing a third shot at Miramontes. 2RP 792.

Galom decided to leave the area for his own safety; he thought the guys he had shot at would be looking for him, wanting to hurt him. 2RP 809-10. Police located him in Indiana. 2RP 384-88, 457-63.

The jury received self-defense instructions covering counts 1-3. CP 123-24. The jury acquitted Galom of first degree assault under count 1 and found him guilty of second degree assault on counts 2 and 3. CP 106-08.

Defense counsel arranged for Dr. Carson, a clinical and forensic psychologist, to provide an expert report and to testify at the sentencing hearing. 2RP 952-53, 965-1029; CP 172-202, 358. According to Dr. Carson, Galom was diagnosed with post-traumatic stress disorder (PTSD) at age 14, with subsequent traumas aggravating this disorder. CP 172-73; 2RP 979-82. Galom had PTSD at the time of the offense. 2RP 979, 985. PTSD engenders a "heightened responsiveness." 2RP 979. Galom's PTSD informed his reaction to the threat he

perceived at the time of offense. CP 172, 177-79, 202; 2RP 985.

Dr. Carson described the violent and threatening interactions that Galom had prior to April 20, 2020, which formed a template or lens through which Galom viewed people and events. 2RP 974-76; CP 179. "He began to see that assault and serious injury and victimization is a real and present danger for him as it continued to occur and that the threats would continue after the initial confrontation." 2RP 977.

The effect of PTSD is a "fight or flight response," which is not simply learned behavior but "actually shapes you biologically and your body responds differently when you have PTSD." 2RP 977. The nature of the "fight or flight" response in the sympathetic nervous system, exacerbated by PTSD, is such that biological activation continues even after the immediate threat is neutralized. CP 172. A person with PTSD has more difficulty

dampening this fear activation once initiated, with more sustained defensive reactivity. CP 179; 2RP 984.

Galom's experiences of being targeted with gun violence supported his testimony that he continued to fear for his life after the proximate confrontation. CP 177-79. Considering the short amount of time between the shots fired, the science says his PTSD would still be activated; "there's no quick shutting down of it." 2RP 986.

The court found the mitigating circumstance of failed self-defense and imposed an exceptional sentence downward. CP 231, 390, 419; 2RP 1079, 1084.

Galom raised multiple claims on direct appeal, including an ineffective assistance of counsel claim based on counsel's failure to call an expert witness at trial in support of the self-defense claim. Galom also filed a personal restraint petition, supporting his ineffective assistance argument with affidavits from his trial attorneys.

The Court of Appeals consolidated the appeal and the petition and affirmed the convictions. Slip op. at 1.

E. WHY REVIEW SHOULD BE ACCEPTED

1. Counsel was ineffective in failing to timely investigate and call an expert witness to testify at trial about Galom's PTSD in support of the self-defense claim.

Galom's counsel was ineffective in failing to investigate the need for an expert witness before trial regarding Galom's PTSD and how it affected his perception of fear at the time of offense. Having failed to conduct an adequate pre-trial investigation, counsel was further ineffective in failing to retain and call an expert witness to testify at trial on these matters. Such testimony would have supported the self-defense claim and there is a reasonable probability that it may have led to acquittal on the two assault counts for which Galom was found guilty. Galom's case presents a significant issue of constitutional law warranting review under RAP 13.4(b)(3).

Evidence of self-defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). Expert testimony on PTSD is relevant to a claim of self-defense and is helpful to the trier of fact in assessing the claim. State v. Allery, 101 Wn.2d 591, 592-93, 596-97, 682 P.2d 312 (1984) (addressing battered woman syndrome, a form of PTSD); Janes, 121 Wn.2d at 222, 233 (addressing battered child syndrome, another form of PTSD).

To fairly assess Galom's claim of self-defense, the jury thus needed to stand in Galom's shoes and consider all the relevant circumstances from his point of view. Expert testimony regarding Galom's PTSD diagnosis would have provided valuable support for the self-defense claim; particularly regarding why he felt heightened fear and why he fired the second shot at the departing group

and the third shot at the prone Miramontes. Such testimony would have given needed context for the jury to evaluate whether Galom truly believed that he faced an imminent threat and that his actions were reasonable to protect himself.

The Sixth Amendment to the United States Constitution guarantees the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "[D]epending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant." State v. A.N.J., 168 Wn.2d 91, 112, 225 P.3d 956 (2010). "To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" In re Pers. Restraint of Fleming,

142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)). "Counsel's decisions made after a less than complete investigation are reasonable only if the decision to limit the investigation was itself a product of reasonable professional judgment." State v. K.A.B., 14 Wn. App. 2d 677, 712-13, 475 P.3d 216 (2020).

Before trial, Galom's attorneys were aware that Galom may suffer from PTSD. Ridgeway Declaration, ¶ 6, 8; Gaffney Declaration, ¶ 4.[1] Yet no effort was made to investigate whether an expert witness was available that could evaluate Galom's PTSD in relation to a self-defense claim. Ridgeway Declaration, ¶ 8; Gaffney Declaration, ¶ 7.

The Court of Appeals opined "[d]efense counsel made a strategic choice not to use Dr. Covell's report at

[1] The declarations are attached to the supplemental brief filed in support of the personal restraint petition.

trial because they did not deem it would be helpful." Slip op. at 7. This misses the mark. Dr. Covell was only retained ın preparation for plea negotiation and sentencing mitigation purposes and was not asked to offer an opinion on Galom's PTSD in relation to a self-defense claim. Ridgeway Declaration, ¶ 2, 6.

In her affidavit, Ms. Ridgeway admits: "We did not realize until the sentencing stage the extent to which qualified expert testimony on Mr. Galom's PTSD would have been relevant and helpful to the claim of self-defense at trial. Not specifically procuring and calling an expert witness at trial to testify about Mr. Galom's PTSD was the result of not fully investigating whether an expert witness would have been useful in supporting the self-defense claim at trial." Ridgeway Declaration, ¶ 17.

Ms. Gaffney likewise acknowledges defense counsel did not fully investigate before trial whether expert testimony on Mr. Galom's PTSD would have

supported the self-defense claim, and that this was an oversight. Gaffney Declaration, ¶ 7. "Despite knowing Mr. Galom's mental state was a key part to the self-defense claim, defense counsel did not seek the advice of an expert to assist in providing testimony at trial about how Mr. Galom's PTSD would have contributed to his actions at the time of the offense and would have led to an extended period of perception of being in danger." Id.

Under these circumstances, counsel performed deficiently in not arranging for expert testimony on the effect of PTSD at trial. Courts will not defer to a trial lawyer's decision against calling a witness if that lawyer made an uninformed choice on the matter. State v. Jones, 183 Wn.2d 327, 340, 352 P.3d 776 (2015). An uninformed decision is not a reasonable one.

The Court of Appeals' contrary conclusion amounts to revisionist history, making up reasons for counsel's decision. "Generally, we credit the statements of defense

counsel as to whether their decisions at trial were — or were not — based on strategic judgments." Doe v. Ayers, 782 F.3d 425, 445 (9th Cir. 2015); see State v. Estes, 188 Wn.2d 450, 461, 395 P.3d 1045, 1051 (2017) ("We have found deficient performance when counsel later admitted that she was unaware of a key matter in the case."). Post hoc rationalizations that contradict an attorney's own sworn statement cannot be used to defeat an ineffective assistance claim. Doe, 782 F.3d at 445.

The Court of Appeals suggests trial counsel did not have reason to know that Galom may suffer from PTSD until he "let his guard down" shortly before the trial started and therefore cannot be faulted for not seeking a continuance to get an expert. Slip op. at 7. In fact, both attorneys knew about Galom's past traumatic experiences and their relation to PTSD before Galom "let his guard down," yet did not pursue an expert on the matter at any

time before trial. Ridgeway Declaration, ¶5, 6 ; Gaffney Declaration, ¶4, 7.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Strickland, 466 U.S. at 694. In the absence of expert testimony on how PTSD affected Galom, it is understandable that the jury found the State proved Galom did not act in self-defense on counts 2 and 3. When the second shot was fired, the group was running away. Ex. 27, 35. When the third shot was fired, Miramontes was on the ground, already injured. Ex. 27, 35. Without a PTSD expert, the State's argument that Galom was not acting in self-defense in firing the second and third shot could not be effectively rebutted. 2RP 875-82. The convictions should therefore be reversed.

At minimum, this case should be remanded for a RAP 16.12 reference hearing on the matter of counsel's deficiency. A reference hearing is appropriate where the

petitioner makes the required prima facie showing of actual prejudice but the merits of the contentions cannot be determined solely on the record. In re Pers. Restraint of Yates, 177 Wn.2d 1, 18, 296 P.3d 872 (2013).

2. The prosecutor impermissibly commented on Galom's exercise of his constitutionally protected right to prearrest silence.

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. U.S. Const. amend. V; Wash. Const. art. I, § 9. The right against self-incrimination prohibits the State from using prearrest silence as substantive evidence of a defendant's guilt. State v. Easter, 130 Wn.2d 228, 237, 922 P.2d 1285 (1996).

On cross-examination, the prosecutor asked Galom if he thought the police would want to talk to him and if his flight to Indiana made it harder for police to find him. 2RP 813-814. The prosecutor later asked why he didn't call

911 and talk to the police. 2RP 837. Galom testified he didn't trust the police, Soto already told the police that he acted in self-defense, and he was told that the police were not looking for him. 2RP 837. In closing argument, the prosecutor emphasized "Mr. Galom didn't call 911," he fled to Indiana, and "He never talked to the police. He knew that he may have killed someone. He knew that he had shot someone. If he truly believed that he was acting lawfully, he would have hung around. He would have talked about what happened." 2RP 887-88.

The prosecutor impermissibly commented on Galom's right to prearrest silence in eliciting evidence and arguing to the jury that Galom never called the police. In State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010), the prosecutor improperly commented on the defendant's right to silence in arguing the defendant fled to Texas and never called the police to try to clear up what happened with his niece. Those suspected of a crime have no

obligation to speak to the police on their own accord and prosecutors cannot use the failure to speak to police against them at trial. There is no requirement that the defendant must specifically invoke the right to remain silent to enjoy it prior to arrest. Easter, 130 Wn.2d at 238.

The Court of Appeals held Galom could not raise this issue for the first time on appeal under RAP 2.5(a)(3) because the State merely used Galom's prearrest silence for an impeachment purpose, citing Jenkins v. Anderson, 447 U.S. 231, 239, n.5, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). Slip op. at 21.

The Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility. Jenkins, 447 U.S. at 238. Whether prearrest silence is probative of the defendant's credibility, and thus available for an impeachment purpose, is a question of state evidentiary law. Id. at 239, n.5. Michigan evidentiary law permitted impeachment in Jenkins. That does not

mean Washington law permits impeachment in this circumstance and, if it does not, then the State had no basis to exploit prearrest silence.

This Court has expressed skepticism "of the probative value of impeachment based on silence" due to the ambiguous significance of silence. State v. Burke, 163 Wn.2d 204, 218, 181 P.3d 1 (2008). "Impeachment is evidence, usually prior inconsistent statements, offered solely to show the witness is not truthful. Such evidence may not be used to argue that the witness is guilty or even that the facts contained in the prior statement are substantively true." Id. at 219.

Galom's pre-arrest silence does not show he failed to testify accurately and truthfully. In testifying, Galom never claimed that he went to the police; he never denied that he did not call the police. Impeachment is unavailable if the defendant's testimony is consistent with evidence of

prearrest silence. State v. Lewis, 130 Wn.2d 700, 706, n.2, 927 P.2d 235 (1996).

As for impeaching the defense theory generally, "[o]nly if the prior silence were somehow inconsistent with the later offered defense would the prior silence have any relevance for impeachment purposes." Id. Galom's silence is in no way inconsistent with his testimony or his defense, given the ambiguity of silence. It is impossible to conclude — and therefore improper for the prosecution to present evidence and argue — that the refusal to speak is more consistent with guilt than innocence. Burke, 163 Wn.2d at 219; Easter, 130 Wn.2d at 237-41.

Moreover, regardless of the theoretical purpose this evidence could have been used, the State in fact used Galom's prearrest silence as substantive evidence of guilt, not impeachment, in arguing its case to the jury. 2RP 887-88. The jury was not instructed that it could consider Galom's silence for impeachment purposes only.

In the Court of Appeals, Galom argued Salinas v. Texas, 570 U.S. 178, 133 S. Ct. 2174, 186 L. Ed. 2d 376 (2013) did not control and even if there was no Fifth Amendment violation, article I, section 9 provides greater protection against using prearrest silence as evidence of guilt. See Brief of Appellant at 73-77; Reply Brief at 36-39. The Court of Appeals did not address these arguments.

Salinas, a fractured decision, has no binding holding. Salinas is also distinguishable. Unlike the suspect in Salinas, Galom never had the opportunity to expressly invoke his right to silence, as he had not yet been contacted and questioned by police. The right to silence exists prior to being contacted by police.

Even if Salinas were deemed to conclusively resolve the question under the Fifth Amendment, article I, section 9 should be deemed to provide greater protection

in this area of the law. Galom provided a Gunwall[2] analysis in the Court of Appeals. Brief of Appellant at 78-83. The Court of Appeals declined to engage in a Gunwall analysis, deeming the state and federal privileges against self-incrimination co-extensive based on cases decided in other contexts. Slip op. at 24, n.7. No precedent has analyzed whether article I, section 9 provides separate and greater protection regarding comments on the exercise of prearrest silence. "[W]hen the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context." State v. Russell, 125 Wn.2d 24, 58, 882 P.2d 747 (1994). Galom seeks review under RAP 13.4(b)(3).

[2] State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

3. The court wrongly admitted evidence of Galom's travel to Indiana to show consciousness of guilt, as the evidence did not meet the evidentiary standard for admission.

"Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'" State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001) (citation omitted). The inference of consciousness of guilt must be substantial and real, not speculative. Id. at 498.

Over defense objection, the trial court admitted evidence that Galom traveled to Indiana after the shooting to show consciousness of guilt. CP 281-82, 410-13; 1RP 565-70, 573-75. The Court of Appeals acknowledged the evidence supports an inference that Galom went to Indiana because he was afraid of retaliation from those he had shot at, but held the flight evidence was properly

admitted because it "also supports the inference that Galom traveled to Indiana to evade arrest, as he knew law enforcement was investigating the crime." Slip op. at 26. This reasoning ignores the rationale for why flight evidence has probative value.

"The rationale which justifies the admission of evidence of 'flight' is that, when *unexplained*, it is a circumstance which indicates a reaction to a consciousness of guilt." State v. Slater, 197 Wn.2d 660, 672, 486 P.3d 873 (2021) (citation omitted). Galom's flight to Indiana is not unexplained. He went to Indiana because he was afraid of retaliation from those he had shot at. It is consistent with innocent activity to leave town due to fear of violent reprisal.

On these facts, there is no confidence in the substantial inference of "flight to consciousness of guilt" and, from that, "consciousness of guilt to consciousness of guilt concerning the crime charged" because Galom's

flight from the area is explainable as the actions of an innocent. Freeburg, 105 Wn. App. at 498. The necessary inference from Galom's conduct to consciousness of guilt is too tenuous to support admission of the evidence. Galom seeks review under RAP 13.4(b)(4).

4. The PRTT order for Galom's Snapchat records and the warrant for Galom's cell phone are unlawful and the motion to suppress should have been granted.

The Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution impose two closely intertwined requirements: the warrant must be supported by probable cause and it must not be overbroad. State v. Higgs, 177 Wn. App. 414, 425-26, 311 P.3d 1266 (2013). Defense counsel moved to suppress evidence under CrR 3.6, contending the pen register/trap and trace (PRTT) order and the warrant for Galom's cell phone were invalid. CP 56-68; 1RP 453-65,

478-82. The trial court denied Galom's motion to suppress evidence. CP 139-42; 1RP 886-94.

Both the PRTT order and the cell phone warrant lack probable cause to believe evidence of the alleged crimes would be found in the location to be searched and are overbroad.

"Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). "[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.

The PRTT application sets forth no information to support a reasonable inference that evidence of Galom's alleged crimes would be found in his Snapchat records.

CP 301-15. The application merely recites that Galom used social media apps to communicate, specifically Snapchat, and that he used Snapchat to communicate with his mother since the shooting. CP 308-09. There are no specific facts to support a reasonable inference that evidence of Galom communicating with his mother or others about the alleged crime would be found on his Snapchat account. "Blanket inferences and generalities cannot be a 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." State v. Dunn, 186 Wn. App. 889, 897, 348 P.3d 791 (2015) (quoting Thein, 138 Wn.2d at 147-48).

The PRTT application requests data all "stored completed communications." CP 304. This converted the order into an unlawful general warrant that permitted law enforcement to conduct an exploratory search into

Galom's private affairs. State v. McKee, 3 Wn. App. 2d 11, 14, 29, 413 P.3d 1049 (2018), rev'd on other grounds, 193 Wn.2d 271, 438 P.3d 528 (2019).

The Court of Appeals held the PRTT order was severable. Slip op. at 16-17. The severability doctrine, however, "must not be applied where to do so would render meaningless the standards of particularity which ensure the avoidance of general searches and the controlled exercise of discretion by the executing officer." State v. Perrone, 119 Wn.2d 538, 558, 834 P.2d 611 (1992).

The cell phone warrant is also infirm. According to Detective Wheeler's affidavit, law enforcement learned Galom's younger sister was reported as a runaway to the McKinney Texas Police on April 20, 2020. CP 340. Detective Shoemake spoke with her father and stepmother. CP 340. "Family told Shoemake that they knew Darrius had recently been communicating with [his

sister] via cell phone. They relayed that Darrius had told [his sister] that he had 'shot someone in the face,' and described other criminal activities." CP 340.

To establish probable cause for issuance of a search warrant based upon an informant's tip, the affidavit must demonstrate (1) the basis of knowledge for the informant's information and (2) the veracity of the informant under the Aguilar-Spinelli test. State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002).

The Court of Appeals opined "Galom cites no authority applying the Aguilar/Spinelli test outside the setting of a confidential informant." Slip op. at 18. That's false. As cited in the reply brief, "'[c]itizen' informants must still provide information to establish a basis for their knowledge about the criminal activity." State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986); State v. Ollivier, 178 Wn.2d 813, 850, 312 P.3d 1 (2013) (applying basis of knowledge prong to named citizen informant).

The Court of Appeals applied a totality of circumstances test for showing informant reliability. Slip op. at 18-19. The cases relied on by the Court of Appeals for this test are inapplicable because they involve Terry stops based on an informant's tip, where the Aguilar-Spinelli test does not apply. See State v. Z.U.E., 183 Wn.2d 610, 619-21, 352 P.3d 796 (2015) (declining to adopt a rule whereby the "veracity" and "factual basis" prongs are treated as necessary elements in Terry stop cases).

The Aguilar-Spinelli test is the correct test, and the basis of knowledge prong of that test is unsatisfied here. The basis for the knowledge Galom told his sister that he had "shot someone in the face" via cell phone is nowhere established and nothing in Detective Wheeler's affidavit corroborates the informant's tip that Galom told his sister via cell phone that he shot someone. Without this link, there are no specific facts that support a reasonable belief

that evidence of the shooting would be found on the cell phone.

Which in turn converts the warrant into an impermissible general warrant. The warrant authorized a search of the entire content of the phone. CP 350. There was no probable cause to search any of it.

Evidence from the cell phone, consisting of an April 21 text message exchange between Galom and Soto on April 21, was admitted at trial. 2RP 475-81; Ex. 31. Soto told Galom that police were at her house, and Galom told her to not say anything, hide her phone, and delete the messages. 2RP 481. This evidence should have been suppressed. State v. Mayfield, 192 Wn.2d 871, 888-89, 434 P.3d 58 (2019) (evidence obtained directly or indirectly from an unlawful search or seizure must be suppressed under the fruit of the poisonous tree doctrine). Galom seeks review under RAP 13.4(b)(1) and (3).

5. Cumulative error violated Galom's due process right to a fair trial.

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007); U.S. Const. Amend. XIV.

An accumulation of errors affected the outcome and produced an unfair trial in Galom's case, including (1) include (1) ineffective assistance of counsel (section D.1, supra); (2) comment on pre-arrest silence (section D.3, supra); (3) improper admission of flight evidence (section D.3., supra); (4) suppression error (section D.4, supra). Galom seeks review of this issue under RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated, Galom respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4995 words excluding those portions exempt under RAP 18.17.

DATED this 15th day of January 2025.

Respectfully submitted,

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FILED
12/16/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. DARRIUS MONTRELL GALOM, Appellant.	No. 84713-9-I (consolidated with No. 86011-9-I) DIVISION ONE UNPUBLISHED OPINION
In the Matter of the Personal Restraint of DARRIUS MONTRELL GALOM, Petitioner.	

BIRK, J. — Darrius Galom appeals his conviction, arguing (1) defense counsel was ineffective in failing to call an expert witness to testify about his posttraumatic stress disorder (PTSD), (2) the trial court erred in denying his motion to suppress evidence from the pen register, trap and trace (PRTT) order and cell phone warrant, (3) the State impermissibly commented on his right to prearrest silence, (4) the trial court erred in admitting evidence of flight to show consciousness of guilt, (5) cumulative error, and (6) the trial court erred in imposing the victim penalty assessment (VPA) fee. We affirm Galom's conviction, and remand to allow the trial court to strike the VPA as a ministerial matter.

I

The State filed an information charging Galom with first degree assault, two counts of second degree assault, and second degree unlawful possession of a firearm[1] stemming from an altercation with Jared Naranjo Miramontes on April 20, 2020.

Naranjo testified that on April 20, 2020, he was dropped off at his friend Trust's[2] house, and the two, along with Trust's cousin, made their way to a park in Burien. Naranjo testified that about five minutes after the group arrived at the park, Trust said he saw someone coming that he knew. Naranjo saw a male, later identified as Galom, with two girls walking towards the group. Naranjo said Trust approached Galom "and I think they were talking . . . [a]nd it looked like they were arguing. . . . So, then I got up and started walking towards my friend. And I just remember getting shot."

Officers obtained two recordings of the incident, one from a surveillance camera at a municipal water district pumphouse that overlooked the park, with video but no audio, and another from a homeowner's surveillance camera which contained audio but did not show the park. The State's theory at trial was that Galom first shot Naranjo, fired a second shot at the fleeing group, and fired the third shot towards Naranjo while he was on the ground.

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[1] Second degree unlawful possession of a firearm was severed from the assault charges. In a bifurcated phase of trial, the jury convicted Galom of the charge. However, the count was later dismissed because the jury was given insufficient evidence to support every element of the charge.

[2] Naranjo's friend is later identified as Jerry Garcia, also known as "Trust" or "Trusty."

Galom testified that on the day of the incident, he met up with Jennifer Soto and Sara Rueda Garcia to go to Southern Heights Park. Galom was in possession of a gun that day because he had "been in instances where [he] got shot at," and a week prior had "just got shot." Galom testified that after about an hour and a half at the park, he, Soto, and Rueda Garcia decided to leave. While walking to the park entrance, Galom recognized a mutual friend amongst a group of people and walked up to shake his friend's hand. Galom testified another individual in the group stood up from the bench and turned around to greet him, and Galom recognized him as Trusty, an individual who had previously shot at Galom. Galom testified Trusty began "egging [him]" and started clutching a gun in his waistband. Galom testified he started to back up, "trying to plead my case, tell him to chill out," and calm the situation.

The other individuals in the group started coming towards Galom "right after [Trusty] stood up and right after I started backing away." Galom testified that "somebody else got up off the bench. And . . . he's coming directly at me with, uh, what I think is a knife in his hand. But, he's literally coming at me." Galom testified that Naranjo "ended up walking in front of Trusty," and Galom shot him. The pumphouse video showed one of the men in the group approach Galom, and showed Galom draw a gun and fire at the man.

Galom testified that after his first shot, the group turned and ran away, and Galom ran and yelled "to, like, scare these guys; you know what I mean? But then I, like, shoot at the ground. I shot literally at the ground. And then I raised my arm, but I'm still yelling at these guys to literally scare these guys." Galom disputed

firing the third shot. He testified that he turned around and "right when I turn around, then that's when they shot." After hearing the third shot, Galom ran away from the park and eventually ended up staying at a hotel.

The next day, Soto messaged Galom that officers came and spoke with her. Galom testified that he told Soto to delete some message because he "didn't trust the cops at this time." Galom testified that after Soto spoke with the police, he thought everything was okay because Soto said the police "already knew everything," and they "weren't even looking for [him] at the time," so he "was just under the impression that everything's okay." Galom testified he decided to leave the area due to safety concerns and flew to Indiana "to lay low and kick it for a while, just to let everything calm down." Galom was eventually arrested in Indiana.

After receiving self-defense instructions for all three counts, the jury acquitted Galom of first degree assault and convicted him of two counts of second degree assault. At Galom's sentencing hearing, Galom presented Dr. Christen Carson, a clinical and forensic psychologist, to testify about his PTSD and other factors in support of an exceptional downward sentence based on failed self-defense. The trial court waived all non mandatory legal financial obligations and imposed the victim penalty assessment (VPA) fee. Galom appealed.

After Galom's appellate counsel filed an opening brief in Galom's appeal, arguing, among other things, that trial counsel was ineffective for not calling an expert witness to testify about Galom's PTSD on the issue of self-defense, Galom filed a personal restraint petition raising the same claim. Galom provided declarations from his trial attorneys in which they testified they retained an expert

to testify about Galom's PTSD at sentencing, but did not call such an expert at trial. Defense counsel stated she sought an expert evaluation by a licensed forensic psychologist, Dr. Christmas Covell, "primarily for mitigation," however, after learning that the psychologist "did not have significant experience in juvenile brain development research or science" and "[h]er conclusions didn't appear to sufficiently account for [Galom's] biological age and relative maturity," defense counsel concluded Dr. Covell's report "would not be helpful," and did not seek to retain another expert to evaluate Galom or assist with trial preparation. Our commissioner granted Galom's motion to consolidate his personal restraint petition with his direct appeal.

II

Galom argues defense counsel was ineffective in failing to call its expert witness to testify about Galom's PTSD because this would have aided the jury in assessing whether Galom acted in self-defense. We disagree.

Criminal defendants are guaranteed the right to effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. To show ineffective assistance of counsel the defendant must demonstrate that: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different but for the challenged conduct. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127

Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either prong has not been met, we need not address the other. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

"To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.' " In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (emphasis omitted) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)). If defense counsel's conduct can be characterized as legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance of counsel. State v. Mak, 105 Wn.2d 692, 731, 718 P.2d 407 (1986), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994). Similarly, an attorney's " 'strategic choices made after thorough investigation of law and facts relevant to plausible options' " will generally not be considered deficient. State v. Fedoruk, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (quoting Strickland, 466 U.S. at 690-91)).

A petitioner may seek relief through a PRP when they believe they are under unlawful restraint. RAP 16.4(a)-(c). To obtain collateral relief through a PRP, the petitioner must demonstrate both error and prejudice. In re Pers. Restraint of Sandoval, 189 Wn.2d 811, 821, 408 P.3d 675 (2018). If the error was of constitutional magnitude, the petitioner must show actual and substantial prejudice. Id. If the petitioner shows ineffective assistance of counsel, they have necessarily met the burden of proving actual and substantial prejudice. In re Pers. Restraint of Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

Galom does not show that defense counsel's decisions about experts constitute deficient performance. Galom received an expert evaluation by a licensed forensic psychologist, Dr. Covell, before trial. His counsel discussed the psychologist's potential findings with her and learned that "a report detailing her findings and opinions would not be helpful." Defense counsel made a strategic choice not to use Dr. Covell's report at trial because they did not deem it would be helpful. Defense counsel was able to argue self-defense and elicit testimony from Galom about his past traumatic experience to explain his perceptions during the shooting.

Defense counsel attested that as trial approached, Galom discussed his childhood and past experiences of trauma with her and "he let down his guard in a way that he had not done before." Dr. Covell previously mentioned that Galom "was guarded and not very forthcoming when she interviewed him." Galom "let down his guard" in February 2022, with voir dire beginning on February 17, 2022, and the first day of testimony being February 23, 2022. It is unlikely that the trial court would have granted a continuance to obtain a new expert witness. "A fair assessment of attorney performance requires that 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. Where Galom's PTSD was recognized, defense counsel consulted an expert about it, and the expert was unhelpful, defense counsel's decision at the time of trial to try the case without expert testimony on PTSD was not deficient performance. Galom's ineffective

assistance of counsel claim fails for this reason and we need not address Galom's arguments about whether the lack of a PTSD expert at trial caused prejudice.

III

Galom argues the trial court erred in denying his motion to suppress evidence from the PRTT order and the cell phone warrant.

At the CrR 3.6 hearing, Galom moved to suppress the results of the PRTT order and cell phone search warrant. Galom argued the State was not "requesting information specifically linked to location," but instead requesting "all stored completed communications for this time period, even though there's no indication provided that Snapchat[3] was used at or around the time of the offense." The State argued the request to seize "stored communications" in the PRTT order were "absolutely related and important in this investigation. They were trying to find [Galom's] location. They didn't know where he was. And they knew that his primary way of communicating was on Snapchat." The State argued the cell phone warrant had probable cause for law enforcement to search for "the motive for the crime" and the warrant was limited "even more specifically by communications for specific people." The trial court ruled the PRTT order and cell phone warrant were sufficiently particular.

A

The warrant clause of the Fourth Amendment and article 1, section 7 of the Washington Constitution require that a search warrant be issued upon a

[3] Snapchat is a cell phone app similar to text messaging except photos and texts sent through Snapchat disappear once they are seen by the recipient and are not preserved.

determination of probable cause based upon "facts and circumstances sufficient to establish a reasonable inference" that criminal activity is occurring or that contraband exists at a certain location. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). There must be "a nexus between criminal activity and the item to be seized and between that item and the place to be searched." State v. Neth, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). "Search warrants may not be based only on generalizations." State v. Denham, 197 Wn.2d 759, 767, 489 P.3d 1138 (2021). We require that probable cause be "based on more than conclusory predictions. Blanket inferences of this kind substitute generalities 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." Thein, 138 Wn.2d at 147-48. A trial judge's decision to authorize a search warrant is normally reviewed for abuse of discretion. Neth, 165 Wn.2d at 182. "Although we defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review de novo." Id.

A warrant is overbroad if it fails to describe with particularity items for which probable cause exists to search. State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499, 98 P.2d 1199 (2004). A search warrant's description of the place to be searched and property to be seized is sufficiently particular if "it is as specific as the circumstances and the nature of the activity under investigation permits." State v. Perrone, 119 Wn.2d 538, 547, 834 P.2d 611 (1992). While the degree of particularity required depends on the nature of the materials sought and the facts of each case, we evaluate search warrants "in a

common sense, practical manner, rather than in a hypertechnical sense." Id. at 549. We review de novo whether a search warrant contains a sufficiently particularized description of the items to be searched and seized. Id.

Washington courts have recognized that the search of computers or other electronic storage devices gives rise to heightened particularity concerns. State v. Keodara, 191 Wn. App. 305, 314, 364 P.3d 777 (2015). 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. Askham, 120 Wn. App. 872, 879, 86 P.3d 1224 (2004); Keodara, 191 Wn. App. at 314.

In Askham, we held that the warrant was sufficiently particular because while it purported to seize a broad range of equipment, drives, disks, central processing units, and memory storage devices, it also specified which files and applications were to be searched. 120 Wn. App. at 879-80. It listed files related to the owner's use of specific websites and files relating to manipulations of digital images and authorized the seizure of software related to manipulation of images, the defendant's handwriting, and fingerprints, and postage stamps. Id. The warrant's description left no doubt as to which items were to be seized and was "not a license to rummage for any evidence of any crime." Id. at 880.

McKee involved a warrant authorizing a " 'physical dump' " of the phone's memory. See State v. McKee, 3 Wn. App. 2d 11, 29, 413 P.3d 1049 (2018),

overruled on other grounds, 193 Wn.2d 271, 438 P.3d 528 (2019).[4] During an investigation of sexual exploitation of a minor and dealing in depictions of a minor engaged in sexually explicit conduct, police obtained a warrant authorizing a search for all images, videos, documents, calendars, call logs, and other data. Id. at 16, 29. "The warrant [gave] the police the right to search the contents of the cell phone and seize private information with no temporal or other limitations." Id. at 29. This allowed a search of general categories of data without objective standards to guide the police executing the warrant. Id. We held the warrant lacked the requisite particularity because it "was not carefully tailored to the justification to search and was not limited to data for which there was probable cause." Id. "The search warrant clearly allow[ed] search and seizure data without regard to whether the data [was] connected to the crime."[5] Id.

In State v. Higgins, 136 Wn. App. 87, 94, 147 P.3d 649 (2006), we held a search warrant was overbroad because it "in no way limited the search to illicit items," and it "contained no list of examples to guide the search." Its general reference to domestic violence was not particular because the statute contained

[4] In McKee, this court held a search warrant was overbroad, suppressed the evidence the State gathered based on it, and remanded for dismissal of the charges. See McKee, 3 Wn. App. 2d at 29-30. The Supreme Court accepted review, but did not review the warrant, and held only that this court had applied the wrong remedy by ordering dismissal, and instead should have remanded for further proceedings with an order to suppress. McKee, 193 Wn.2d at 279. Thus, the Court of Appeals opinion remains precedential on the analysis of the warrant.

[5] In McKee, we found the unlimited search parameters were a constitutional violation even where a witness had informed police of specific images she had seen on the phone depicting the minor, and the opinion did not suggest that any other evidence was used to support charges besides the specific images to which the witness had directed police. 3 Wn. App. 2d at 16, 19, 29.

six different ways to commit the crime. Id. at 93. A warrant to search for evidence of any such violation would allow for seizure of items for which the State had no probable cause. Id.

We look to three factors set out in Higgins to determine if a warrant suffers from overbreadth: (1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. Id. at 91-92. " 'Specificity has two aspects: particularity and breadth. Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based.' " McKee, 3 Wn. App. 2d at 23 (quoting United States v. Towne, 997 F.2d 537, 544 (9th Cir. 1993)). A search warrant is overbroad if it either "fails to describe with particularity items for which probable cause exists," or "describes, particularly or otherwise, items for which probable cause does not exist." Maddox, 116 Wn. App. at 805.

B

1

Galom argues the PRTT order does not establish a nexus between the place to be searched and evidence of illegal activity.

The affidavit describes the investigation from the evening of the shooting and law enforcement's initial contact with eyewitnesses. On April 20, 2020, law

enforcement was dispatched to Southern Heights Park where there were reports of a shooting and discovered Naranjo lying on the ground suffering from a gunshot wound to the lower face. Witnesses stated they heard two or three shots and saw several people running away from the park. A witness, Gabriela Irigoyen Diaz contacted law enforcement and stated her daughter, Soto, was likely involved in the shooting. Unidentified friends of Naranjo spoke with law enforcement and stated they heard Soto was present during the shooting and that the shooter was Galom. The affidavit details a surveillance video taken from a water tower near the park that depicted a male and two females walk toward a group of individuals and after a verbal exchanged, showed the male pull out a pistol and fire at the victim.

The affidavit details an interview with Soto and Rueda Garcia who both admitted being at the park with Galom. Rueda Garcia admitted "she did see Galom draw and fire, and the victim get struck in the chin and fall to the ground." The affidavit stated law enforcement unsuccessfully asked Soto, Rueda Garcia, and Galom's mother for assistance in contacting Galom. The affidavit noted Galom did not use a phone with service, but instead used Snapchat to communicate. Galom's mother told the affiant Galom "primarily used a Snapchat account named "Darrius_Galomm" and has used that account to communicate in the last week but recently stopped communicating with family members using that account. She said the new account he is using to communicate with her is the Snapchat account "D_money2400." The affidavit requested to use a PRTT device to locate Galom and arrest him.

These circumstances supported a reasonable inference that Galom was probably involved in criminal activity, the shooting, and that evidence of the crime would be found within his Snapchat location data, including evidence locating him at the shooting and showing his then-current location. The PRTT order was supported by probable cause to search for Galom's location.

Galom further argues the PRTT order lacked particularity because it "authorized police to seize the entire communication content of Galom's Snapchat account." The search warrant authorized law enforcement to search the business records of Snap Inc. and seize "evidence of the above crimes, specifically the evidence described in Finding of Fact number (9)(d) above for April 20, 2020 to the date of compliance with this warrant/order, and continuing for the 10 days this warrant is in effect." Finding of fact 9(d) described the following data authorized to be seized,

> i. Subscriber or Registration Account Information, including subscriber or registered user name or identity, address, billing/payment information; account initiation date; type of account; custom account features; additional phone numbers; addresses (both physical and electronic) and/or other contact information; additional persons having authority on the account; any additional accounts linked to the subject account; account changes for the target address and any linked accounts; and
>
> ii. Device Identifying Information for the device accessing the target address, such as phone number, MAC [media access control] address, IP [internet protocol] address, and other unique hardware and software identifiers; and
>
> v. Stored Completed Communications including *stored completed/read content associated with the above listed account, including but not limited to; all pictures and videos, all stored Snaps, Stories, Memories, and chat content and all metadata associated with that content*

> vi. Stored Location Information, including stored and transactional records, such as communication detail data, together with date and time of each communication; including positioning information such as GPS [global positioning system] longitude/latitude, or other information tending to reveal the proximate or precise location of the device associated with the above-identified target address, detail such as IP address, Port, Socket Address, VoIP [voice over internet protocol] address, routing information; the address(es) from which the communication is made, conducted, and terminated; non-content text or email, header, IP address; and other non-content information.

(Emphasis added; boldface omitted.)

A warrant can be overbroad if it describes, particularity or otherwise, items for which probable cause does not exist. Maddox, 116 Wn. App. at 805. The PRTT order authorized police to search for numerous items that were supported by probable cause and described with particularity, such as the subscriber information, device identifying information and stored location information. However, the order could be read to authorize law enforcement to also seize the entirety of Galom's "Stored Completed Communications," without limitation.[6] The affidavit fails to establish a nexus between Galom's "pictures and videos, all stored Snaps, Stories, Memories, and chat content" and evidence of his location or otherwise evidence of the crimes under investigation. Thus, for the same reasons explained in McKee, to this extent the PRTT order was overbroad.

[6] The order is ambiguous as to whether it required account content to be believed by law enforcement to constitute "evidence of the above crimes" in order to be seized, or defined the account content as "evidence of the above crimes" subject to seizure. The State does not argue that the prefatory language "evidence of the above crimes" provided the necessary specificity under the Askham/McKee framework and, because we conclude the order is severable, it is not necessary to determine whether the prefatory language was so effective.

"Under 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.' " Maddox, 116 Wn. App. at 806 (internal quotation marks omitted) (quoting Perrone, 119 Wn.2d at 556). The severability doctrine applies only where: (1) the warrant lawfully authorized entry into the premises, (2) the warrant includes one or more particularly described items for which there is probable cause, (3) the part of the warrant that includes particularly described items supported by probable cause is significant when compared to the warrant as a whole, (4) the searching officers 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 did not conduct a general search. Id. at 807-08.

The PRTT order meets all five requirements. Of the four categories of data that were requested to be seized, three were particularly described and had probable cause. Law enforcement had probable cause to seize "Subscriber or Registration Account Information," "Device Identifying Information," and "Stored Location Information," to find evidence that the account was connected to Galom, and discover Galom's location. These categories were limited to a time frame of 10 days. The warrant's grant of authority to search for location data was significant when compared to its whole. Law enforcement found each item that they seized while they were looking for Galom's location data. And although law enforcement also seized "two videos that were taken from the Snapchat information" of the day the shooting occurred, this evidence was not offered or used at trial. We conclude

the severability doctrine applies, and the PRTT order's overbreadth does not require suppression of the properly seized location information admitted at trial.

2

Galom argues the cell phone warrant did not establish a nexus between the place to be searched and evidence of illegal activity.

Galom does not question that the cell phone affidavit gave probable cause linking him to the shooting. It described the investigation from the evening of the shooting and law enforcement's initial contact with eyewitnesses. These witnesses included Elizabeth and Valery Resindez, both of whom saw Jerry Garcia and heard him say Galom had shot at him. The affidavit discussed the surveillance video captured from the water tower and the subsequent interviews with Soto and Rueda Garcia. Rueda Garcia "identified one of the members of the victim group as Jerry Garcia and showed detectives a Facebook page with the username of 'Ese Trusty.' " The affiant was "familiar with Garcia from other investigations and [knew] that he associates with the Playboy Surenos criminal street gang." Based on information learned from the previously issued PRTT order, and given the "number of messages and geolocation points," the affiant stated it was reasonable to believe that Galom was in possession of a cell phone from April 20, 2020 onward. In an interview Galom described the incident and stated one of the individuals from the park "had a problem with him," and after seeing three guns, he "drew his own pistol and fired at one of the guys" in self-defense.

Galom focuses his argument on the affiant's basis for believing evidence would be found on his phone. The affiant learned that Galom's younger sister had

been reported as a runaway to Texas law enforcement and "considering the possibility of [Galom] meeting with his sister while fleeing law enforcement," they contacted Texas law enforcement. In the course of the runaway investigation, law enforcement spoke with the sister's father and step-mother and learned that Galom "had recently been communicating with [his sister] via cell phone. They related that [Galom] had told [his sister] that he had 'shot someone in the face,' and described other criminal activities." This information is sufficient to raise a reasonable inference that evidence of the crime would be found in Galom's cell phone records.

Citing State v. Vickers, 148 Wn.2d 91, 112, 59 P.3d 58 (2002), Galom nevertheless argues that we should not consider his sister's parents' statements to Texas law enforcement when determining whether probable cause exists because, Galom says, their statements fail to meet the Aguilar/Spinelli test. Aguilar v. Texas, 278 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). Galom cites no authority applying the Aguilar/Spinelli test outside the setting of a confidential informant nor any basis to conclude that it applies at all to statements like those here by concerned parents relaying information logically received from their child and circumstantially matching details of the crime under investigation. Assuming without deciding that Aguilar/Spinelli applies in such a context at all, the apparent circumstances of reliability in the parents' report here easily meets the reliability standards of that test. In the confidential informant context, when an officer bases their suspicion on an informant's tip, the State must show that the tip

bears some "indicia of reliability" under the totality of the circumstances. State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015). This test requires that there either be (1) circumstances establishing the informant's reliability or (2) some corroborative observation, usually by the officers, that shows either (a) the presence of criminal activity or (b) that the informer's information was obtained in a reliable fashion. State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980); State v. Lesnick, 84 Wn.2d 940, 943-44, 530 P.2d 243 (1975). These corroborative observations do not need to be of particularly blatant criminal activity, but they must corroborate more than just innocuous facts, such as an individual's appearance or clothing. See State v. Wakeley, 29 Wn. App. 238, 241-43, 628 P.2d 835 (1981). Here, Galom's sister's parents told law enforcement that their daughter had been communicating with Galom and during that communication, Galom told her he " 'shot someone in the face.' " The familial chain of communication along with the accuracy of the statement—Galom said he " 'shot someone in the face' " which is exactly what happened on April 20, 2020—are indicia of reliability. The cell phone warrant did not lack probable cause.

Galom additionally contends the cell phone warrant violates the particularity requirement because it did not limit the search to a specific part of Galom's phone, but instead "authorized a search of the entire content of the phone and then permitted the police to rummage through its content to locate certain categories of information."

The warrant satisfies the particularity requirement. It directed officers to "search" the phone and "seize" evidence of the crime and evidence of the identity

of the owner of the device. The seizure of the evidence was limited to communications with Soto, Rueda Garcia, and Galom's sister about the crime, internet searches relating to media coverage of the incident, location information between April 10 and April 20, and photographs or videos depicting the possession of a firearm. Furthermore, the warrant authorized the search of information regarding the telephone number associated with the seized phone, its service provider and all data used by a service provider to identity the phone, and evidence of other accounts associated with the device that would aid in determining the user of the device. The terms of the warrant were sufficiently descriptive to direct law enforcement's actions. Law enforcement had probable cause to seize information specified as likely evidencing the crimes under investigation that would demonstrate the phone being searched was Galom's, and that any evidence discovered on the phone was connected to Galom.

Thus, in contrast to McKee, the warrant did not authorize search of the electronic data repository without identifying the material sought, but rather as in Askham described the specific matter permitted to be sought within the larger data repository. Accord United States v. Purcell, 967 F.3d 159, 181 (2d Cir. 2020) ("The September 2017 Warrant identified the target Facebook account to be searched and the specific kinds of data from that account to be seized. It was therefore adequately particularized and justifiably broad with respect to both the location to be searched (the 'Mike Hill' Facebook account) and the items to be seized from that location (the twenty-four enumerated categories of data)."); United States v. Ulbricht, 858 F.3d 71, 100-01 (2d Cir. 2017) (warrant issued to search a laptop for

specifically identified items relevant to the charged criminal enterprise), overruled on other grounds by Carpenter v. United States, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018).

The trial court did not err in denying Galom's motion to suppress the cell phone warrant.

IV

Galom argues for the first time on appeal that the State impermissibly commented on his exercise of the right to prearrest silence. We hold that Galom cannot raise this issue for the first time on appeal because he cannot establish a manifest error affecting a constitutional right under RAP 2.5(a)(3).

On cross-examination, the State questioned why Galom traveled to Indiana after the shooting if it "made it harder for law enforcement to find" him. Galom testified he did not believe law enforcement was looking for him. The State questioned, "You just shot someone at a park? And—and you thought that law enforcement wouldn't at least want to talk to you about it?" The State later asked Galom why he did not consider calling 911 after the incident to "clear this up."

Galom did not object in the trial court that the State improperly commented on his prearrest silence. RAP 2.5(a)(3) states that a party may raise for the first time on appeal a "manifest error affecting a constitutional right." This rule is intended to allow a reviewing court to correct any "serious injustice to the accused" and to preserve the fairness and integrity of judicial proceedings. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To determine the applicability of RAP 2.5(a)(3), we ask whether (1) the error is truly of a

constitutional magnitude, and (2) the error is manifest, meaning the appellant can show actual prejudice. State v. J.W.M., 1 Wn.3d 58, 90-91, 524 P.3d 596 (2023).

The Washington state and federal constitutions provide criminal defendants with the right against self-incrimination. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). Miranda v. Arizona held pursuant to the self-incrimination clause of the Fifth Amendment that "if a person in custody is to be subjected to interrogation," they must first be informed that they have the right to "remain silent." 384 U.S. 436, 467-68, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Miranda warnings "constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty." Easter, 130 Wn.2d at 236. The State violates a defendant's due process rights under the Fourteenth Amendment if it uses for impeachment purposes a defendant's silence at the time of arrest or after receiving Miranda warnings. Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The prohibition against using post-Miranda silence "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.' " Wainwright v. Greenfield, 474 U.S. 284, 291, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986) (quoting South Dakota v. Neville, 459 U.S. 553, 565, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983)).

However, "the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility." Jenkins v. Anderson, 447 U.S. 231, 238, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). In Jenkins, the defendant was charged with murder and later convicted of manslaughter. Id. at 232, 234. He

did not report the incident to the police until about two weeks after the killing. Id. at 234. At trial, Jenkins admitted stabbing the victim but claimed self-defense. Id. at 233. During cross-examination, the prosecutor elicited from Jenkins that he had not reported the stabbing to the police for two weeks, suggesting that he would have spoken out if he had killed in self-defense, and again referred to Jenkins's prearrest silence during closing argument. Id. at 233-34. Jenkins argued the prosecutor's actions violated the Fifth Amendment. Id. at 235. The Court, quoting Harris v. New York, 401 U.S. 222, 225, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), stated,

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

Jenkins, 447 U.S. at 237-38 (alteration in original) (quotation marks omitted). For "[o]nce a defendant decides to testify, '[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.' " Id. at 238 (alteration in original) (quoting Brown v. United States, 356 U.S. 148, 156, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958)). The Court noted that the decision did not force any state court to allow impeachment with prearrest silence, and jurisdictions remained free to formulate evidentiary rules defining the situation. Id. at 240. But, such a rule would not be based on the federal constitution. Id. at 238.

Galom's case is in conformity with Jenkins, and thus does not raise a constitutional issue. As in Jenkins, Galom was involved in a killing and then for several days made no report to the authorities, only to claim while testifying at trial that the killing was in self-defense and so lawful. Under Jenkins, Galom was properly subject to cross-examination on his failure to make that claim at the time of the killing, and the Fifth Amendment did not shield him from this cross-examination. Because using prearrest silence for impeachment purposes does not violate the Fifth Amendment but, under Jenkins, implicates evidence law at best, Galom fails to show that any error is one of truly constitutional dimension, as required by RAP 2.5(a)(3).[7]

V

Galom argues the trial court wrongly admitted evidence of his travel to Indiana after the shooting to show consciousness of guilt. We disagree.

During discussion of motions in limine, the State moved for leave to "introduce the fact that [Galom] fled the state[and] went to Indiana" to "make

[7] Galom further argues we should engage in a State v. Gunwall analysis to determine whether the Washington Constitution provides greater protection than the Fifth Amendment. 106 Wn.2d 54, 720 P.2d 808 (1986). In State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991), use of the Gunwall analysis was found to be unnecessary because "the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment." Though Earls addressed the Fifth Amendment right to counsel rather than Fifth Amendment privilege against self-incrimination, Earls relied upon State v. Moore, 79 Wn.2d 51, 483 P.2d 630 (1971) and State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982), abrogated on other grounds by State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015), two decisions which specifically addressed the coextensive scope of the state and federal privileges against self-incrimination. See Earls, 116 Wn.2d at 375-77. Because Earls, Moore, and Franco hold that the state constitution does not afford an analysis different from that of the federal constitution, and are binding on this court, we decline to engage in the Gunwall analysis that Galom proposes.

argument about the fact that he did leave the State after this shooting happened." Galom argued the State did not have evidence linking flight to consciousness of guilt, and "[t]here [was] no indication from the State, no specific evidence that they can point to that suggests that [Galom] left because he was trying to avoid apprehension rather than for fear of his own safety." Instead, Galom argued, "There is every reasonable inference that [Galom's] leaving of Washington and leaving the scene was out of fear for his own safety." The trial court admitted the evidence and concluded, "[I]t could be evidence of consciousness of guilt and also fear of retaliation. And those things aren't mutually exclusive."

We review a trial court's decision to admit or exclude evidence for abuse of discretion. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). A trial court abuses its discretion when the exercise of discretion is unreasonable or based on untenable grounds. State v. Barker, 103 Wn. App. 893, 902, 14 P.3d 863 (2000). "A trial court must not automatically allow [flight evidence] but must first decide whether or not the proposed evidence amounts to a reasonable inference of flight that is more than mere speculation and supports a consciousness of guilt inference." State v. Slater, 197 Wn.2d 660, 674, 486 P.3d 873 (2021). The probative value of flight evidence as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged

to actual guilt of the crime charged. State v. Freeburg, 105 Wn. App. 492, 498, 20 P.3d 984 (2001).

Here, Snapchat GPS coordinates showed Galom in Indiana three days after the shooting. Contrary to the State's suggestion, the bare fact of travel to Indiana does not suggest Galom's guilt for any of the assaults charged. The inference of guilt was logical when that fact was combined with other evidence later brought out at trial—namely that Galom resided locally and went to Indiana only abruptly, without advance plans to do so, and shortly after the shooting. Galom argues the evidence merely shows that he went to Indiana because he was afraid of retaliation from those he had shot at. However, the evidence also supports the inference that Galom traveled to Indiana to evade arrest, as he knew law enforcement was investigating the crime. The trial court did not abuse its discretion in admitting Galom's flight to Indiana as consciousness of guilt.

VI

Galom argues that cumulative error violated his right to a fair trial. We disagree. 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 (2006). However, the doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. Id. Here, because any errors are few and had no effect on the outcome of the trial, we reject Galom's cumulative error argument.

VII

Galom argues the trial court erroneously imposed the VPA. The State does not object that remand is appropriate to strike the imposition of the fee. We accept the State's concession and remand to strike the imposition of the VPA.

We affirm Galom's conviction and remand to allow the trial court to strike the VPA as a ministerial matter.

Birk, J.

WE CONCUR:

Coburn, J.

Bowman, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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