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SUPREME COURT NO. _____ Case #: 1045883
COA NO. 85768-1-I

THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GIOVANNI HERRIN,

Petitioner.

ON APPEAL FROM
THE KING COUNTY SUPERIOR COURT

The Honorable Sandra Widlan, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Giovanni Herrin is the petitioner.

B. COURT OF APPEALS DECISION

Herrin requests review of the decision in State v. Giovanni Dashawn Herrin, Court of Appeals No. 85768-1-I (slip op. filed August 18, 2025).

C. ISSUES PRESENTED FOR REVIEW

1. Did the court err in refusing to dismiss the case under CrR 8.3(b) because the State's mismanagement resulted in actual prejudice to Herrin's right to a fair trial?

2. Did the court err in not excluding certain State witnesses from testifying as a lesser available sanction for the State's mismanagement?

3. The prosecutor introduced evidence that Herrin told detectives that he questioned whether he should call the police after his girlfriend was shot and

that he did not go to the police of his own free will. Then the prosecutor in closing argument pointed out that Herrin didn't call the police. Did the prosecutor impermissibly use Herrin's prearrest silence as evidence of guilt?

4. Did the court err in admitting evidence that Herrin attempted to elude police days after the shooting to show consciousness of guilt, where Herrin had a non-incriminating reason for doing so?

5. Did a combination of errors create an unfair trial under the cumulative error doctrine, in violation of due process?

D. STATEMENT OF THE CASE

Karyme Barreto-Sabalza was Giovanni Herrin's girlfriend. 2RP 884-85, 1246-47. Herrin was 19 years old; Barreto-Sabalza was 18. CP 1872; 2RP 872. The State charged Herrin with first degree murder,

alleging he killed Barreto-Sabalza. CP 947-49. Herrin denied doing so. 2RP 1073. He told detectives, "I did that love girl and everybody knows that." 2RP 1073.

The first trial ended in a mistrial because the State improperly redacted Herrin's statement to police. CP 886-87. After a second trial, the court granted a new one because of surprise evidence and other discovery violations. 2RP 372-77. At the third trial, a jury returned a guilty verdict on first degree premeditated murder. CP 1723.

Evidence presented at the third trial showed Barreto-Sabalza was found lying on the ground in Salt Air Vista Park in Kent with a gunshot wound to her head and a scarf over her eyes at about 7:38 pm on June 16, 2018; she died at the scene. 5RP 352, 389-92, 411-14, 538-41, 1333-34.

Witnesses gave varying descriptions of a man and woman they saw at the park, two of whom associated the man with a white Nissan, one of whom said the man was wearing a black Adidas tracksuit with three white stripes, and none of whom identified Herrin as the man. Compare 2RP 1158-66; 4RP 949-55, 958, 964-65, 973-77, 980-88; 5RP 232-34, 239, 243-47, 469-74, 479 with Exhibit 118 (Herrin's booking photo). Elijah Maile described seeing a "family friend" he associated with his friend Antonio driving a white sedan out of the park; police later identified Antonio as Herrin's brother. 4RP 997-99; 5RP 11-12-15, 20, 29.

Barreto-Sabalza had a white Nissan Altima, which Herrin was known to drive. 2RP 877; 4RP 239, 1196-98, 1340. Fred Meyer surveillance video from earlier that morning showed Herrin and Barreto-

Sabalza together; Herrin wore a black tracksuit with a single white stripe. Ex. 63; 2RP 1257-58; 5RP 362-65.

Phone records showed Herrin's phone accessed a cell phone tower in the general vicinity of Salt Air Vista Park at 7:38 pm. 4RP 1056-57, 1062-63; Ex. 251. Herrin used Barreto-Sabalza's bank card to make a cash withdrawal and to get gas that evening. 4RP 464-71; 5RP 106-07, 321-30, 675, 679-83, 704-05; Ex. 62, 189. On June 20, police found a Puma tracksuit (black with one white stripe) in the dumpster of the apartment complex where Herrin's mother lived. 2RP 990, 996-97, 1029, 1105; 4RP 1167-76; Ex. 150.

Police arrested Herrin on June 19 following a car chase. 2RP 964-66; 5RP 521-533. Herrin, in handcuffs, was interrogated at the Kent police station for over three hours in the middle of the night. 2RP 967-69, 974, 982, 1064; 1239-1277, 1355-1389, 1451-99, 1505-45;

4RP 664-65; Ex. 56 (recording); Ex. 57 (transcript). Herrin repeatedly denied killing his girlfriend. 2RP 970, 1073-74. He loved her. 2RP 1073; Ex. 57, p. 124, 131, 144. Their relationship was good. 2RP 1248-49.

Herrin said Monte Rainwater shot her at the park, ultimately acknowledging he was present when Rainwater did so. 2RP 1454, 1457, 1462-63, 1505-06. Detective Gee told Herrin that he knew Rainwater did not kill Barreto-Sabalza and expressed his belief that Herrin was the shooter. 2RP 1518-22; Ex. 57, p. 108, 160-61. After a break in the interrogation, Herrin said his brother, Antonio, shot Barreto-Sabalza. 2RP 969, 1093-94; 5RP 80-82; Ex. 57, p. 166-79.

Rainwater was mad that Herrin had ripped him off in a drug deal and threatened Barreto-Sabalza to get to Herrin. 4RP 869-71, 878-79, 898-900, 913-14; 5RP 170-72. Rainwater purchased a gun hours before

Barreto-Sabalza died. 4RP 920. Rainwater claimed he was at a party on the day of the shooting and left around 5 or 6 pm. 4RP 891-92, 926-27. Jasmyn Dickerson, Rainwater's girlfriend at the time, and Jasmyn's mother claimed Rainwater was with them at the party and did not leave until 8:30 or 9:30 pm. 4RP 433-40, 441, 452-534, 473-83.

As defense counsel argued to the jury, "This case fails for so many reasons. There's no motive; there's no murder weapon; there's no DNA; there's no fingerprints; there's no blood; there's no gunshot residue; there's no person that can say, 'That's Geo Herrin. That's the person I saw at the park'; there's no video placing him at the park." 4RP 1521-22. The defense theory of the case was that Herrin was the victim of confirmation bias and inadequate police

investigation. 4RP 1520-21, 1590. The defense pointed to Rainwater as the real killer. 4RP 1577-85.

The jury nevertheless convicted. CP 1723. Herrin requested an exceptional sentence downward based on the mitigating role of youth. 4RP 1706-12; CP 1752-1866. The court imposed a standard sentence of 37 years in confinement. CP 1870.

E. WHY REVIEW SHOULD BE ACCEPTED

1. The court erred in not dismissing the case due to cumulative misconduct that prejudiced Herrin.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to a fair trial. State v. Mullin-Coston, 115 Wn. App. 679, 692, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107 (2004). Dismissal under CrR 8.3(b) is warranted when the defendant shows "arbitrary action or government misconduct, which may include simple

mismanagement," and "actual prejudice affecting his fair trial rights." State v. Oppelt, 172 Wn.2d 285, 297, 257 P.3d 653 (2011).

This case presents a question not yet answered by Washington precedent. In the context of CrR 8.3(b), does actual prejudice from the State's mismanagement encompass the State profiting from its mismanagement by securing new trials, thereby strengthening its case with additional evidence while weakening the only defense presented? Herrin seeks review under RAP 13.4(b)(3) and (b)(4).

"Extremely concerning." CP 921 (CL 3). "Highly problematic." 4RP 68. "Not acceptable" 4RP 71. "Outrageous." 4RP 69-70. "Thoroughly egregious." 4RP 70. That's how the court described the State's conduct in this case.

The defense made a series of motions to dismiss the case under CrR 8.3(b) due to a pattern of State mismanagement and discovery violations. CP 899-905, 910; 3RP 763-71 (first motion); CP 922-46, 1000-31 (second motion); CP 1075-1291, 1292-1393, 1394-95, 1396-1509 (third motion); CP 1597-1626 (fourth motion). As evidence of cumulative misconduct, the defense pointed to (1) Nuñao Gallegos' identification testimony at the first trial, which violated the pre-trial ruling excluding such testimony, (2) the State's improper redaction of Herrin's interrogation that retained reference to a prior robbery at the first trial, (3) Detective Dvorak's improper coaching of Maile regarding his account and Maile's staging outside the courtroom so that he could see Herrin escorted by three officers in handcuffs at the first trial, (4) the State's failure to disclose Firefighter Plumb's report until 15

minutes before he testified at the second trial; and (5) Detective Dvorak's failure to disclose her investigation of witnesses regarding Rainwater's alibi at the second trial, which caught the defense by surprise. Id.

The State's improper redaction of Herrin's interrogation caused the first mistrial. CP 886-87. The court later identified Gallegos' testimony as an independent basis for mistrial, as it violated a pre-trial ruling, it was highly prejudicial, and the State should have foreseen what would happen in questioning Gallegos as it did. 4RP 66-67.

The court granted a second mistrial due to the nondisclosure of the extent of police investigation into Rainwater, thereby setting a "trap" for the defense as it tried to discredit the police investigation and advance its other suspect theory of the case. 2RP 375-77; CP 1532-34. The court also pointed to the detective's

review of Maile's account and the untimely disclosure of Plumb's report as problematic. 2RP 377. The trial court did not grant any of the motions to dismiss, believing Herrin did not suffer such prejudice that this remedy was appropriate. CP 917-20,1690-91; 2RP 373, 425; 3RP 3331-43.

The trial court's conception of prejudice was too limited. The trial court based its rulings on an incomplete analysis of what prejudice means in this context. The court considered whether mismanagement would prejudice Herrin in the future and concluded he wouldn't be. 2RP 373. But the court did not take into account the prejudice arising from allowing the State to capitalize on its mismanagement by strengthening its case while weakening Herrin's defense.

How many bites of the apple does the State get before a trial becomes unfair? The crux of Herrin's

argument is that a fair outcome is one in which the State is not permitted to profit from its mismanagement to the defendant's detriment. This is one form of prejudice — one which is not remedied by a new trial. United States v. Bundy, 968 F.3d 1019, 1043-44 (9th Cir. 2020); United States v. Chapman, 524 F.3d 1073, 1087 (9th Cir. 2008). The State, through its wrongdoing, maneuvered itself into a better position, leaving Herrin in a worse position than he had been before the mismanagement and misconduct took place.

Because the trial court permitted the State to retry the case rather than dismiss it outright, the State was able to correct weaknesses in its case and present evidence at the third trial that it did not provide at the previous trials. Most significantly, in the first and second trial, the State did not call Jasmyn or Karen

Dickerson as alibi witnesses for Rainwater and did not present photographs in support of their claim that Rainwater was at the party and so could not have shot Barreto-Sabalza. The only evidence that Rainwater was elsewhere at the time of the shooting was Rainwater's own uncorroborated testimony. 3RP 3044-45. By the third trial, the State figured out that the Dickersons would strengthen Rainwater's claimed alibi. The State presented the Dickersons as witnesses and ushered the photos into evidence. This undermined Herrin's "other suspect" defense. In exhorting the jury to convict, the prosecutor argued the Dickersons' account supported Rainwater's alibi contention. 4RP 1511.

Also worth noting, in the second trial, Detective Yagi did not testify as to how his investigation drew a connection between Maile's identification of the man he

saw in the car at the park with Herrin. 3RP 910-27, 1462-76. At the third trial, Detective Yagi testified that he investigated "Antonio," referenced by Maile, and learned that Herrin was Antonio's brother. 4RP 997-99. This strengthened Maile's identification in support of the State's theory that the man he saw was Herrin. The State used it in closing argument. 4RP 1464.

The Court of Appeals held the trial court did not abuse its discretion in denying the motions to dismiss because the mistrials provided an adequate remedy, ultimately permitting the defense to proceed to a third trial without unfair surprise. Slip op. at 12-15. A new trial was not an adequate remedy. In some cases, such as here, giving the government an opportunity to retry the case prejudices the defendant by permitting the State to strengthen its case.

In Bundy, the Ninth Circuit affirmed the trial court's dismissal based on a Brady¹ violation where "[l]esser sanctions—such as a continuance to allow the defendants to review discovery or declaring a mistrial and starting over — would have given the government an opportunity to strengthen its case at the defendants' expense." Bundy, 968 F.3d at 1043-44. There, the trial court "concluded that the government should not benefit from its misconduct. And there can be no denying that the government would enjoy the benefit of having done a 'dry run' of this case." Id. at 1045.

Bundy cited Chapman, where the trial court's dismissal was affirmed because "the mistrial remedy would advantage the government, probably allowing it to salvage what the district court viewed as a poorly conducted prosecution." Chapman, 524 F.3d at 1087.

¹ Brady v. Maryland, 373 U.S. 83 (1963).

The government should not be permitted "a chance to try out its case, identify any problem areas, and then correct those problems in a retrial." Id. (citation and alterations omitted). Giving the government an opportunity to benefit from its wrongdoing by being able to strengthen its prosecution after a failed trial is "an advantage the government should not be permitted to enjoy." Id.; see also United States v. Shafer, 987 F.2d 1054, 1059 (4th Cir. 1993) ("[The government's] self-inflicted injury cannot be used to afford the government a second chance to prosecute so that it may argue a recast theory of the case better supported by the evidence.").

"Fairness to the defendant underlies the purpose of CrR 8.3(b)." City of Kent v. Sandhu, 159 Wn. App. 836, 841, 247 P.3d 454 (2011). What is a fair trial? There is no "one size fits all" approach. A new trial is

not always a sufficient remedy. The State had years to prepare its case. It wasn't until it twice denied Herrin a fair trial that it decided to call the Dickersons as witnesses to strengthen its attack on Herrin's other suspect defense in a third trial — a decision made after having the benefit of studying how the defense presented their other suspect theory at the second trial. The State strengthened its case and succeeded in undermining the defense. That is not speculative. We observe the tangible results of the State's mismanagement. The remedy should not put the defense in a worse position.

Under the rationale of cases like Bundy and Chapman, dismissal is an appropriate remedy when any lesser remedy would unfairly advantage the State. The trial court, in refusing to dismiss Herrin's case, in effect rewarded the State for its misbehavior, which in

turn prejudiced Herrin by making him face a third prosecution with more formidable evidence against him. "In the drive to achieve successful prosecutions, the end cannot justify the means." State v. Martinez, 121 Wn. App. 21, 35, 86 P.3d 1210 (2004). The State should not have been given another opportunity to prosecute its case.

2. Alternatively, the court erred in not excluding witnesses and evidence as a lesser available remedy for the mismanagement.

While dismissal is authorized by CrR 8.3(b), courts have recognized dismissal is an extraordinary remedy that is unwarranted "where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct." State v. Marks, 114 Wn.2d 724, 730, 790 P.2d 138 (1990). An intermediate remedial step short of dismissal can thus be an appropriate remedy if it is adequate to protect the

defendant's right to a fair trial. State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003).

Herrin moved to suppress testimony from the Dickersons and associated photographs from the party as late discovery. CP 1679-80, 1684; 2RP 438-49. The gist of the motion was that permitting the State to offer these witnesses and evidence for the first time at the third trial would allow the State to benefit from their own misconduct by putting the State in a better position to obtain a conviction while hampering Herrin's ability to prepare for trial. CP 1678.

In addressing the motion, the court observed there was an initial omnibus before the first trial where the State was required to be ready with discovery. 2RP 443. Now the case was five years old and discovery was supposed to be completed "long ago." 2RP 443. The court in this manner recognized the late

arrival of the Dickersons and their photographs as a discovery violation.

But the court denied the motion to exclude this evidence for the third trial, finding Herrin was not prejudiced by the timing of the disclosure because the information came as no surprise. CP 1696; 2RP 453. The court abused its discretion in applying the wrong legal standard. Under CrR 4.7(h)(7)(i), suppression can be a suitable sanction for a discovery violation, and "[n]othing in the language of the rule requires a finding of prejudice before remedying a discovery violation with something less than dismissal." City of Seattle v. Lange, 18 Wn. App. 2d 139, 154-55, 491 P.3d 156 (2021).

The Court of Appeals upheld the trial court's decision on the ground that there was no "unfair surprise." Slip op. at 16. Lack of surprise in going into

the third trial does not answer the question of prejudice. The prejudice, as argued by defense counsel and above in connection with the dismissal argument, is that the State was allowed to achieve a tactical advantage due to its own mismanagement. The State was put in a better position to achieve conviction by strengthening its case with additional witnesses and evidence. Conversely, Herrin's "other suspect" defense was significantly weakened, as the Dickersons and their photographs corroborated Rainwater's claimed alibi. The State profited from its late discovery to Herrin's detriment. Under the circumstances, the proper remedy was to exclude the Dickersons as witnesses and the photographs as evidence.

The defense also moved to exclude the testimony of Elijah Maile as an alternative remedy to dismissal. This motion was based on Detective Dvorak's coaching

and the officer escort of Herrin in handcuffs in front of Maile. CP 899, 905, 910; 3RP 771-73. The court denied the motion to dismiss and motion for mistrial while precluding Maile from making any in-court identification of Herrin. CP 920-21 (CL1); 3RP 776-77.

Maile's testimony that he saw the "family friend" associated with "Antonio" driving the white sedan from the park effectively functioned to identify Herrin as the driver. 5RP 11-13, 20, 29-31. This was a damaging piece of evidence because it placed Herrin at the scene of the shooting. Other eyewitnesses offered varied descriptions of who they saw at the park, none of which plainly matched Herrin. 2RP 1158-61; 4RP 949-55, 965, 973-91; 5RP 232-34, 239, 243-47, 472-74, 479; Ex. 118. Even without an in-court identification, Maile's testimony on the subject was the most damning because it linked Herrin with his brother Antonio,

thereby establishing the identity of the person Maile saw at the park. Maile was a tainted witness and should have been excluded altogether.

3. The prosecutor impermissibly commented on Herrin'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).

During the second trial, defense counsel sought to exclude parts of the interrogation as an unconstitutional comment on Herrin's right to silence, namely his failure to call 911 and his failure to come to

the station to speak to Detective Gee. 3RP 1414-18; CP 2608. The court initially excluded the challenged evidence as requested by the defense. 3RP 1479-82. Further argument took place later that day. 2RP 351-66. The court mostly adhered to its earlier ruling but permitted the State to elicit Herrin's statement to police that "I debated; was like should I call the police," explaining Herrin offered up the statement; it wasn't in response to a question. 2RP 359. The parties and the court relied on these rulings at the third trial. 2RP 1168.

At the third trial, the redacted interrogation was published to the jury, including the line "I debated, was like should I call the police." 2RP 1516; Ex. 57, p. 111, lines 4-5. The State questioned Detective Gee about the circumstances surrounding his encounter with Herrin. 2RP 956-61, 1007-08. Gee testified that he called

Herrin on the morning of the 19th; he was not aware of anyone else from the police department speaking to Herrin before then. 2RP 957-58. Gee met with Herrin later that night. 2RP 959. When the prosecutor asked if Herrin showed up to Gee's office on his own, the court sustained counsel's "comment on silence" objection. 2RP 959.

The prosecutor then elicited that Herrin was brought in by officers, and that it was not the result of him going to those police. 2RP 959-60. In response to a question, Gee affirmed there was a period during the day when Gee stopped having communication with Herrin. 2RP 960. When the prosecutor asked Gee when that was, the court sustained counsel's "comment on silence" objection. 2RP 960. Gee also testified a little later that Herrin was brought to the police station after being forcibly stopped by police. 2RP 967.

In closing argument, the prosecutor addressed Herrin's statement that he thought about calling the police:

Detective Gee says, "Well, did you do anything to try to stop him?" He's like, "Well, I said, 'Hey, man, you don't want to do this.' And then he just points the gun and he shoots her." He said he hesitated about 30 seconds, and then again said the detectives, "Again ran to the car and I just went about my day." *Says he thought about calling the police. Didn't.* 4RP 1493-94 (emphasis added).

The standard is whether the prosecutor manifestly intended a remark to be a comment on the right to silence. State v. Burke, 163 Wn.2d 204, 216, 181 P.3d 1 (2008). The State demonstrated its intent by eliciting evidence that Herrin did not come to the police of his own volition. 2RP 959-60, 967. The State further demonstrated its intent by exploiting Herrin's statement in closing argument by pointing out that Herrin did not call the police. 4RP 1493-94. The

unmistakable implication is that an innocent man — one who has nothing to hide — would clear the matter up by immediately talking to the police. "When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence." Easter, 130 Wn.2d at 238.

The Court of Appeals concluded "the State did not comment on Herrin's right to silence, but used Herrin's properly admitted statement to make a proper argument." Slip op. at 17. Herrin's admitted statement did *not* include not contacting the police, only that he debated doing so. The State in closing argument added that he did not call the police.

The Court of Appeals opined "[w]hen a defendant waives the right to remain silent, the State may draw the jury's attention to the shortcomings in the defendant's story," citing State v. McFarland, 73 Wn.

App. 57, 64-66, 867 P.2d 660 (1994), aff'd, 127 Wn.2d 322, 899 P.2d 1251 (1995). Slip op. at 17.

McFarland is inapplicable. McFarland simply held the rule prohibiting comment on *post-arrest* silence under Doyle v. Ohio, 426 U.S. 610 (1976) did not apply because the defendant waived his Fifth Amendment rights and did not subsequently invoke his right to remain silent. The State did not comment on Herrin's post-arrest, post-Miranda² silence. The State commented on his *pre-arrest* silence. This is so because his "silence" — his not calling the police — occurred before his arrest, before Miranda.

The dividing line between prearrest silence and post-arrest silence is drawn by when the silence was exercised. When silence is exercised before arrest, it is a pre-arrest silence scenario. See, e.g., Burke, 163

² Miranda v. Arizona, 384 U.S. 436 (1966).

Wn.2d at 217-18; Easter, 130 Wn.2d at 241. When silence is exercised after Miranda warnings are given following arrest, it is a post-arrest silence scenario. See, e.g., State v. Heller, 58 Wn. App. 414, 417-21, 793 P.2d 461 (1990); State v. Chuprinov, 32 Wn. App. 2d 508, 518-20, 556 P.3d 1127 (2024).

Herrin exercised his right to silence before his arrest by not calling the police of his own volition. This is therefore a prearrest silence case. That Herrin's silence before arrest was brought up during his post-arrest interrogation, and ushered into evidence in this manner at trial, does not transform this case into a post-arrest silence scenario any more than if a State's witness had brought the subject up for the first time at trial by testifying that Herrin had not called the police before arrest. There is no authority for the Court of Appeals' proposition that when someone talks about

pre-arrest silence following arrest that the timing of disclosure permits the State to comment on that silence.

The Court of Appeals also opined "the State enjoys reasonable latitude in arguing inference from the evidence, including inferences as to witness credibility." Slip op. at 17. Herrin, though, did not testify at trial. The State therefore cannot justify its use of Herrin's prearrest silence under the guise of impeachment. Easter, 130 Wn.2d at 237; Burke, 163 Wn.2d at 206, 217-18.

In the Court of Appeals, Herrin argued Salinas v. Texas, 570 U.S. 178 (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 91-94; Reply Brief at 15-22. 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, Herrin's silence occurred before he interacted with police, at which time he had no occasion to invoke his right to silence to anyone. 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. Herrin provided a Gunwall³ analysis in the Court of Appeals. Brief of Appellant at 95-99. No precedent has analyzed whether article I, section 9 provides separate and greater protection regarding comments on the exercise of prearrest silence. Herrin seeks review under RAP 13.4(b)(3).

³ State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

4. The court wrongly admitted evidence of Herrin's attempt to elude police to show consciousness of guilt.

"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.

Defense counsel argued evidence of Herrin's attempt to elude the police was inadmissible under ER 403 and ER 404(b). 1RP 641-43, 646-48. Counsel acknowledged the consciousness of guilt theory of admission that provided "some small amount of probative value" but pointed out Herrin had an

alternate reason why he fled police: he had missed a court date and had an outstanding warrant for his arrest. 1RP 642-43.

The Court of Appeals held the trial court did not abuse its discretion in admitting Herrin's flight from the police to show consciousness of guilt. Slip op. at 18-20. It acknowledged Herrin's argument that he fled from police because of his outstanding warrant in an unrelated matter but determined "the evidence also supports the inference that Herrin fled from police for the much more serious purpose to avoid being caught driving Barreto-Sabalza's vehicle." Slip op. at 20.

This reasoning ignores the rationale for why flight evidence has sufficient 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). Herrin's flight is not unexplained. Flight from a warrant on an unrelated matter provides the explanation.

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 Herrin's flight from police is explainable as something other than wanting to avoid capture for murder. Freeburg, 105 Wn. App. at 498. Herrin seeks review under RAP 13.4(b)(4).

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

Under the cumulative error doctrine, a new trial is required as a matter of due process 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; Wash. Const. art. 1, § 3. An accumulation of errors produced an unfair trial here. These errors include (1) misconduct associated with motions to dismiss or, in the alternative, denial of motion to exclude witnesses and evidence as a lesser alternative remedy (section E.1, 2., supra); (2) comment on silence (section E.3, supra); (3) admission of flight evidence (section E.4., supra). Herrin seeks review of this issue under RAP 13.4(b)(3).

F. CONCLUSION

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

I certify that this document was prepared using word processing software and contains 4944 words excluding those portions exempt under RAP 18.17.

DATED this 17th day of September 2025.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in black ink, appearing to read 'Casey Grannis', is written over a horizontal line.

CASEY GRANNIS

WSBA No. 37301

Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

GIOVANNI DASHAWN HERRIN,

Appellant.

No. 85768-1-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — Giovanni Herrin appeals his conviction, arguing (1) the trial court abused its discretion when it declined to dismiss his murder charge due to cumulative governmental misconduct, (2) the trial court erred by not excluding certain witnesses and evidence as a lesser available remedy, (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 community custody condition requiring Herrin to remain within geographic boundaries was unconstitutionally vague. Finding no error, we affirm.

I

The State charged Herrin by information with murder in the first degree of Karyme Barreto-Sabalza, felony murder with the predicate offense of robbery in the first degree, unlawful possession of a firearm in the first degree,¹ and escape

¹ In a bifurcated bench trial, the trial court acquitted Herrin of unlawful possession of a firearm in the first degree.

in the second degree.² After two mistrials—which will be discussed below—the following testimony was elicited at Herrin’s third trial.

Josefina Castello testified that on June 16, 2018 she watched a male and female walk into the wooded area of Salt Air Vista Park. Castello testified that after about 30 seconds, she heard a loud boom that she thought was a gunshot, walked out of her house, and saw the male walk quickly out of the woods. Castello watched the male enter a white Nissan Altima. Elijah Maile testified that he was playing basketball at another park when he heard two or three gunshots coming from Salt Air Vista Park. Maile ran toward the park, and along the way saw someone he recognized as a family friend leaving the area in a white four-door vehicle. Maile testified that the person he saw was associated with a person he knew as “Antonio.”

Officers were dispatched to Salt Air Vista Park to conduct a welfare check. An individual had called and reported a woman lying in the woods unconscious with something covering her face. Upon arrival, officers saw a woman lying on the ground with a blindfold over her eyes, blood along her face and head, with an “obvious injury” by her left ear. The woman was declared dead at the scene after rescue efforts failed. The medical examiner opined the cause of death was a gunshot wound to the side of the head.

Kent Police Detective Daniel Yagi testified he began searching for a white Nissan in the area, and memorized the license plate number of a Nissan Altima

² The escape charge was severed from the other two charges. Herrin pleaded guilty to escape in the second degree.

that he observed. Yagi testified he investigated "Antonio" and learned that Antonio and Herrin were brothers. Detective Yagi further discovered that Herrin was associated with Barreto-Sabalza. Detectives ran the license plate of the Nissan and learned that it was registered to the Barreto family, and Herrin was associated with the vehicle. Officers pulled up Barreto-Sabalza's department of licensing photo and, after confirming with her family, determined she was the victim found in the woods.

The day after the murder, Alicia Perez met with Herrin to discuss the murder. Herrin told Perez that Barreto-Sabalza's family told him that someone took Barreto-Sabalza to the woods, blindfolded her, and shot her in the head. Herrin also told Perez that Barreto-Sabalza's car was missing and that the police did not find photo identification, a wallet, or a phone on her. The police had not disseminated that information to the public.

Kent Police Detective Lovisa Dvorak testified that three days after the murder she received information that Barreto-Sabalza's Nissan Altima was located at a residence in South Seattle. The detective subsequently received word that the vehicle was driving away from that residence, so she and another detective began to pursue the vehicle. The detectives performed a pursuit intervention technique to stop the vehicle and arrested the driver, who was identified as Herrin.

Police transported Herrin to the station for a recorded interview in which Herrin provided inconsistent accounts for how the murder occurred. In the first account, Herrin accused Montae Rainwater of murdering Barreto-Sabalza, and claimed he was not present. In the second account, Herrin stated Rainwater

murdered Barreto-Sabalza while Herrin was present. After a break, Herrin provided a third statement in which he said his younger brother Antonio killed Barreto-Sabalza.

Based on Herrin's statements, Detective Dvorak interviewed Rainwater. The detective also interviewed Rainwater's girlfriend, Jasmyn Dickerson, and her mother, Karen Dickerson. Both Karen³ and Jasmyn testified that on June 16, 2018 they attended a barbecue with Rainwater in Tacoma from approximately 1:00 p.m. until approximately 8:30 to 9:30 p.m. Karen drove to the party in her vehicle. Karen testified that to her knowledge, Rainwater did not leave the party, which Jasmyn corroborated.

The jury convicted Herrin of murder in the first degree. The trial court sentenced Herrin to 37 years in prison, and 36 months of community custody upon release. The sentence on one of Herrin's convictions included a term of community custody. In "Appendix H" to the judgment and sentence, the court ordered that Herrin comply with eight community custody conditions, including that Herrin "[r]emain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with [Stay Out of Drug Area] order." Herrin appeals.

II

Herrin argues the trial court abused its discretion in denying his CrR 8.3(b) motion to dismiss because of cumulative governmental misconduct. We conclude

³ For clarity, we use first names to refer to Karen and Jasmyn Dickerson. We do not intend disrespect.

that the trial court acted within its discretion in denying Herrin's motion because he has not established actual prejudice.

We review a trial court's decision on a motion to dismiss under CrR 8.3(b) for abuse of discretion. State v. Koeller, 15 Wn. App. 2d 245, 251, 477 P.3d 61 (2020). A court abuses its discretion where its decision is manifestly unreasonable, or rests on untenable grounds or was made for untenable reasons. Id. CrR 8.3(b) provides that a "court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." Thus, a movant must show by a preponderance of the evidence (1) arbitrary action or misconduct by the government, and (2) prejudice affecting the movant's right to a fair trial. Koeller, 15 Wn. App. 2d at 251; State v. Kone, 165 Wn. App. 420, 432-33, 266 P.3d 916 (2011). Dismissal under CrR 8.3(b) is an "extraordinary remedy" and should be granted "only as a last resort." State v. Brooks, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). Dismissal is available "only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial." State v. Baker, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970).⁴

⁴ Citing State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997), Herrin argues that governmental misconduct in the form of discovery and other delays impermissibly forced him to choose between his right to a speedy trial and his right effective assistance of counsel. Herrin's argument is flawed because he bases his prejudice in the delays he says resulted from the State's serial disclosures, but relies on case law almost predating 2003 amendments to CrR 3.3 that, subsequent decisions have held, foreclose time-to-trial arguments as a basis for dismissal

A

1

In Herrin's first trial, Maria Nuño Gallegos testified that she lives just down the street from the park. On the day of the murder she saw a man in a white Nissan drive by her. The State asked her to describe the individual, and Nuño Gallegos responded, "He was white-skinned. Having this person in front of me makes me feel nervous." Herrin moved to strike the response, and the trial court instructed the jury to disregard the statement. Outside the presence of the jury, Herrin moved for a mistrial, which the trial court denied.

On the third day of trial, Detective Gerald Gee testified about Herrin's police interrogation. The State admitted the audio recording of Herrin's interrogation, and discovered the recording was improperly redacted, allowing the jury to hear Herrin say that he had been "doing robberies" since he was nine years old. Herrin filed a second motion for a mistrial, which the trial court granted because "[a] redaction that the court deem[ed] was prejudicial was missed in the audio statement of the defendant."

2

During Herrin's second trial, the State disclosed that Maile had made some disclosures to the State in the presence of Detective Dvorak about the untruthfulness of his prior statements. The trial court granted Herrin's request to interview Maile after the court was in recess for the day, and ruled that Maile's

under CrR 8.3(b). With regard to time to trial, Herrin was required to show a violation of CrR 3.3, a statute, or the state or federal constitution, none of which was shown. See CrR 3.3(h).

cross-examination would begin the following day. During his interview, Maile stated that he and Detective Dvorak went through Maile's previous statements and the detective identified inconsistencies between the statements, told him that certain things in the statement did not make sense, and admonished him to just tell the truth. After the conversation with the detective, Maile stated that he went through and disavowed additional statements from his defense interview. Detective Dvorak stated she met with Maile, but she did not endorse the level of discussion about his testimony that Maile had described.

Herrin filed a CrR 8.3(b) motion to dismiss "due to governmental misconduct in irreparably tainting witness [Maile] with excessive coaching and cueing," or alternatively, requested the court grant a mistrial and suppress Maile's testimony at a subsequent trial. Herrin further argued that dismissal was warranted because Maile was present in the hallway outside the courtroom when Herrin entered, handcuffed and "flanked by three officers." The trial court denied Herrin's motion to dismiss and suppressed Maile's in-court identification.

At trial, Detective Dvorak testified about her communication with Rainwater, the individual that Herrin had accused of killing Barreto-Sabalza. Detective Dvorak testified that Rainwater told her his whereabouts on the day of the murder, and she also spoke with his girlfriend Jasmyn, and his mentor Falshan Langston. Herrin elicited that in a previous defense interview, Detective Dvorak had explicitly stated that she had not interviewed Langston about Rainwater's alibi and failed to mention that she had verified Rainwater's alibi with Jasmyn, which contrasted with her direct examination testimony. Detective Dvorak testified that she did not

personally notify defense counsel of her interview with Langston. Herrin cross-examined Detective Dvorak about Rainwater's statement that he was at his girlfriend's aunt's house on the day of the murder, and questioned Detective Dvorak as to whether she spoke to the aunt or determined her address. The detective indicated, "[W]e did have that information." Herrin directed the detective to her previous interview and asked, "And you did not document [the aunt's name] in your report, either, did you?" Detective Dvorak responded that she had documented it, and "[i]t was in a Word doc[ument] and it wasn't transferred over," another fact she had not disclosed to the defense during the interview. Detective Dvorak testified, "I believe I explained that to you guys in this interview after—after this initial line of questioning. I write my reports in a Word doc[ument]. My laptop eventually essentially blew up and fried and no digital forensic experts were able to get that."⁵

Herrin also objected to Todd Plumb, a retired firefighter, being called as a witness, asserting a discovery violation. Herrin argued that he was not provided any medical or narrative reports from Plumb and learned the previous night that there was a report Plumb had used to prepare for testifying. Herrin argued he had been surprised by the information and prejudiced because it had not been provided in a timely fashion. As a remedy, the trial court allowed Herrin to interview Plumb before he testified.

⁵ Before the remainder of the detective's cross-examination, Herrin made a request to interview her regarding the police reports that were on the destroyed laptop, which the trial court granted.

Herrin filed a renewed CrR 8.3(b) motion to dismiss and argued there was governmental misconduct by Detective Dvorak for failing to document or disclose the discovery of missing files, and misconduct by the State for failing to disclose that information to the defense. Herrin contended he was prejudiced because he was led to believe he did not need to interview certain witnesses, there was contact information he did not obtain, and he was surprised by Detective Dvorak's testimony that she interviewed Langston as an alibi witness for Rainwater. The trial court denied the motion to dismiss and instructed the jury that it should disregard all reference to incomplete or lost police reports and any investigation documented, and should not give weight to any such testimony or evidence.

After the jury found Herrin guilty of murder in the first degree, Herrin moved to dismiss based on cumulative prosecutorial misconduct, and argued that the curative instruction was inadequate to cure the prejudice caused by the State's discovery violations. The trial court denied a mistrial and denied the motion to dismiss. But the trial court reconsidered its ruling and held another hearing on Herrin's motion to dismiss. The court ruled it was not dismissing the charge because "exculpatory evidence was not withheld in this case and prosecutorial misconduct and prosecutorial error does not make it so that [Herrin] is precluded from having a fair trial in the future." The trial court found that Herrin was denied information regarding the scope of Detective Dvorak's investigation into Rainwater's alibi witnesses, which was critical to the defense case, and the court's instruction to the jury to disregard part of the detective's testimony was insufficient to cure the prejudice. The trial court further found that the State's failure to provide

Herrin with Plumb's testimony until 15 minutes before he testified substantially prejudiced Herrin's preparation for trial. Thus, the trial court granted Herrin's motion for a mistrial.

3

Before the third trial, the court held an omnibus hearing. Herrin objected to the new witnesses and discovery that the State had provided since the trial date had been reset. The trial court excluded certain witnesses and evidence and reserved ruling on other evidence, including Karen and Jasmyn's testimony, as well as photos from Jasmyn that supported Rainwater's alibi.

At a hearing on the parties' supplemental motions in limine, Herrin re-raised the issues that had been reserved at the omnibus hearing. Herrin argued Karen's testimony should be excluded because he was concerned that her testimony would not be based on her own recollection, but instead would be influenced by Jasmyn and the State. Herrin argued that during the defense interview, Karen had texted Jasmyn about the key issue of what date the barbecue had taken place and the State had separately corrected Karen about the date. The trial court denied the motion and found that Karen's testimony was not irreparably tainted and could be explored during cross-examination. Herrin, while acknowledging he had previously interviewed her, also moved to exclude Jasmyn's testimony because the State did not previously list her as a witness and moved to exclude the photographs she provided of herself and Rainwater at a party at the date and time of the homicide, as well as a video taken on the same day. Herrin argued the photographs and the video should be excluded as late discovery. The trial court

denied the motion to exclude Jasmyn's testimony, denied the motion to exclude Jasmyn's photographs and Snapchat⁶ video, and granted the motion to exclude Jasmyn from identifying any voices from the video. As to the photographs and video evidence, the trial court found Herrin was not prejudiced because the defense had reasonable notice of the evidence and the timing of the disclosure did not impact the defense's ability to prepare for trial.

B

Herrin argues the State engaged in cumulative misconduct and points to: (1) Nuñao Gallegos's identification testimony, (2) the State's improper redaction of Herrin's interrogation, (3) Maile's improper coaching and staging outside the courtroom,⁷ (4) Detective Dvorak's failure to disclose her investigation of witnesses regarding Rainwater's alibi, and (5) the State failing to disclose Plumb's report until 15 minutes before he testified.

Some of the errors Herrin complains of did not occur at, and thus did not affect or prejudice, the third trial. Nuñao Gallegos did not identify Herrin in the third trial, and similarly, the jury from the third trial did not hear Herrin admit to committing robberies in his interrogation. Other errors were remedied with the grant of a new trial. The importance of Maile's testimony lay primarily in his recognizing a person at the scene as connected to Antonio, Herrin's brother, rather

⁶ Snapchat is a cell phone app similar to text messaging except that photos and texts sent through Snapchat disappear once they are seen by the recipient and are not preserved.

⁷ Herrin argues the trial court "never definitively resolved which account was credible regarding the extent of [Maile's] coaching." However, the trial court held that the circumstances of the alleged coaching and staging did not constitute governmental misconduct.

than in identifying Herrin in court years later, which the court ultimately prohibited him from doing. Herrin argued he was unfairly surprised by Detective Dvorak's investigation into Rainwater's alibi witnesses, as well as the late disclosure of Plumb's report. Because the court granted a mistrial, Herrin was able to review Plumb's report with adequate time and interview Jasmyn and Karen. Thus, the unfair surprise was remedied. Herrin argues Detective Dvorak's untimely disclosures interfered with his ability to prepare for the State's attack on his other suspect defense. However, the State did not withhold exculpatory evidence, but instead withheld evidence that discredited Herrin's other suspect defense. The remedy of a new trial permitted Herrin to meet these facts without being surprised by them, precisely as he could have done if the State had timely disclosed them from the start.

Herrin further argues that the State "was able to profit from the mismanagement of its case" and "able to leverage a new trial to its advantage by strengthening its case, thereby reaping a reward for its mismanagement." The State presented new evidence at the third trial, including Jasmyn's and Karen's testimony, a doorbell video, which corroborated Herrin's statement that he placed Barreto-Sabalza's phone into a storm drain, testimony that the iPhone recovered from the storm drain was Barreto-Sabalza's phone, and testimony that officers investigated the person Maile referred to as "Antonio" and thereby discovered a link to Herrin. Citing United States v. Chapman, 524 F.3d 1073, 1087 (9th Cir. 2008), and United States v. Bundy, 968 F.3d 1019, 1043-44 (9th Cir. 2020), Herrin

argues that dismissal is an appropriate remedy when any lesser available remedy would unfairly advantage the State.

In Chapman, the Ninth Circuit found that it was not an abuse of discretion to dismiss an indictment after finding that the prosecution engaged in “flagrant misbehavior” that resulted in a mistrial due to violations of Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). 524 F.3d at 1078, 1085, 1088. The district court initially declared a mistrial, and subsequently refused to permit a re-trial, reasoning that the defendants would suffer substantial prejudice because the government and its witnesses would not make the same mistakes again. Id. at 1080. The Ninth Circuit stated that the district court was in the best position to evaluate the strength of the government’s case to gauge the prejudicial effect of a re-trial, and concluded that “the district court considered and properly rejected” the argument that a mistrial was an adequate sanction, “because the mistrial remedy would advantage the government, probably allowing it to salvage what the district court viewed as a poorly conducted prosecution.” Id. at 1087. Thus, the Ninth Circuit held the district court’s ruling was not an abuse of discretion.

In Bundy, the government failed to produce exculpatory evidence that had been requested by the defendants. 968 F.3d at 1026. The district court found that “ ‘retrying the case would only advantage the government by allowing [it] to strengthen [its] witnesses’ testimony based on the knowledge gained from the information provided by the defense and revealed thus far,’ ” and concluded that dismissal of the indictment was warranted. Id. at 1029 (alterations in original). In concluding that the district court did not abuse its discretion by dismissing, the

Ninth Circuit, citing Chapman, highlighted the possibility of the government gaining an advantage from already having tried the case and its ability to identify weaknesses and attempting to correct them in a second prosecution. Id. at 1043-45.

Both Chapman and Bundy involved the government wrongfully withholding information helpful to the defense and arguing theories not needing to deal with the withheld information. Chapman, 524 F.3d at 1079 (the government withheld rap sheets, plea agreements, and other information casting doubt on the credibility of numerous government witnesses); Bundy, 968 F.3d at 1025, 1027 (a “central pillar” to the government’s case was that the defendants falsely stated government snipers surrounded their ranch, and it withheld evidence that the government itself had referred to agents observing the ranch as snipers). Had re-trials been allowed, the government would have been allowed to better argue its case in light of the new revelations undermining its original theories. Herrin points to information that was withheld that helped the government’s case and was consistent with the theory the government pursued all along. In Herrin’s case, the issue was not that he was unfairly deprived of an opportunity to rebut the government’s theory, but that he was unfairly surprised by nondisclosure. That failing was adequately redressed by a new trial, with full and fair notice. Further, in both Chapman and Bundy, the Ninth Circuit held that the district court did not abuse its discretion in dismissing the indictment. It did not hold that dismissal was required as a matter of law. Its analysis indicates that a trial court has the discretion to determine what sanction is appropriate, and while usually the appropriate remedy is something

short of dismissal, the district courts in those cases nonetheless did not abuse their discretion.

Given that dismissal is a “last resort” and the trial court had a chance to remedy the surprise rather than dismiss the case outright, the trial court acted within its discretion in denying Herrin’s CrR 8.3(b) motion to dismiss. See State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003) (noting that the trial court ignored “ ‘intermediate remedial steps,’ ” such as excluding testimony, before resorting to dismissal (quoting State v. Koerber, 85 Wn. App. 1, 4, 931 P.2d 904 (1996))).

C

Alternatively, Herrin argues the trial court erred by not suppressing Maile, Karen, and Jasmyn’s testimony, as well as Jasmyn’s photographs, as a lesser available remedy. We disagree.

We will not disturb the trial court’s denial of a motion to dismiss for discovery violations unless the denial constitutes a manifest abuse of discretion. State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001), abrogated on other grounds by State v. Schierman, 192 Wn.2d 577, 739 n.69, 438 P.3d 1063 (2018).

During the second trial, Herrin moved for a mistrial and moved to exclude Maile’s testimony because of Detective Dvorak’s coaching compounded with the suggestiveness of Maile seeing Herrin walk into the courtroom while handcuffed. The trial court denied a mistrial, held that Maile could not provide an in-court identification of Herrin, and the remedy for Maile’s “changing stories” would be

cross-examination.⁸ On the day of the murder, Maile told officers he saw a person driving away from Salt Air Vista Park that he knew to be “ ‘Antonio’s friend’ ” but whose name he did not know. As noted, this statement was probative primarily circumstantially because Herrin in fact was Antonio’s brother, not because of Maile’s ability to identify the person he saw years later. The statement was given years before Detective Dvorak’s alleged coaching and Maile viewed Herrin handcuffed and surrounded by officers. The remedy the trial court provided—suppressing Maile’s in-court identification—was sufficient to remedy any prejudice surrounding the coaching or the staging. Herrin fails to show that the trial court abused its discretion in declining to exclude Maile from testifying.

Similarly, Herrin fails to show that the trial court’s decision to allow Jasmyn and Karen to testify was an abuse of discretion. Herrin moved to suppress their testimony due to late discovery. Herrin was unfairly surprised at the second trial by Detective Dvorak’s investigation into Rainwater’s alibi witnesses, causing the trial court to declare a mistrial. However, Herrin knew of Jasmyn and Karen as witnesses, as well as the significance of their knowledge, even before the first trial. And at the time of the third trial, Herrin knew that Detective Dvorak had followed up on Jasmyn and Karen’s testimony. Thus, there was no longer any unfair surprise by allowing both Karen and Jasmyn to testify and admitting Jasmyn’s photographs and Snapchat video from the night of the murder. The trial court did not abuse its discretion by allowing Maile’s, Jasmyn’s, and Karen’s testimony.

⁸ Herrin argues the trial court abused its discretion by not explicitly ruling on the motion to suppress Maile’s testimony. However, Herrin did not re-raise the motion in the third trial. Herrin did not preserve the issue for appeal.

III

Herrin argues the State impermissibly commented on his exercise of his right to prearrest silence because it used his decision not to call the police as substantive evidence of guilt. We disagree.

During the second trial, Herrin objected to any evidence that constituted an improper comment on Herrin's prearrest or postarrest exercise of the right to silence, including statements regarding his failure to call 911 when he alleged he saw Rainwater shoot Barreto-Sabalza. The trial court admitted Herrin's statement, "I stayed there for like thirty seconds. I debated, was like should I call the police." The parties relied on this evidentiary ruling for the third trial, and the statement was included in both the admitted audio recording of Herrin's interrogation, as well as the transcript of the interrogation that was published to the jury. During closing argument of the third trial, the State discussed the differing accounts Herrin told the police during his interrogation. While summarizing Herrin's second account, in which Herrin alleged that Rainwater shot Barreto-Sabalza while Herrin was present, the State said,

Detective Gee says, "Well, did you do anything to try to stop him?" He's like, "Well, I said, 'Hey, man, you don't want to do this.' And then he just points the gun and he shoots her." He said he hesitated about 30 seconds, and then again said the detectives, "Again ran to the car and I just went about my day." Says he thought about calling the police. Didn't.

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).

Herrin was properly advised of his Miranda rights following his arrest, and made a knowing, intelligent, and voluntary waiver of his Fifth Amendment rights. The trial court ruled that Herrin’s statement that he debated calling the police was admissible, and Herrin does not assign error to that ruling on appeal. In its closing argument, the State summarized the differing accounts Herrin told to the police, including the one in which Herrin stated he debated whether to call the police, and discussed why Herrin’s account did not match the evidence in the case. The State never argued that Herrin not calling the police before he was arrested suggested his guilt, but argued only that the admissible statements he made to the police did not fit with the evidence and were not believable. When a defendant waives the right to remain silent, the State may draw the jury’s attention to the shortcomings in the defendant’s story. See State v. McFarland, 73 Wn. App. 57, 64-66, 867 P.2d 660 (1994), aff’d, 127 Wn.2d 322, 899 P.2d 1251 (1995). Furthermore, the State enjoys reasonable latitude in arguing inference from the evidence, including inferences as to witness credibility. State v. Johnson, 40 Wn. App. 371, 381, 699 P.2d 221 (1985). We conclude the State did not comment on Herrin’s right to silence, but used Herrin’s properly admitted statement to make a proper argument.

IV

Herrin argues the trial court abused its discretion in admitting evidence of Herrin’s attempt to elude police to show consciousness of guilt. We disagree.

Before the first trial, Herrin moved to exclude reference to his flight from the police before his arrest, and argued that unfair prejudice would outweigh any probative value. Herrin argued he fled because he thought the pursuit was associated with an outstanding warrant due to missing a court hearing that day for an unrelated case. The State argued that even with that alternative reason, another reason Herrin could have been fleeing was because he was in the victim's vehicle. The trial court found the prejudicial effect of the evidence did not outweigh its probative value and ruled that the evidence was admissible.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. State v. Jennings, 199 Wn.2d 53, 59, 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 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, three days after Barreto-Sabalza's murder, while driving Barreto-Sabalza's vehicle, Herrin led police officers on a several-minute, high speed chase, on local streets. An officer testified to traveling an estimate of 80 miles per hour and noted that Herrin was "pulling away from [him]." Officers were forced to use a pursuit immobilization technique to stop the vehicle. Herrin argues the evidence merely shows that he fled from police because of his outstanding warrant in an unrelated matter. However, the evidence also supports the inference that Herrin fled from police for the much more serious purpose to avoid being caught driving Barreto-Sabalza's vehicle. The trial court did not abuse its discretion in admitting Herrin's flight from the police to show consciousness of guilt.

V

Herrin argues cumulative error violated his due process right to a fair trial. 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. Because there were no errors here, we reject Herrin's cumulative error argument.

VI

Herrin argues the community custody condition requiring him to remain within "geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with [Stay Out of Drug Area] order" is unconstitutionally vague. We recently addressed the same community custody condition in State v. Lundstrom, ___ Wn. App. 2d ___, ___ P.3d ___ (2025), No.

86537-4-I, slip op. at 1 (Wash. Ct. of Appeals July 28, 2025), <https://www.courts.wa.gov/opinions/pdf/865374.pdf>, and concluded the condition was not unconstitutionally vague. For the reasons set forth in Lundstrom, we conclude the geographic boundaries condition is not unconstitutionally vague.

Affirmed.

Birk, J.

WE CONCUR:

Chung, J.

Mann, J.

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

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