

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of

MARTIN STANLEY IVIE,

Petitioner.

No. 96860-8

ORDER

Court of Appeals
No. 49526-1-II

Department II of the Court, composed of Chief Justice Fairhurst and Justices Madsen, Stephens, González and Yu, considered this matter at its November 5, 2019, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's "Motion For Leave To File Motion to Modify" is granted to the extent that the Petitioner's pro se motion to modify is accepted for filing as a supplemental memorandum in support of the motion to modify he filed through counsel. The Petitioner's motion to modify the Commissioner's ruling is denied.

DATED at Olympia, Washington, this 6th day of November, 2019.

For the Court

Fairhurst, C.J.
CHIEF JUSTICE

FILED

AUG 6 2019

WASH. STATE COURT OF APPEALS
CLERK'S OFFICE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of:

MARTIN STANLEY IVIE,

Petitioner.

No. 96860-8

Court of Appeals No. 49526-1-II

RULING DENYING REVIEW

Through counsel, Martin Ivie filed a timely personal restraint petition in Division Two of the Court of Appeals challenging his judgment and sentence on two counts of first degree assault, one count of third degree assault, and one count of attempting to elude a pursuing police vehicle. The court ordered a reference hearing. After receiving the reference hearing findings, a panel of judges denied the petition in an unpublished decision. Through counsel, Mr. Ivie now seeks this court's discretionary review. RAP 16.14(c).¹

¹ In addition to counsel's motion for discretionary review, Mr. Ivie filed a pro se pleading entitled "Grounds for Direct Review and Motion for Emergency Injunction." When the clerk advised Mr. Ivie that the motions could not be accepted for filing when Mr. Ivie was represented by counsel, he indicated that he wished for his filing to be treated as a statement of additional grounds for relief. Through counsel, Mr. Ivie subsequently moved to allow his pleading to serve as a statement of additional grounds. As the clerk noted, a statement of additional grounds applies only in the context of a criminal case on direct appeal. RAP 10.10. Nonetheless, in the interests of justice, the motion to accept the pro se filing is granted in part. I will treat the pleading as a supplemental memorandum in support of counsel's motion for discretionary review and consider the arguments therein.

To obtain this court's review, Mr. Ivie must show that the Court of Appeals decision conflicts with a decision of this court or with a published Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). To obtain postconviction relief generally, Mr. Ivie must show that he was actually and substantially prejudiced by constitutional error or that his trial suffered from a nonconstitutional error that inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 347, 325 P.3d 142 (2014).

Mr. Ivie primarily argues that his trial counsel was ineffective in various ways. Defense counsel is strongly presumed to have rendered adequate assistance. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To overcome this presumption, Mr. Ivie must demonstrate that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional performance, there is a reasonable probability the outcome of the trial would have been different. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013). If Mr. Ivie fails to establish either element of an ineffective assistance claim, the reviewing court need not address the other element. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To understand Mr. Ivie's claims, a review of the facts and trial evidence is necessary. Deputy William Reed was staking out a location where he suspected someone had been stealing wood. Deputy Reed saw a man arrive in a pickup truck and begin working with the wood. Sergeant Travis Adams then arrived in a marked patrol car, and Deputy Reed recognized the man working with the wood as Mr. Ivie. Deputy Reed ordered Mr. Ivie to get on the ground, but Mr. Ivie got in the truck and drove towards Sergeant Adams. While Deputy Reed pursued on foot, Mr. Ivie quickly turned the truck around and accelerated toward Deputy Reed, who pointed his flashlight

toward the truck. Mr. Ivie did not stop as he approached Deputy Reed on the narrow road, forcing Deputy Reed to jump to avoid the truck. Sergeant Adams then pursued Mr. Ivie in the patrol car with emergency lights flashing. Mr. Ivie soon stopped the truck, put it in reverse, and backed into the front of Sergeant Adams's car. Mr. Ivie then turned up a steep side road. Sergeant Adams followed, and Mr. Ivie again stopped the truck. Mr. Ivie again turned the truck around and accelerated towards Sergeant Adams. Sergeant Adams feared that he might be hit by the truck, moved sideways, and fired at the truck. Mr. Ivie crashed into trees, sustaining gunshot wounds, and was taken to a hospital for treatment. About 16 hours later, two detectives arrived at the hospital to read to Mr. Ivie his rights and interview him. Mr. Ivie provided a recorded statement.

At trial, the State called Cameron Simper, a Thurston County Sheriff's Office detective who also acted as the lead investigator of these crimes, as an expert witness. Detective Simper testified that investigators used a computer program to map the trajectory of the bullets at the scene where Sergeant Adams fired at the truck and introduced into evidence several computer-generated images of the crime scene.

Defense counsel called Fred Doughty as an expert witness, who testified that he had worked in law enforcement for 22 years. Through counsel's questioning, Mr. Doughty testified to how he reconstructed the scene of the shooting. Counsel asked Mr. Doughty for his general observations, and Mr. Doughty testified that he could try to draw a picture of the scene.

Defense counsel also called Marty Hayes as a defense expert. Mr. Hayes said that he had previously testified as an expert in ballistics, crime scene reconstruction, and blood stain pattern analysis. Mr. Hayes opined that the truck was veering away from Sergeant Adams when the shots were fired.

Mr. Ivie testified that he was in pain and heavily medicated at the time he was interviewed at the hospital, and that he was told he had been given morphine and

OxyContin. Mr. Ivie said that his speech was slurred during the interview and his eyes were closed. The detectives described Mr. Ivie as alert. Mr. Ivie also presented witness testimony that he had a dog in the truck at the time of the incident, and that the dog had been wounded in the shooting. Deputy Reed and Sergeant Adams testified that they did not see a dog.

In closing arguments, defense counsel implied that the prosecution was creating false evidence to support its theory of the case. In rebuttal, the prosecution argued multiple times that defense counsel was asking the jury to ignore eyewitness testimony.

In his personal restraint petition, Mr. Ivie argued that the prosecutor's closing arguments were improper and inflammatory, and that defense counsel was ineffective for failing to call an appropriately qualified crime scene or forensic expert to provide an alternative expert opinion that Sergeant Adams was not in the direct line of the vehicle when the shots were fired. Mr. Ivie also argued that counsel should have provided veterinary records and testimony supporting his testimony that his dog was in the truck, and that counsel was ineffective in failing to call the treating physician at the hospital to testify about Mr. Ivie's state of mind and medical condition when interviewed by detectives. Mr. Ivie included a declaration from the doctor that Mr. Ivie had been treated with morphine and was in severe pain. Mr. Ivie also argued that counsel incompetently failed to call the doctor to discuss his gunshot wounds, failed to prepare Mr. Ivie for his testimony, failed to properly object and cross-examine witnesses, failed to contact a lay witness who would have testified that police tried to fabricate evidence, failed to provide a proper closing argument, and failed to object to the State's closing rebuttal argument. The Court of Appeals agreed that the prosecutor's statements were improper and that counsel should have called the treating physician to provide evidence of Mr. Ivie's medication, but it held that Mr. Ivie failed demonstrate prejudice. As to the other claims, the court found no deficient performance by counsel.

In his motion for discretionary review, Mr. Ivie argues that the Court of Appeals applied an improper legal standard to the ineffective assistance of counsel claim by focusing on the sufficiency of the State's evidence rather than on whether there was a reasonable probability that the outcome of the trial would have been different but for counsel's deficient performance. But Mr. Ivie mischaracterizes the Court of Appeals decision. The court carefully explained the rules governing personal restraint petitions and accurately recited and discussed the standards governing ineffective assistance of counsel claims. In finding no prejudice, the court applied these principles and found that, under the circumstances, there was no prejudice. There is no indication that the court applied an improper standard of review, and thus there is no basis for this court's review under RAP 13.4(b).

Mr. Ivie also challenges the Court of Appeals holding that counsel was not deficient in failing to locate and call the lay witness about police fabrication of evidence. This argument was the subject of the reference hearing, and as the Court of Appeals explained, the superior court at the reference hearing found that defense counsel had been aware of the potential witness and had directed an investigator to locate and interview the witness. Given these findings, the Court of Appeals holding that counsel's investigation of the lay witness was not deficient does not conflict with ineffective assistance precedent. The court reasonably found that counsel made a strategic decision to not call a witness he was aware of and whom his investigator could not locate. This issue does not merit review under RAP 13.4(b).

In his supplemental memorandum, Mr. Ivie makes pro se arguments that in part support counsel's arguments but also seek to raise additional legal grounds for relief that were not presented in the personal restraint petition. To the extent Mr. Ivie's supplemental brief addresses the claims raised by counsel in the motion for discretionary review, I have considered these arguments. But as to the new claims, they

may not be raised for the first time in a motion for discretionary review. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188 n.5, 94 P.3d 952 (2004).

In sum, Mr. Ivie has not demonstrated a sufficient basis for review under RAP 13.4(b).

The motion for discretionary review is denied.



COMMISSIONER

August ¹⁷6, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

January 23, 2019

DIVISION II

In the Matter of the Personal Restraint of:

No. 49526-1-II

MARTIN STANLEY IVIE,

UNPUBLISHED OPINION

Petitioner.

BJORGEN, J. — Martin Stanley Ivie seeks relief from personal restraint imposed following his convictions of two counts of first degree assault, one count of third degree assault, and one count of attempting to elude a pursuing police vehicle.

Ivie argues that the prosecutor improperly impugned defense counsel's role and integrity during rebuttal closing argument. He argues also that defense counsel was ineffective because he failed to (1) consult with a qualified crime scene expert, (2) introduce veterinary records and testimony that would corroborate his testimony, (3) present testimony from his emergency room physician, Thomas J. Ferrer, M.D., to address his physical and mental condition at the time he provided a statement to police at the hospital, (4) present testimony from Dr. Ferrer as to the location of Ivie's gunshot wounds, (5) present testimony from Dr. Ferrer to rebut the impeachment of Ivie's direct testimony with his hospital statement, (6) introduce photographs of his gunshot wounds to challenge the State's version of the shooting, (7) prepare him to testify, (8) present an adequate closing argument including basic exculpatory facts, (9) object to testimony regarding the computer-based crime scene reconstruction, and (10) locate and interview lay witness Aaron Churchill to corroborate his story. Finally, Ivie argues that the cumulative effect of the claimed errors denied him a fair trial.

On the claim of prosecutorial misconduct, we hold that the challenged comments by the prosecutor were improper, but not flagrant and ill-intentioned or prejudicial. On the claims of ineffective assistance of counsel, we hold that the failure to contact Dr. Ferrer regarding Ivie's physical and mental condition when he provided his hospital statements was deficient, but not prejudicial. We assume that the failure to prepare Ivie for cross-examination was deficient, but hold it did not prejudice him.

We previously remanded the claim that defense counsel failed to locate and interview Churchill to the superior court for a reference hearing to determine necessary issues of fact. On the basis of the superior court's findings of fact on that reference hearing, we hold that defense counsel did not act deficiently with respect to Churchill. On all other claims of ineffective assistance, we hold that the challenged actions of defense counsel were not deficient. Finally, we hold that the cumulative effect of the errors claimed by Ivie did not deprive him of a fair trial.

For these reasons we deny Ivie's personal restraint petition (PRP).

FACTS

The facts underlying Ivie's conviction are set forth in our unpublished opinion from his direct appeal. *See State v. Ivie*, No. 44258-2, slip op at 187 Wn. App. 1008 (Wash. Ct. App. Apr. 21, 2015) (unpublished). We include here only the facts necessary to resolve the issues Ivie raises in this PRP.

I. IVIE'S ENCOUNTER WITH OFFICERS

On a dark, wet, and foggy night, Deputy William Reed was on surveillance at a site from which he suspected someone had been stealing wood. *Ivie*, slip op at 187 Wn. App. 1008, at *2. A pickup truck eventually arrived at the site, and Reed observed an individual exit the truck and

begin working with the wood. *Id.* at *2-3. Reed attempted to get a clearer view of the suspect as Sergeant Travis Adams arrived in his marked patrol car. *Id.* at *3. Reed recognized the suspect as Ivie and ordered him to get on the ground. *Id.* Ivie ignored Reed's orders, got in his truck and drove away in the direction of Adams. *Id.*

Reed pursued on foot as Ivie quickly turned his truck around and proceeded back the way he had come, accelerating toward Reed. *Id.* Reed pointed his flashlight toward Ivie's oncoming truck. *Id.* The road was narrow and provided only about two feet of space on either side of Ivie's truck. *Id.* Ivie did not stop as he approached Reed. *Id.* When the truck came within about five yards, Reed jumped out of the way to avoid it, and Ivie continued down the road. *Id.* Adams pursued Ivie in his patrol car with emergency lights flashing. *Id.*

Soon after, Ivie stopped his truck. *Id.* As Adams' patrol car slowed, Ivie put his truck into reverse and backed into the front of Adams' car. *Id.* Ivie then turned and proceeded up a steep side road. *Id.* Adams followed Ivie up the side road until he observed Ivie come to a landing. *Id.* Ivie stopped the truck on the landing, and Adams stopped about 20 feet behind him. *Id.*

Adams got out of his car with his assault rifle and began backing down the roadway to a point about 30 feet behind his car, coming to stand at the foot of an embankment. *Id.* at *4. Adams issued orders to Ivie, who remained in his truck. *Id.* Ignoring the orders, Ivie turned his truck around and accelerated directly at Adams. *Id.* Adams was afraid he may have been "squished or killed," so he moved out of the way sideways along the embankment. *Ivie*, at *5. As Adams moved sideways along the embankment, he fired four shots at Ivie's truck and, as Ivie

continued down the road, he fired four additional shots. *Id.* Ivie crashed into trees at the bottom of the embankment. *Id.*

Ivie sustained multiple gunshot wounds and was taken to a hospital emergency room for treatment. *Id.* Roughly 16 hours later, two detectives arrived at the hospital to read to Ivie his *Miranda*¹ rights and to interview him. *Id.* Ivie provided a recorded statement. *Id.*

II. PROCEDURAL HISTORY

The State charged Ivie with (1) two counts of first degree assault, based on the incidents in which he drove his truck toward Reed and, later, Adams, (2) two counts of second degree assault based on the same conduct, (3) one count of third degree assault, based on the incident in which he backed his truck up into Adams' patrol car, (4) one count of attempting to elude a pursuing police vehicle, and (5) one count of second degree theft, based on Ivie's activities at the felled maple tree on or about February 9. *Id.*² at *6. The jury returned guilty verdicts on all counts as charged. *Id.* The trial court entered convictions on all the verdicts, except those for the alternative second degree assault charges, which the court vacated. *Id.* Ivie appealed. *Id.* at *7. In his direct appeal, we reversed Ivie's conviction of second degree theft, but we affirmed all of his remaining convictions. *Id.* at *1-2.

Ivie subsequently filed the present PRP. We remanded the matter to superior court for a reference hearing to determine certain issues of fact relating to Ivie's claim that defense counsel failed to locate and interview Churchill, a potential witness. The superior court held the reference hearing and issued findings of fact on the referred issues.

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

III. ADDITIONAL FACTS

A. Defense Counsel's Closing Argument

Defense counsel, James P. Foley, made closing remarks, in pertinent part, as follows:

You know, there's a saying in the law, or an expression we use in the law that says a philosopher is a blind man at midnight in a cellar looking for a black cat that isn't there. He's distinguished from the theologian in that the theologian finds the cat. He is further distinguished from the prosecutor who smuggles the black cat into the cellar under his coat and emerges to try and produce it. That is what is going on here, ladies and gentlemen of the jury.

Martin Ivie was shot. And whether it was excessive or not is not your issue. Martin Ivie was shot. And now the State wants you to believe oh, he was shot because he was assaulting officers. Not stealing wood, he was assaulting officers. That is a black cat in a cellar at midnight that isn't there.

You go back and you read all of the jury instructions carefully, and you look at all the evidence, and you weigh all the testimony you've heard, and return verdicts of not guilty on all of the assault counts and the eluding.

Verbatim Report of Proceedings (VRP) at 773-74.

B. Prosecutor's Closing Rebuttal Argument

The State made closing rebuttal argument, in pertinent part, as follows:

Apparently *Mr. Foley* [defense counsel] *wants you to ignore the testimony* of, for instance, Fred Doughty and Martin Hayes – and I'll come right back to it in a moment and talk about it. He wants you to focus only, and solely, and entirely, on the testimony of Martin Ivie, the defendant in this very serious case.

VRP at 775 (emphasis added).

But *Mr. Foley wants you to forget* about everything else that you heard evidence of, and he wants to continue to talk about the shooting, but then rightfully tell you that that isn't what this case is about.

VRP at 775 (emphasis added).

Again, thank goodness for headlights. *Mr. Foley would have you believe that these rogue cops* dressed in black in the dark of night were just in the road and nobody could see them. As he's driving straight at Deputy Reed, right in the middle of the headlights with Deputy Reed's flashlight shining back at the car, Deputy Reed shouts into his radio, he's coming right at me; has to jump out of the way so

as not to get hit. And it's a second or two later that Sergeant Adams goes by and can see when he goes by, and Deputy Reed is not in the roadway in the headlights.

VRP at 780 (emphasis added).

Mr. Foley says that the angles of the shots that Sergeant Adams fired don't add up. Apparently he's really asking you to again ignore the testimony of all of the witnesses, including Mr. Hayes, who evaluated the vehicle, and evaluated all the measurements that the Thurston County Sheriff's Office produced.

VRP at 781 (emphasis added).

C. Testimony of Adams

A major point of contention in this matter involves Adams' testimony about his position in relation to Ivie when he fired the shots. In *Ivie*, we stated:

As Adams moved sideways along the embankment, he held his assault rifle up as high up as he could, attempting to get the barrel on the same level as Ivie, and fired four rounds. The truck straightened out and went off the embankment. As the truck passed him, Adams fired four additional rounds into the driver's side door area. The truck proceeded down the embankment, crossing the road behind Adams's car and crashing into trees and bushes at the bottom of the embankment on the other side of the road.

Ivie, slip op at 187 Wn. App. 1008, at *3.

However, Adams' exact position is somewhat ambiguous. Adams testified that he would have been hit "dead center" and "squished or killed" if he had not moved out of the way. VRP at 315. Adams said that as he was moving laterally out of the way of Ivie's truck along the embankment:

I took my rifle and held it up high, so that I could try to get it up to the driver's height. And I fired at the driver in the vehicle at that point to try and get him to stop – stop driving and run me over. . . . But I was down on the bank below the level of the vehicle and the truck was up above me. So I wanted to get my rifle up in the air as high as I could, hoping to get the rounds into the truck.

VRP at 316. Adams also testified:

At the time that I . . . fired the first four rounds . . . I was surprised that I didn't get hit. I was surprised that I was able to move across the bank fast enough to not get hit by the front of the truck. I didn't bother firing any rounds at that point because I would have hit nothing but grille.

VRP at 320. He further stated:

I was still very concerned that that truck was going to go sideways and come off the bank and hit me. With those first four rounds I was just trying to get the driver to stop that behavior so that I didn't get squished by the truck.

....

At that point the vehicle straightened – seemed to straighten out and it came off the bank right where I had been standing a second before. I turned at that point and shined my light again on the truck. And what I could see was the driver was down hanging on the steering wheel and had turned and was looking down the road, basically in the direction from which we had just come up.

VRP at 318. "My concern at that point was if this truck gets behind me and starts heading back down this road from where we came from . . . that there was going to be a collision . . . so I fired again at the vehicle." VRP at 319.

From the time Adams started to move laterally to the point where he fired the second volley of shots, Ivie's truck was continuously accelerating in a forward direction. Adams' testimony suggests that he fired four rounds at the driver's side of the truck as it was moving toward him and then an additional four rounds at the driver's side as it was moving past and away from him.

D. Testimony of Detective Cameron Simper

The State called Cameron Simper, a detective for the Thurston County Sheriff's Office, as an expert witness. Simper was assigned as the lead investigator in Ivie's case. The State introduced several computer-generated images of the crime scene through the testimony of Simper.

Simper testified that investigators used a program called “Total Station,” which is “computer software that generates an image . . . [a] two-dimensional, three-dimensional image to represent what was . . . located at the scene.” VRP at 221. He testified, “Due to the . . . total station we can map . . . the trajectory . . . of bullets.” *Id.* He testified investigators used the software to map “the progression of Ivie’s pickup truck based on the tire tracks that were located at the scene.” *Id.* at 223. He testified investigators “[a]lso used the total station equipment to mark the expended casings from Sergeant Adams’ patrol rifle, and also the resting point of Ivie’s vehicle, as well as other items of evidentiary value that were collected at the scene.” *Id.*

E. Testimony of Fred Doughty

Fred Doughty was the first expert witness that Foley called in Ivie’s defense. Doughty testified that he worked in “law enforcement for about 22 years” prior to his current position as a “private investigator.” VRP at 358. Doughty did not testify as to whether he was a forensics expert.

Foley asked Doughty if he could make some “general observations . . . about trajectories, and where bullets might have come from, and that sort of thing?” VRP at 375. Doughty responded, “Yes, sir.” *Id.* Foley then stated,

Okay. And if you could, we’re going to test out your artistic skills. Having seen this – been to the scene, could you draw us a picture of where the – on the landing the travel trailer was, and the police car, and the path of Mr. Ivie’s car based on all of your observations and expertise?

Id. To which, Doughty responded, “I can try.” *Id.* Doughty then drew a picture of the incident, including trajectories and vehicle orientation, in response to Foley’s questions.

Ivie claimed that his dog was with him at the time of the incident. Doughty testified that he had reviewed the veterinary records, which confirmed that Ivie’s dog had sustained a gunshot

No. 49526-1-II

wound. Reed and Adams testified that they did not see or hear a dog during the events of that night. However, Adams testified also that “as I was moving down [towards Ivie’s truck that crashed], it sounded like something scurried off into the brush, or moved into the brush line.”

VRP at 351. He did not “know what it was.” *Id.*

F. Testimony of Marty Hayes

Marty Hayes was the second expert witness Foley called in Ivie’s defense. Foley questioned Hayes about his qualifications as follows:

[Foley]: And in your several dozen times testifying in court you’ve been qualified as an expert in, like I said before, the use of force, yes?

[Hayes]: Yes.

[Foley]: Ballistics?

[Hayes]: Yes.

[Foley]: Crime scene reconstruction?

[Hayes]: Yes.

[Foley]: Blood stain pattern analysis?

[Hayes]: Yes.

VRP at 458.

Hayes provided his expert opinion as to the path of Ivie’s vehicle, in part, as follows:

That opinion would be that he was – the vehicle itself was veering away from Sergeant Adams’ vehicle, and of course where Sergeant Adams said he was. And I base that on the – the picture that I saw, the trajectory of the rounds, the – the tracks in the grass and in the – the mud that were – were provided to me, and frankly Sergeant Adams[’] own statement that he gave to investigating officers where he said that it wasn’t coming at him any longer when he fired the shots.

VRP at 461-62.

G. Testimony of Barbara Marx

Barbara Marx and Ivie lived together. Marx testified that she was with Ivie prior to the incident. She further testified that Ivie had his dog with him when he left that night. Marx claims that, on the day following the incident, she found Ivie's dog who was "bloody, and . . . [his] neck was all swollen." VRP at 485. Marx testified she took the dog to the veterinarian. Marx opined that Ivie's dog had been shot.

H. Testimony of Ivie

Ivie testified as to the location of his gunshot wounds as follows: "I was hit – grazed here, on top of my head, and two in my back." VRP at 592.

Ivie argues that he was in pain and heavily medicated at the time he was interviewed by detectives at the hospital. He testified that "I was told that I was on morphine and also OxyContin." VRP at 552. Ivie's eyes were closed throughout the interview and his speech was somewhat slurred during the first portion of it. *Ivie*, slip op at 187 Wn. App. 1008, at *3. The detectives, however, described Ivie as alert. *Id.* Ivie also testified that he had his dog with him at the time of the incident.

ANALYSIS

I. PRP LEGAL PRINCIPLES

To be entitled to collateral relief through a PRP, the petitioner must first prove error by a preponderance of the evidence. *In re Pers. Restraint of Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Second, if the petitioner is able to show error, he or she then must also prove prejudice, the degree of which depends on the type of error shown. *Id.* at 421.

If a constitutional error, the petitioner must demonstrate it resulted in actual and substantial prejudice to him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). “Actual and substantial prejudice, which ‘must be determined in light of the totality of circumstances,’ exists if the error ‘so infected petitioner’s entire trial that the resulting conviction violates due process.’” *Crow*, 187 Wn. App. at 421 (quoting *In re Pers. Restraint of Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)). If a nonconstitutional error, the petitioner must meet a stricter standard and demonstrate the error resulted in a fundamental defect, which inherently resulted in a complete miscarriage of justice. *In re Pers. Restraint of Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015); *Woods*, 154 Wn.2d at 409. If the petitioner fails to make a prima facie showing of either actual and substantial prejudice or a fundamental defect, we deny the PRP. *Schreiber*, 189 Wn. App. at 113.

The PRP must be supported with facts or evidence and may not merely rely on conclusory allegations. *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010). If allegations are based on evidence external to the existing record, the petitioner must show that he has competent, admissible evidence to establish the facts that entitle him to relief.

Id.

“If the petitioner’s evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits . . . must contain matters to which the affiants may competently testify.”

Id. at 488-89 (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)).

“The petitioner must show that the ‘factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.’” *Id.* at 489 (quoting *Rice*, 118 Wn.2d at 886).