MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

R. Brian Woodward
Appellate Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Caroline G. Templeton
Supervising Deputy Attorney General

Alexandria N. Sons
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

David Christian Cotto,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 17, 2024

Court of Appeals Case No. 23A-CR-252

Appeal from the Lake Superior Court

The Honorable Natalie Bokota, Judge

Trial Court Cause No. 45G02-2109-MR-39

Memorandum Decision by Judge Bradford
Judges Vaidik and Brown concur.

Bradford, Judge.

Case Summary

[1] In September of 2021, the State charged David Christian Cotto with the murder of Andrew Lukacek after Lukacek had been shot and killed outside of a bar in Gary. The State also alleged that Cotto was a habitual offender and charged his girlfriend, Felicia Nelson, with assisting a criminal, *i.e.*, Cotto. At the State's request, and over Cotto's and Nelson's objections, the cases were joined for trial. Following trial, a jury found both Cotto and Nelson guilty as charged, Cotto admitted to being a habitual offender, and the trial court sentenced Cotto to an aggregate, seventy-five-year term of incarceration. On appeal, Cotto contends that the trial court abused its discretion in (1) joining his trial with Nelson's and (2) admitting certain evidence. We affirm.

Facts and Procedural History

[2] We have previously affirmed Nelson's conviction and our decision in that case relates the relevant facts as follows:

> Nelson met [Cotto], also known as "Bapo," on April 19, 2021, and the two quickly entered into a romantic relationship. Tr. v. IV at 63. Nelson lived in a home in Gary with her three children. [Lukacek] lived in a home across the street from Nelson and her children. Cotto did not like Lukacek and told one of Nelson's sons that Cotto would "shoot up" Lukacek's house if he ever saw Nelson's car parked there. Tr. v. VII at 14.

On the evening of September 10, 2021, Nelson and Cotto went to a football game with Nelson's two sons while Nelson's daughter remained at the home of Nelson's parents. After the game, Cotto, Nelson, and her sons went to Cotto's house in Gary to eat dinner. Nelson then left Cotto's house to meet some friends for drinks. Nelson and her friends drove to Tavern at the Oaks, a bar close to Nelson's home. Nelson and her friends drank alcohol in the bar parking lot as they waited for Lukacek to arrive and sell them cocaine.

At approximately 11:30 p.m., Cotto drove himself and Nelson's sons to Nelson's home. When Cotto discovered that Nelson was not at her home, he was "mad" and asked Nelson's sons if they knew where Nelson was. Tr. v. VI at 174.

Nelson's sons stated that Nelson was probably at the Tavern at the Oaks. Cotto drove himself and Nelson's two sons to the bar and pulled up behind Nelson's vehicle that was parked in the bar parking lot. Nelson was sitting in the driver's seat of her car, and Cotto walked up to her to speak with her while the children waited in Cotto's vehicle. Cotto then returned to his vehicle and began to drive away from the parking lot. However, at that point Lukacek arrived in the parking lot and approached Nelson's vehicle. Cotto saw Lukacek, stopped his car and exited it, walked up to Lukacek, and shot Lukacek with a gun owned by Nelson. Cotto then drove away, took Nelson's sons back to Nelson's home, and drove away from that home.

Nelson remained in the parking lot and attempted to administer cardiopulmonary resuscitation (CPR) to Lukacek. Meanwhile, Nelson's two sons walked back to the Tavern at the Oaks to try to find Nelson. When they arrived, they observed Lukacek on the parking lot ground with a sheet over his body. The children then saw Nelson, who was crying, and they hugged her. Nelson's mother, Veronica Sanchez, then arrived at the scene and found Nelson and her sons. Although an officer told Sanchez not to leave, she drove away with Nelson and her sons.

As Sanchez was driving, Nelson was on her cell phone. Sanchez believed Nelson was speaking with Cotto. Nelson said, "I want to be where you're at." Tr. v. V at 166. Nelson gave Sanchez directions on where to drive, until they arrived at a location where Cotto was waiting. Nelson and her sons exited Sanchez's vehicle, and Sanchez drove away.

Cotto, Nelson, and Nelson's sons then went to a hotel. One of Nelson's sons overheard a conversation between Cotto and Nelson in which "[t]hey wanted to say that a black person did it." Tr. v. VI at 188. Nelson told her sons to "lie about the shooting" and "not to tell anyone." *Id.* at 237. Cotto left the hotel after the first night. Approximately four days later, Nelson drove with her two sons and her daughter to Nelson's sister's house in Georgia, where Nelson left the children. Nelson then drove to Florida to meet up with Cotto. Approximately two days later, Cotto and Nelson arrived in Georgia to pick up Nelson's children, and they all drove back to Indiana. On the way to Indiana, they stopped in Tennessee, where Cotto and Nelson became engaged to marry.

At some time in or around September 2021, Nelson drove Cotto's vehicle to the home of her former aunt by marriage, Carolyn Bernal, and parked the car in front of Bernal's house. Nelson told Bernal that Bernal's grandson, who lived with Bernal, was buying the vehicle. Bernal stated that she did not want Nelson to leave the vehicle in front of Bernal's home, but Nelson did so anyway. When the police subsequently executed a subpoena to retrieve the vehicle from Bernal's property, they informed Bernal that the vehicle had been "involved in a homicide." Tr. v. VII at 96.

On September 24, 2021, law enforcement officers executed an arrest warrant for Nelson and Cotto at Nelson's home. Nelson answered the front door and came out of the house as instructed by the officers. As Officer John Artibey passed by Nelson on his

> way into her home, he asked her "several times" if there was anyone else in the house, and Nelson said "no one." Tr. v. VIII at 37. The officers announced their presence at the front door but heard nothing from inside the home. The officers then entered the home and made "numerous announcements" of their presence, but initially found no one there. *Id.* at 38. Officer Artibey noticed a chair underneath an attic access point in a back bedroom of the home. Officer Artibey then announced that he had a K-9 police dog and stated "come on out[, i]f I send the dog, you'll be bit." *Id.* The officers then heard movement from above, and "a foot came through the bathroom ceiling." *Id.* at 39. Cotto then came down from the attic and was taken into custody. Both Cotto and Nelson were arrested.

Nelson v. State, 2023 WL 7273706 at *1–2 (Ind. Ct. App. Nov. 3, 2023) (final set of brackets in the original).

[3] On September 25, 2021, the State charged Cotto with murder, a felony. The State also filed a firearm enhancement, alleging that Cotto had used a firearm in the commission of the crime, and alleged that Cotto was a habitual offender. Nelson was charged with Level 5 felony assisting a criminal, *i.e.*, Cotto. On May 17, 2022, the State moved to join Cotto's and Nelson's cases for trial. The trial court granted the State's motion over Cotto's and Nelson's objections.

[4] Following trial, the jury found Cotto guilty. Cotto then admitted to being a habitual offender and the State agreed to dismiss the firearm enhancement. On January 6, 2023, the trial court sentenced Cotto to an aggregate, seventy-five-year term of incarceration.

Discussion and Decision

I. Joinder

[5] Cotto first contends that the trial court abused its discretion in joining his case with Nelson's case for trial. Indiana Code section 35-34-1-9(b)(3) provides that two or more defendants can be joined together for trial when it is alleged that the charged offenses "(A) were part of a common scheme or plan; or (B) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one (1) charge from proof of the others." "Absent any statutory provision for consolidated trials of separately-charged defendants, it is within the trial court's discretion to determine whether defendants' trials should be joined." *Peck v. State*, 563 N.E.2d 554, 557 (Ind. 1990). "To show an abuse of discretion, an appellant must show that in light of what occurred at trial, the denial of a separate trial subjected him to actual prejudice." *Id.*

[6] Cotto has failed to prove that the trial court's decision to join his and Nelson's cases together for trial subjected him to actual prejudice. In claiming that the trial court abused its discretion in granting the State's motion to join his and Nelson's cases for trial, Cotto argues as follows:

> [T]he State introduced evidence that [Nelson] had bought a firearm on August 31, 2021. However, the relevance of this evidence was cast into doubt because it was never determined what weapon was used to shoot the victim. Further, there was no evidence that anyone had ever seen Cotto in possession of the firearm which [Nelson] bought, other than the minor children. There was no evidence of the firearm ever having been recovered or that Cotto or anyone else disposed of it. Because of the

> introduction of evidence about [Nelson's] purchase of a firearm, which was not definitely tied to the shooting, the trial should have been severed to promote a fair determination of the guilt or innocence of Cotto.

Appellant's Br. pp. 15–16.

[7] Contrary to Cotto's argument, however, there was evidence linking the firearm purchased by Nelson to both Cotto and the shooting. Both of Nelson's sons testified at trial that, prior to the night of the murder, they had seen Cotto with the firearm that had been recently purchased by Nelson. In addition, G.N., one of Nelson's sons, testified that the firearm Cotto had used in the shooting was the Ruger handgun that had recently been purchased by Nelson. G.N. further testified that the Ruger was "the only gun" that he had seen Cotto and Nelson with, stating "[t]hat's the only gun they had." Tr. Vol. VI p. 218. Nelson's sons' testimony is sufficient to connect both Cotto to the firearm and the firearm to Lukacek's murder.

[8] In addition, evidence that Cotto had had access to the murder weapon was relevant and would have been admissible at Cotto's trial even if he and Nelson had had separate trials. *See Pickens v. State*, 764 N.E.2d 295, 299 (Ind. Ct. App. 2002) (providing that evidence that a defendant had access to a weapon of the type used in the crime was relevant, admissible evidence), *trans. denied*. Moreover, even if evidence relating to when the firearm had been acquired would not have been relevant, its admission was harmless given that both of Nelson's sons and another eyewitness testified definitively that Cotto had shot

Lukacek.[1] Cotto has failed to establish that he was prejudiced by the trial court's decision to join his and Nelson's cases for trial. *See Peck*, 563 N.E.2d at 557.

II. Admission of Evidence

[9] Cotto next contends that the trial court abused its discretion in admitting certain evidence during trial. Specifically, Cotto argues that the trial court abused its discretion in admitting certain (1) evidence recovered during a search of Nelson's home and (2) alleged hearsay.

> Generally, a trial court's ruling on the admission of evidence is accorded a great deal of deference on appeal. Because the trial court is best able to weigh the evidence and assess witness credibility, we review its rulings on admissibility for abuse of discretion and only reverse if a ruling is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights.

Hall v. State, 36 N.E.3d 459, 466 (Ind. 2015) (internal quotations omitted).

A. Evidence Recovered During a Search of Nelson's Home

[10] Cotto asserts that the trial court abused its discretion in admitting certain evidence that had been recovered during a search of Nelson's home. Nelson's

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[1] We agree with the State that Cotto's apparent attempt to paint Nelson's sons as being unreliable witnesses merely because they were minors is unavailing. Cotto does not present any specific argument as to why Nelson's sons should have been found to be unreliable witnesses, pointing only to their young age. However, despite their young age, both of Nelson's sons were eyewitnesses to the murder. Each testified clearly and consistently regarding the incident, identifying Cotto as the shooter and the firearm that had been purchased by their mother as the murder weapon, and was subject to cross-examination.

mother testified that Nelson lived in her "family home" where other members of her family received mail. Tr. Vol. V p. 167. On one occasion when Nelson's brother had stopped by Nelson's home to check the mail, he had observed an envelope with a "name on the envelope [that] did not belong to anyone who" lived in or received mail at the residence. Tr. Vol. V p. 169. After Nelson's brother had opened the envelope and read the contents of the letter inside, he gave the letter to Nelson's mother who had turned it over to law enforcement. Based on the contents of the letter, law enforcement had subsequently obtained a warrant to search Nelson's residence, during which search they had recovered, *inter alia*, letters in which Cotto had reiterated to Nelson that her sons should not appear for scheduled depositions and/or court proceedings. The letters were relevant as they tended to show that Cotto had a consciousness of guilt. *See Washington v. State*, 273 Ind. 156, 160, 402 N.E.2d 1244, 1248 (1980) ("Any testimony tending to show an attempt to conceal or suppress implicating evidence is relevant as revealing consciousness of guilt.").

[11] Cotto claims that the letters should have been excluded from evidence because the warrant issued in connection with the search of Nelson's home was defective. Cotto argues that the search warrant was defective because it had been issued after the State came into possession of a letter that had been illegally retrieved from the home's mailbox by Nelson's brother. The United States Supreme Court has recognized that "[l]etters and other sealed packages are in the general class of effects in which the public has a legitimate expectation of privacy; warrantless searches of such effects are presumptively

unreasonable" under the Fourth Amendment. *U.S. v. Jacobsen*, 466 U.S. 109, 114 (1984). Cotto argues that the evidence recovered from the search of Nelson's home should have been excluded because the search warrant had been based on the contents of the letter and that Nelson's brother had violated his expectation of privacy by opening a letter that had not been addressed to him.

[12] For its part, the State asserts that the act of opening the letter by Nelson's brother could not constitute a violation of the constitutional right to privacy because, as the *Jacobsen* Court further recognized, protection from a warrantless search applies only to "governmental action" and not to action taken by a private citizen. *Id.* at 113. Alternatively, the State asserts that even if the letter recovered by Nelson's brother had been opened in violation of Cotto's right to privacy, the evidence was admissible because law enforcement had relied on it in good faith. *See Jackson v. State*, 908 N.E.2d 1140, 1143 (Ind. 2009) ("[T]he exclusionary rule does not require the suppression of evidence obtained in reliance on a defective search warrant if the police relied on the warrant in objective good faith.").

[13] As the State asserts, the United States Supreme Court has "consistently construed" Fourth Amendment protection "as proscribing only governmental action." *Jacobsen*, 466 U.S. at 113. "[I]t is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Id.* (internal quotation omitted). The Indiana Supreme Court has recognized this holding and has reached the same conclusion with

regard to the Indiana Constitution. *See Gunter v. State*, 257 Ind. 524, 527, 275 N.E.2d 810, 812 (1971) (noting that the U.S. Supreme Court has consistently held that the Fourth Amendment does not apply to searches conducted by private individuals and providing that even if the search would not have been valid if conducted by a police officer, the evidence recovered during the search was admissible under the Indiana Constitution when the search was conducted by a private citizen who was acting without the supervision or knowledge of the police). It is undisputed that Nelson's brother is a private citizen and was not acting on behalf of the police when he opened and read the letter. Pursuant to Jacobsen, Nelson's brother's actions in this regard did not implicate the Fourth Amendment protections.

[14] In addition, even if we were to assume that the search had been unlawful, the admission of the evidence recovered from the home was, at most, harmless because Cotto's conviction was supported by ample independent evidence of his guilt. "If we are satisfied the conviction is supported by independent evidence of guilt such that there is little likelihood the challenged evidence contributed to the verdict, the error is harmless." *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014).

[15] While the challenged evidence tended to show a consciousness of guilt, it was merely cumulative of eye-witness testimony identifying Cotto as the individual who had shot Lukacek. "The testimony of a single eyewitness to a crime is sufficient to sustain a murder conviction." *Green v. State*, 756 N.E.2d 496, 497 (Ind. 2001). In this case, there was not one eyewitness who identified Cotto as

the shooter, there were three. Again, both of Nelson's sons identified Cotto as the shooter. Another eyewitness, Sabrina McLean, also identified Cotto as the shooter. We agree with the State that it is very unlikely that the jury relied on the inferences of guilt contained in the challenged evidence in light of the testimony from three different eyewitnesses identifying Cotto as the shooter. We therefore conclude that the trial court did not abuse its discretion in admitting the challenged letters.

B. Alleged Hearsay

[16] Coto also asserts that the trial court abused its discretion in admitting certain course-of-the-investigation testimony from Lake County Detective William Poe, who had led the investigation into Lukacek's death, claiming that the testimony amounted to inadmissible hearsay. Hearsay is an out-of-court statement offered for "the truth of the matter asserted," Ind. Evidence Rule 801(c)(2), and it is generally not admissible as evidence. Ind. Evidence Rule 802. The question of whether a statement is hearsay "will most often hinge on the purpose for which it is offered." *Blount*, 22 N.E.3d at 565 (internal quotation omitted).

[17] "Out-of-court statements made to law enforcement are non-hearsay if introduced primarily to explain why the investigation proceeded as it did." *Id.* "Although course-of-investigation testimony may help prosecutors give the jury some context, it is often of little consequence to the ultimate determination of guilt or innocence." *Id.* "Thus, course-of-investigation testimony is excluded from hearsay only for a limited purpose: to bridge gaps in the trial testimony

that would otherwise substantially confuse or mislead the jury." *Id.* (internal quotation omitted).

[18] Cotto challenges the following exchange, arguing that Detective Poe's answers include impermissible hearsay:

> [The State]: So … you knew who the victim was, at this point in time, was your investigation, I guess, being led toward any particular individual that might be a suspect?
>
> [Det. Poe]: Yes.
>
> [The State]: What type of information was there that pointed you in that type of direction?
>
> [Defense]: Objection, calls for hearsay response, your Honor.
>
> [The Court]: Response?
>
> [The State]: Your Honor, it's the sense of impression on the listener. It goes to the direction of his investigation as it was in its infancy at this point in time.
>
> The Detective has testified that he was gathering information from many sources at this point in time and taking into consideration all of that information.
>
> [The Court]: Well, the objection is overruled as the question asks for a type of information you were being given and you can answer that.
>
> [Det. Poe]: We received a nickname of Bapo and possible baby daddy of Felicia was who the suspect was.

Tr. Vol. IV pp. 50–51. Cotto argues that the trial court abused its discretion in admitting this course-of-the-investigation evidence because it did not identify the declarant and it implicated Cotto and Nelson as potential suspects. Cotto further argues that he was prejudiced by the admission of this evidence as he was unable to cross-examine the unknown declarant. We disagree.

[19] As with the challenged evidence discussed above, we need not determine whether the trial court abused its discretion in admitting the challenged testimony because even if Detective Poe's testimony regarding the course of his investigation should not have been admitted, such evidence was harmless given the substantial, independent evidence of Cotto's guilt. Again, three separate eyewitnesses identified Cotto as the shooter. Given the substantial independent evidence of Cotto's guilt, we believe that it is very unlikely that the jury relied on Detective Poe's testimony regarding the course of his initial investigation. As such, any error the trial court might have made in admitting Detective's Poe's testimony can only be considered harmless. *See Blount*, 22 N.E.3d at 564 ("If we are satisfied the conviction is supported by independent evidence of guilt such that there is little likelihood the challenged evidence contributed to the verdict, the error is harmless.").

[20] The judgment of the trial court is affirmed.

Vaidik, J., and Brown, J., concur.