SUPREME COURT NO. 100981-0

NO. 81723-0-I

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JEROME TA'AFULISIA,

Petitioner.

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

The Honorable Sean O'Donnell, Judge

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER/DECISION BELOW

Jerome Ta'afulisia, appellant below, asks this Court to grant review, pursuant to RAP 13.4, of the decision, published in part, of the Court of Appeals in State v. Ta'afulisia, no. 81723-0-I, entered on May 9, 2022. A copy of the opinion is attached as an appendix.

## B. ISSUES PRESENTED FOR REVIEW

1. Statements are testimonial and subject to the Confrontation Clause when they are procured with the primary purpose of creating an out-of-court substitute for trial testimony. This primary purpose test encompasses the purposes of both parties to the conversation. Jerome's brothers spoke to a family member, who surreptitiously recorded the conversation (known as the encampment video) for the police. Did the admission of his brothers' statements violate Jerome's Sixth Amendment right to confront witnesses?

2. Under the privacy act, an intercept order for a one-party consent recording requires a showing of probable cause

that the target has committed a felony. Did the court err in admitting the encampment video when probable cause rested solely on the word of a criminal informant and police did not corroborate anything but innocuous information?

3. Under the privacy act, an intercept order also requires a specific showing that normal investigative procedures are likely to be either unsuccessful or too dangerous. Did the court err in admitting the encampment video when the application for the order relied on generalities, police sought the order after only one day of investigation, and police omitted material information?

4. Under ER 404(b), evidence of other misconduct may be admitted only if the court finds, on the record that its relevance to an element of the charged crime outweighs the danger of unfair prejudice. Did the court err in admitting evidence the brothers may have possessed other weapons unrelated to the charged crime without weighing the probative value against the danger of prejudice on the record?

5. Was appellant's constitutional right to effective assistance of counsel violated when his attorney failed to object to expert ballistics matching testimony that exceeded the limits of generally accepted science and violated the court's ruling in limine?

## C. STATEMENT OF THE CASE

### 1. The Taafulisia brothers grew up neglected and abused amidst drug use and criminality.

Jerome Taafulisia and his two brothers were raised in the streets, motels, and homeless encampments of King County. CP 244, 384-85. From a very young age, they were neglected, abused and exposed to substance abuse, untreated mental illness, and violence. CP 224-25, 384-85. Their father was in jail. CP 275. Their mother had, on multiple occasions, kicked them out and left the boys to fend for themselves. CP 245. In these dangerous circumstances, survival depended on projecting an image of strength and toughness. 2RP 1723-24, 1725-26.

On January 26, 2016, Jerome was 16 years old. CP 223. His brother James was 17. CP 223. Their younger brother

J.K.T. was just 13. CP 223. Their uncle was Pule Leatigaga, a homeless drug dealer known as Juice. Ex. 225 at 1-3, 17, 50. Another uncle was Faoi Tautolo, a homeless drug dealer known as Lucky. 2RP 1555-58. Lucky and the boys were very close and saw each other two or three times per week. 2RP 1561.

In late 2015, Lucky was involved in a tense incident between the Samoan community and Phat Nguyen, a Vietnamese drug dealer. 2RP 1738. Nguyen lived in a homeless encampment under Interstate 5 just off Airport Way South known as the Jungle, specifically, a part of the Jungle known as "the Caves." 2RP 518, 528. Lucky learned that one of Nguyen's dealers was trying to take over Samoan drug dealing territory and had threatened one of their elders with a gun. 2RP 1738. Lucky and Reno armed themselves with guns and went to confront Nguyen. 2RP 1740-50. Lucky described it as a miscommunication which was then resolved. 2RP 1620, 1751-52. He denied having a gun that night, but agreed he usually took his gun everywhere. 2RP 1742, 1747-48. He agreed his

group was armed and would have shot back if fired upon. 2RP 1740-41, 1747-48.

### 2. On January 26, 2016, there was a shooting at the Seattle homeless encampment known as the Jungle.

At about 7 p.m. on January 26, 2016, several persons came up to Nguyen behind his tent at the caves and asked about buying heroin. 2RP 528. Nguyen told them to go around to the front of the tent. 2RP 528-29. In front of the tent, James Tran, Amy Jo Shinault, and Ken Duke sat near a campfire. 2RP 532-34. Nguyen's girlfriend Tracy Bauer and a friend, Janine Zapata or Brooks were inside a nearby tent. 2RP 478; 535. Andrea Broussard and Jeffrey Patterson were also inside nearby tents. Ex. 60 at 71-75; Ex. 195 at 41.

One of the new arrivals suddenly pulled out a gun and shot Tran and then Nguyen. 2RP 546-52. When Bauer ran out of the tent, she was shot as well. 2RP 553-55. A different person then shot Shinault. 2RP 564. After the group left, Nguyen saw that Zapata had also been shot. 2RP 574-75.

Tran and Zapata died from their injuries. 2RP 780-81, 791-93. Bauer, Nguyen, and Shinault went directly into surgery and remained hospitalized for substantial lengths of time. 2RP 813, 820, 834, 841.

### 3. Tracy Bauer identified Juice as the man who shot her.

While still at the scene, Bauer said the shooter was a man named "Juice." Ex. 194 at 79; Ex. 195 at 55, 58. Police were quickly able to identify Juice as the street name of Pule Leatigaga, a homeless drug dealer. 2RP 1175-76. On January 28, two days after the shooting, Detective James Cooper talked to Bauer in the hospital. 2RP 1233, 1238-39. She again said that Juice shot her and described him as a Samoan male with braids. 2RP 1240-42.

Cooper waited four days to show Bauer a photo montage. 2RP 1366-68. He did not show her a photo of Juice because, by that time, he had decided Juice was no longer a suspect. 2RP 1961. Bauer did not identify any of the Ta'afulisia brothers. 2RP 1950-52. At trial, shje again testified she was shot by a

man she knew as Juice, who sometimes wore his hair in braids. Ex. 195 at 49, 54-55.

On January 28, Cooper also visited Nguyen. 2RP 1233-36. Nguyen told Cooper he had seen the shooter and would be able to identify him. 2RP 1237. Nevertheless, Cooper also waited four days to show a photo montage to Nguyen. 2RP 1956-57. Nguyen identified Jerome's brother James. 2RP 1956-57. He did not recognize Jerome. 2RP 1956-57.

At trial, Nguyen described the shooters as five people, young, with masks over their faces, possibly Samoan with curly hair. 2RP 523-24, 527-28. He testified that, based on the noise, he and Tran were shot with a .45 caliber weapon, while the Shinault and Bauer were hit with something smaller such as a .22 caliber. 2RP 558-59, 565.

Shinault was also shown montages but did not identify anyone. 2RP 2057-60, 2067-68.

Cooper waited approximately a year after the shootings before contacting Juice. 2RP 1996-97. Juice denied

involvement. Ex. 225 at 32. However, he revealed that, about a week before the shootings, Nate, another local drug dealer, suggested a plan to take over Nguyen's drug dealing operation in the Caves. Ex. 225 at 23-25. He suggested the plan in the presence of Juice, another man, and the Ta'afulisia brothers. Ex. 225 at 24-25. The brothers showed no reaction, and Juice claimed he did not consider it a serious plan. Ex. 225 at 26.

**4. The boys' uncle Lucky implicated them in hopes of obtaining leniency for his own crimes.**

Thanks to Bauer's identification of Juice after the shooting, Seattle police were immediately alerted to look out for a Samoan suspect. 2RP 985. Detective James Huber called his contact, Lucky, who agreed to see what he could find out. 3RP 509-10, 512-13.

Lucky had contacted Huber about a month earlier seeking to exchange information for help with numerous pending charges. 3RP 498, 504-05. A new conviction for Lucky would mean a hefty prison sentence as well as extension of the sex offender registration requirement that prevented him from

living with his family. 2RP 1585-87. Thus far, Lucky had been unable to provide anything Huber deemed useful, but Lucky stayed in frequent contact, trying to come up with something. 3RP 498, 504-05, 510. Huber described Lucky as unusually persistent. 2RP 976-77.

Later that evening, Lucky called Huber back and told him word on the street was that the Vietnamese were responsible for the Jungle shooting. 2RP 631. The next day, Lucky called back with a new story. 2RP 638, 657.

According to Lucky, he had gotten a call from James Ta'afulisia. 2RP 1572-73. James told Lucky he was looking for Juice, Lucky's brother-in-law and close friend, because the police were looking for Juice as a shooting suspect. 2RP 1572-74. James said that he, James, was responsible for the shooting, so Juice should turn himself in. 2RP 1574.

Later that day, Lucky arrived at the police station along with his brother-in-law, known as Reno, for an interview with Cooper. 2RP 635, 639, 1221. Before coming to the station,

Lucky and Reno had called James back, this time secretly recording the call, and had James again confessed to being the shooter. 1RP 205. Knowing this recording was inadmissible under the privacy act, Cooper obtained a court order authorizing a one-party consent recording. 1RP 208, 211; Pre-trial Ex. 9. Lucky and Reno agreed to try to talk to James about the shooting again, this time wearing a secret recording device. 2RP 1227, 1583-84. The resulting recording is known as the encampment video, admitted as exhibit 203. 2RP 1596-97.

At trial, Lucky testified to his interpretation of the encampment video and denied acting to protect Juice. 2RP 1616-59, 1808. In the video, Lucky asks James if he shot Nguyen, and James answers, "yeah." 2RP 1621. James says he went to the Jungle that day with five other people, including his brothers. 2RP 1621, 1625. James says he might as well just "smoke" all of them. 2RP 1648. James implicates his brother, saying, "Jerome shot him [Nguyen] two times in the neck." Ex. 203, 204. James admits to firing the .45. Ex. 203, 204.

During the video, Lucky never uses Jerome's name. 2RP 1862. In helping interpret the video for the jury, Lucky attributed only a few statements to Jerome. According to Lucky, Jerome mentioned a lady screaming. 2RP 1627. Lucky claimed it was Jerome who said, "all I know is I had a full clip" and admitted having the .22. 2RP 1649, 1881-82; Exs. 203, 204. Jerome also mentioned it was loud at the Caves because of the generator. 2RP 1650; Exs. 203, 204.

Over the course of the video, Lucky and Reno buy from James a .45 caliber handgun that Lucky reported James claimed to have had during the shooting. 2RP 1639-42, 1881-83. The video also shows a broken, antique firearm and a taser in the boys' possession. Exs. 203, 204.

Two days after the encampment video, Seattle police arrested Jerome and his brothers. 2RP 2228-29. In the tent where J.K.T. was found, police also found a .22 caliber Ruger handgun, a taser, a .25 caliber Erma Werke handgun, and a ski mask. 2RP 2294-95, 2301-04, 2306-07.

### 5. The boys were tried three times for the Jungle shooting.

The King County prosecutor charged Jerome and James with two counts of first-degree murder and three counts of first-degree assault, while armed with a firearm. CP 1-3.

Pre-trial, the brothers argued the encampment video was inadmissible in violation of Washington's privacy act. CP 461. The court admitted the video under the statutory exception allowing police to record with one party's consent and a court order. CP 14-17.

The boys also moved to sever their cases for trial or exclude each other's statements on the encampment video under the Confrontation Clause. 1RP 837-38; 4RP 15-33. The court ruled the Confrontation Clause did not apply because the boys' statements on the encampment video were not testimonial and denied the motion to sever. 1RP 837-40,

The defense also moved to exclude evidence of the antique firearm and taser under ER 404(b). CP 30-33. The court denied the motion, finding the weapons relevant to linking

James and Jerome to the tent where J.K.T. was found. CP 63-64.

Jerome also moved to restrict the ballistics testimony by the crime lab's forensic scientist. 1RP 733. Arguing that the science does not support an ability to match bullets or casings to a specific firearm with certainty, he argued the forensic scientist should not be permitted to testify using the terms "match" or "certainty." 1RP 733; CP 37-38. He argued she should be restricted to saying that the toolmarks on the bullets, casings, and firearms were consistent with having been fired from a specific firearm. CP 37-38. The court granted this motion. 1RP 736; CP 64.

Despite the pre-trial ruling, counsel did not object when the forensic scientist testified that the four shell casings found at the scene of the shooting were fired in the Colt .45. 2RP 2423. The witness testified she could "conclusively determine" the bullet pulled from Tran's body was fired by the .45 Colt.

2RP 2424. She identified three other casings from the scene as having been fired in the .22 Ruger found in the tent. 2RP 2423.

The first two juries were unable to reach a unanimous verdict, and mistrials were declared. CP 140-41, 462. At the third trial, the brothers were found guilty. CP 171-180. In recognition of the boys' youth and upbringing, the court imposed an exceptional sentence below the standard range of 480 months. CP 426-28. Notice of appeal was timely filed. CP 437. Jerome now seeks this Court's review.

## D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

### 1. Admission of the encampment video violated Jerome's Sixth Amendment right to confront witnesses.

The Confrontation Clause is concerned with testimonial statements that are "procured with a primary purpose of creating an out-of-court substitute for trial testimony." Michigan v. Bryant, 562 U.S. 344, 358-59, 131 S. Ct. 1143, 1155, 179 L. Ed. 2d 93 (2011). The primary purpose test encompasses both the speaker's purpose in making the statements and the listener's

purpose in eliciting the statements. Id. at 367. Jerome argues the encampment video is testimonial hearsay because it is the result of a law enforcement mission, the purpose of which was to obtain admissible, incriminating evidence for use at trial. The Court of Appeals held the video is not testimonial because the brothers were unaware they were speaking to law enforcement. Slip op. at 24. This Court should accept review and reverse.

Review is appropriate under RAP 13.4(b)(3) because this case presents a significant question of constitutional law that has yet to be answered by this Court or the United States Supreme Court.

The Confrontation Clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The Confrontation Clause protects the right of the accused to cross-examine those who provide testimony against him or her at trial. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Courts apply the "primary purpose" test to determine whether the primary purpose of the statement is to provide a substitute for live testimony on the one hand, or instead some other purpose such as to address an ongoing emergency. Ohio v. Clark, 576 U.S. 237, 246, 135 S. Ct. 2173, 2179, 192 L. Ed. 2d 306 (2015); Bryant, 562 U.S. at 359-59. The primary purpose test encompasses both the speaker's purpose in making the statements and the listener's purpose in eliciting the statements. Bryant, 562 U.S. at 367. The test is an objective analysis of the circumstances of the encounter and the actions of the parties to determine "the purpose that reasonable participants would have had" as ascertained from those statements, actions, and circumstances. Bryant, 562 U.S. at 360. As the Court of Appeals recognized, the United States Supreme Court has not determined whether a statement is testimonial under this test when the speaker and the interrogator have different, and diametrically opposed, purposes. Slip op. at 14 (quoting Bryant, 562 U.S. at 383 (Scalia, J., dissenting)).

Here, this Court should hold that Jerome's brothers' statements in the encampment video were testimonial hearsay and their admission at his trial violated the Confrontation Clause because the recording is the result of a law enforcement mission, the purpose of which was to obtain admissible, incriminating evidence for use at trial. This fact distinguishes this case from Clark, where the Court found statements about child abuse, made by a student to a concerned teacher, were not testimonial. 576 U.S. at 250-51. Applying the primary purpose test, the Clark Court reasoned that, despite the law requiring teachers to report child abuse, the encounter was not "a law enforcement mission aimed primarily at gathering evidence for a prosecution." Id. at 249. Clark noted that both the teachers' questions and the boy's answers "were primarily aimed at identifying and ending the threat." Id. at 247. The Court found "no indication that the primary purpose of the conversation was to gather evidence" for the prosecution. Id.

By contrast, the encampment video in this case was, from the outset, "a law enforcement mission aimed primarily at gathering evidence for prosecution." Id. at 249. Lucky had already told police James had confessed, but Lucky's credibility was suspect due to his relationship with Juice and his desire to obtain the state's help with pending charges. 2RP 1574; 1RP 276-78, 1226-27, 1337. Lucky and Reno's earlier secret recording was inadmissible. 1RP 205, 208. The purpose of the encampment video was to enhance Lucky's credibility and obtain a confession that would be admissible at trial. 1RP 191-93, 272; Pre-trial Ex. 9.

Lucky and Reno's purpose as informants was no different from that of the police. "An informant knows or should know that anything he or she says can and will be used against the target." State v. Hudlow, 182 Wn. App. 266, 284, 331 P.3d 90, 98 (2014).

The Court of Appeals held that unwitting statements to an undercover officer were not testimonial in State v. Chambers, 134 Wn. App. 853, 853, 862, 142 P.3d 668 (2006) (citing Bourjaily v.

United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)). However, the Chambers decision predated both Bryant and Clark, and the Chambers court's application of the primary purpose test focused solely on the intent of the speaker to the exclusion of the interrogator. Id. at 862. As the Court of Appeals correctly recognized, Chambers is of little help because it fails to apply the current version of the primary purpose test. See Slip op. at 14 (noting this Court did not recognize the primary purpose test until 2019).

Jerome asks this Court to accept review of this question and reverse his convictions. Admission of the encampment video violated Jerome's right to confront his brothers as witnesses because he had no opportunity to cross examine them about the statements made on the video. Hudlow, 182 Wn. App. at 282 (citing Crawford, 541 U.S. at 53–54).

### 2. The encampment video was likewise inadmissible under the privacy act because an uncorroborated informant's tip fails to establish probable cause.

The authorization of a recording with only one-party's consent requires a showing of probable cause that the non-consenting party has committed a felony. RCW 9.73.090(2). Here, that showing rested solely on Lucky's claim that James confessed to him. This was insufficient because there was no information establishing whether Lucky's information was credible. This Court should accept review to determine whether the Aguilar-Spinelli[1] test, which normally governs determinations of probable cause, also applies in the context of the privacy act.

Review is warranted under RAP 13.4(b)(1), (2), and (4). This question is one of substantial public interest, and the Court of Appeals determination is in conflict with case law from this Court and the Court of Appeals providing that the privacy act provides greater protection for privacy than even the Washington

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[1] Spinelli v. United States, 393 U.S. 410, 41389 S. Ct. 584, 21 L. Ed. 2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 11484 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

Constitution as well as State v. Salinas, 119 Wn.2d 192, 199-200, 829 P.2d 1068 (1992), where this Court turned to these constitutional standards to define probable cause in the context of the Privacy Act because the legislature did not offer its own definition. Id.

Washington's privacy act, chapter 9.73 RCW, "is one of the most restrictive electronic surveillance laws ever promulgated." State v. O'Neill, 103 Wn.2d 853, 878, 700 P.2d 711 (1985). The act makes it unlawful, with a few narrow exceptions, to record a private conversation without the consent of all parties. RCW 9.73.030. Any information obtained in violation of the act is categorically inadmissible in court. RCW 9.73.050.

The court admitted the encampment video under the exception outlined in RCW 9.73.090 and RCW 9.73.130. Under that exception, police may obtain judicial authorization for a one-party-consent recording by presenting an affidavit that establishes

probable cause to believe that the nonconsenting party has committed a felony. RCW 9.73.090.

Normally, for an informant's tip to create probable cause, there must be evidence of both the basis of the informant's knowledge and the informant's credibility. State v. Jackson, 102 Wn.2d 432, 435, 688 P.2d 136 (1984). Specifically, the affidavit must set forth sufficient underlying circumstances (1) "so that a magistrate can independently evaluate the reliability of the manner in which the informant acquired his information;" and (2) "from which the officer concluded that the informant was credible." Id. (citing Spinelli, 393 U.S. at 413; Aguilar, 378 U.S. at 114).

The Court of Appeals concluded the knowledge and veracity requirements of the Aguilar-Spinelli test do not apply to probable cause determinations under the privacy act. Slip op. at 25 (adopting analysis from State v. James Ta'afulisia, ____ Wn. App. 2d ____, 2022 WL 1447642 (2022) (unpublished)).

The court cites State v. D.J.W., 76 Wn. App. 135, 145, 882 P.2d 1199 (1994), aff'd and remanded sub nom. State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996), in which the court rejected application of the constitutional particularity requirement in the context of the privacy act. But the court overlooks a critical distinction between the particularity requirement and the basis-of-knowledge and veracity requirements of Aguilar-Spinelli. The particularity requirement is designed to rein in the scope of the intrusion into privacy after the justification for that intrusion has already been established. D.J.W., 76 Wn. App. at 145 (particularity requirement imposed to guarantee that intrusion on one's person or expectation of privacy extends no further than necessary). By contrast, the veracity and basis-of-knowledge requirements relate to the amount of evidence necessary to justify an intrusion. By using the term probable cause, the legislature likely intended to import the same quantum of evidence generally required to justify searches and seizures.

Additionally, as D.J.W. points out, the privacy act specifically notes that particularity may or may not be present, indicating an express intent that the constitutional particularity requirement should not apply. 76 Wn. App. at 144 (quoting RCW 9.73.090's requirement that an application must contain a statement as to "'[t]he identity of the particular person, if known'"). By contrast, the legislature used the term "probable cause" to describe the level of belief necessary that criminal activity is afoot. Nothing about the law suggests the legislature intended the term to mean something different in the context of the privacy act or to afford criminal informants more credibility than under search and seizure law.

The application to record the encampment video fails to establish Lucky's veracity. "Unlike a citizen informant calling 911, a criminal informant is not presumed to be acting out of civic responsibility." State v. Morrell, 16 Wn. App. 2d 695, 702, 482 P.3d 295 (2021). Additionally, if the circumstances of the tip raise suspicions that the informant was also criminally involved,

the presumption of reliability is diminished. State v. Rodriguez, 53 Wn. App. 571, 576-77, 769 P.2d 309 (1989).

Lucky was a career criminal and an informant seeking advantage by providing information. 2RP 1557, 1565-67, 1585-87, 1666-83. His statements were not against his own penal interest, because nothing he said incriminated him. The application did not show Lucky had a track record of providing accurate information. Pre-trial Ex. 9. Nor did the application outline any independent corroboration of non-innocuous information.

Lucky's statements were the only indication linking Jerome and his brothers to this crime. Pre-trial Ex. 9. Yet the application fails to set forth information the court could use to independently assess Lucky's veracity or the reliability of his information. Id. He was a criminal informant, motivated by a need for money and prosecutorial leniency, and he was closely related to the only other suspect. 2RP 1660-61, 1765-66. Therefore, the court erred in admitting the encampment video

under the privacy act because the application for the intercept order fails to establish probable cause.

### 3. The encampment video was also inadmissible because the government failed to show that normal investigation would be unsuccessful or too dangerous.

Under the privacy act, when police seek to record a conversation with only one party's consent, that application must include "A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ." RCW 9.73.130(3)(f).

Subsection (f)'s requirement, of a "a particular statement of facts" showing that normal investigation is unlikely to succeed or would be too dangerous, is designed to protect against recordings being used in every case. State v. Gonzalez, 17 Wn. App. 2d 64, 70, 484 P.3d 9 (2021). This Court should also accept review and hold that the application for the intercept order failed to meet this standard.

Police wanted the encampment video for reasons that would largely pertain in every cause, such as the need to bolster the credibility of their witnesses and the idea that the perpetrators of a crime would likely not discuss the crime with strangers. Pre-trial Ex. 9 at 6. Additionally, police did not make reasonable efforts toward using normal investigation before applying for the intercept order. Cooper admitted normal investigation was tried for less than 24 hours before he applied for the order. 1RP 373. Although Bauer and Nguyen had both said they could identify the shooter, Cooper did not even try to show them a photomontage before applying for the order. 1RP 204-05, 260-61, 418.

Regarding difficulties in investigating this specific case, the application contains several claims that are misleading and/or inaccurate. The application claimed witnesses could not identify the attackers despite Bauer's repeated identification of Juice and Nguyen's confirmation he would be able to identify his assailant. Pre-trial Ex. 9 at 5; 1RP 395-96, 397-98, 400, 414. The application also claims there was "no physical evidence linking

any individuals to the shooting." Pre-trial Ex. 9 at 5. But eight shell casings, believed to be from the shooting, had been gathered and could be tested for fingerprints, DNA, and/or ballistics matching. 1RP 434-37, 442-43.

The Court of Appeals concluded the police pointed to more than mere generalities and the alternative methods of investigation would not have succeeded. Slip op. at 25 (adopting analysis from State v. James Ta'afulisia, ____ Wn. App. 2d ____, 2022 WL 1447642 (2022) (unpublished)). This Court should accept review under RAP 13.4(b)(2), and (4) because the Court of Appeals decision is at odds with Gonzalez, 17 Wn. App. 2d at 70, and presents an issue of substantial public interest, namely, the expansion of police authority to record private conversations without the consent of all parties.

**4. The court erred in admitting evidence the brothers possessed a taser and an antique firearm.**

This Court should also accept review under RAP 13.4(b)(2) of the trial court's erroneous denial of Jerome's

motion to exclude evidence of other weapons found in the tent where J.K.T. was arrested. The Court of Appeals opinion conflicts with State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001), where the Court held that evidence that an accused person possessed or had access to a firearm is unduly prejudicial and inadmissible unless that firearm is connected to the charged offense.

In Freeburg, the trial court erred in admitting evidence that Freeburg possessed a gun at the time of arrest, when the prosecution had no evidence that that gun was related to the charged offense. Id. The Court of Appeals determined that Freeburg's gun possession, without evidence linking it to the charged crime, tended to show he was a "bad man" or was likely to have possessed the gun at the time of the offense. Id. This improperly encouraged the jury to convict for unfair reasons and undermined the conviction. Id.

Here, the defense moved to exclude evidence of the taser and the .25 caliber Erma Werke under ER 404(b). CP 30-33. The

Court of Appeals agreed with Jerome that the trial court erred in failing to conduct, on the record, the four-part balancing test required under ER 404(b). Slip op. at 27. The Court erred in finding the error harmless.

As in Freeburg, the jury was likely to view the evidence of other firearms as proof that the boys were bad persons or likely to have brought firearms to the Caves. 105 Wn. App. at 502. The defense made a credible argument that the boys' statements in the encampment video amounted to nothing more than bragging to impress their older relatives. 2RP 2612-13. Two previous juries failed to agree that the evidence showed guilt beyond a reasonable doubt. CP 141, 462. In this context, the highly prejudicial evidence of other firearms was likely to materially impact the jury's verdict. Jerome's convictions should be reversed.

### 5. Defense counsel was ineffective in failing to object to inadmissible evidence of certainty in ballistics matching.

Jerome's attorney failed him by not objecting when a crime lab witness testified, in violation of a pre-trial ruling, in absolute terms that the bullets and casings were fired from a specific firearm. The Court of Appeals concluded, however, that counsel's performance was not deficient. Slip op. at 30. This Court should also accept review of this constitutional question under RAP 13.4(b)(3).

Constitutionally ineffective assistance of counsel results when "(1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures." State v. Canfield, 13 Wn. App. 2d 410, 414, 463 P.3d 755 (2020) (citing Strickland v. Washington, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Before trial, counsel moved to restrict the forensic scientist's testimony, specifically to preclude her from claiming the shell casings were a "match" for the firearms. CP 37-38. She argued the science supported only a conclusion that the bullets or casings were "consistent with" having been fired by a specific firearm. CP 37-38. The state agreed the forensic scientist could not testify that the casing was fired from a specific weapon to the exclusion of all others. 1RP 734-35. The court granted the defense motion, ruling that the forensic scientist "shall not use the phrase 'match' when testifying about her conclusions." CP 64.

In her testimony, the forensic scientist undermined the spirit, if not the letter, of this ruling. While the witness did not use the forbidden words "match" or "certainty," she claimed 100 years of research validating her ability to determine whether a casing had been fired from a specific gun. 2RP 2370. She followed that with a categorical declaration that the casings found at the scene were fired from the gun purchased at the encampment and found in the tent. 2RP 2423. She declared she

could "conclusively determine" the bullet from the autopsy was fired from the .45. 2RP 2424. This goes far beyond asserting that the shell casings were consistent with having been fired from these weapons, which was the only permissible conclusion.

Counsel was deficient in failing to object when the witness violated the court's ruling in limine. Having moved pre-trial to exclude such a definitive-sounding conclusion, there was no valid reason not to object when the witness failed to stay within the bounds of the ruling.

Under Frye and the rules of evidence, a scientific witness may not claim greater certainty than is warranted by the underlying science. See, e.g., State v. Quaale, 182 Wn. 2d 191, 198, 340 P.3d 213 (2014). When results are consistent with the conclusion, rather than excluding all other possibilities, the witness must so testify. Id. This error undermines confidence in the outcome for two reasons. First, the court was likely to have sustained an objection based on the pre-trial ruling. When the court sustains an objection, the jury must disregard the testimony.

Had the jury not been allowed to consider the misleadingly certain-sounding ballistics testimony, there is a reasonable probability the jury would not have voted to convict. The ballistics testimony regarding the shell casings and bullets was the only physical evidence linking the guns found in the boys' possession to the shooting. The only other evidence linking the brothers' guns to the shooting was the encampment video, which was suspect for numerous reasons including the defense theories that the brothers were bragging to obtain higher status or had been persuaded to take the fall for Juice and/or Nate. 2RP 2563, 2593, 2612-13. The encampment video itself is difficult to make out and interpret. Ex. 203. Without ballistics testimony purporting to definitively link the boys' guns to the shooting, the jury would have been far more likely to doubt the state's interpretation of the encampment video. The fact that two previous juries failed to reach a unanimous verdict also shows the reasonable probability of a different outcome. CP 141, 462. The

convictions should be reversed due to ineffective assistance of counsel.

## E. CONCLUSION

For the foregoing reasons, Ta'afulisia respectfully requests this Court grant review and reverse.

DATED this 8th day of June, 2022.

I certify that this document was prepared using word processing software and contains 5,727 words excluding the parts exempted by RAP 18.17.

Respectfully submitted,

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# Appendix

FILED
5/9/2022
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEROME K. TA'AFULISIA,

Appellant.

DIVISION ONE

No. 81723-0-I

OPINION PUBLISHED IN PART

DWYER, J. — Over the past two decades, as the United States Supreme Court has announced and refined new principles applicable to the scope of the Sixth Amendment's confrontation clause, several things have been made clear. The admissibility of a challenged statement no longer is evaluated by resort to its judicially-perceived reliability. The confrontation right applies to out-of-court statements by witnesses who have not been subject to previous cross-examination. The right to confront applies only when the challenged statements are testimonial in nature. A statement is testimonial when its primary purpose is to create an out-of-court substitute for trial testimony. And the primary purpose of the encounter in which the challenged statement was made is discerned by objectively evaluating all of the pertinent circumstances, including not only the motivations of the speaker but also of other participants. These principles are clear.

Less clear—because the High Court has never allowed itself to be confronted by the thorny question—is what analytical process a court should employ to objectively discern the primary purpose of a conversation in which the participants (speaker and interrogator) have competing purposes (primary or otherwise). It may be that Justice Scalia was correct when he accused the Court of not providing an answer to this "glaringly obvious problem, probably because it does not have one."[1]

The United States Supreme Court gets to pick and choose the cases and issues it will address. We are afforded no such luxury. Thus, we must discern an appropriate answer from that which is available to us—hints in the High Court's opinions, the decisions of federal circuit courts, and similar decisions from state supreme courts.

Today, at the end of this analytical exploration, we hold that the challenged out-of-court utterances of Jerome Ta'afulisia's brothers, admitted into evidence against him at his trial, fell outside the ambit of the protections of the confrontation clause and, accordingly, the trial judge did well to allow their placement before the jury. Because appellant establishes no entitlement to appellate relief on any of his remaining claims, we affirm the judgment and sentence from which this appeal was taken.

I

On January 26, 2016, a group of young Samoan males wearing masks and dark clothing entered a section of a homeless encampment known as the

[1] Michigan v. Bryant, 562 U.S. 344, 383, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (Scalia, J., dissenting).

"Jungle," located beneath a freeway in Seattle near the intersection of Interstates 5 and 90 and, after asking to purchase heroin, began shooting occupants of the encampment. This section of the encampment, known as the "Cave," was occupied by a group of people involved in selling and using crack cocaine and heroin. Two of the masked individuals fired shots, killing two encampment occupants: James Tran and Jeanine Brooks. The masked attackers also shot three occupants who survived: Phat Nguyen, Amy Jo Shinault, and Tracy Bauer.

The next day, Foa'I Tautolo, known as "Lucky," contacted the police, claiming that his 17-year-old nephew[2] James Ta'afulisia[3] had admitted to being the shooter. Lucky and his relative,[4] Reno Vaitlui, went to the Seattle Police Department's headquarters to be interviewed by Detective James Cooper. Lucky agreed to attempt to obtain a secret video recording of a conversation with James. Detective Cooper applied for authorization to make a one-party consent recording, which was granted by a superior court judge.

On January 30, 2016, Lucky was wired and made a recording of his visit with James and James's younger brothers, 16-year-old Jerome and 13-year-old J.K.T.[5] in the encampment. The video recording obtained by Lucky is approximately one hour long. During the encounter, Lucky told the Ta'afulisia brothers that they "gotta sit down and talk, man." James discussed going to the

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[2] Lucky is related to the Ta'afulisia brothers' mother and refers to the boys as his nephews, although he is actually a more distant relation.

[3] James and Jerome Ta'afulisia are referred to by first name for clarity.

[4] Although Lucky and Reno are often referred to as brothers in the record, they are cousins.

[5] J.K.T. was convicted for his participation in the shootings in juvenile court and is referred to by initials throughout this opinion. See State v. J.K.T., 11 Wn. App. 2d 544, 455 P.3d 173 (2019), review denied, 195 Wn.2d 1017 (2020).

"Cave" and shooting at people there. J.K.T., laughing and miming a shooting, exclaimed that "[i]t was like this: Tap, tap, tap, tap, tap." Lucky told the boys that Phat Nguyen survived the attack, to which James responded that "Jerome shot him two times in the neck. And then the other guy, popped him in his chest."

The conversation took place outdoors, in a loud and chaotic environment. The discussion meandered, and participants—including the Ta'afulisia brothers—physically walked in and out of the conversation. During much of the discussion, Lucky lectured the brothers, telling them that they "need to change" and that they are his "blood." He referred to them as his "little nephews."

Ultimately, James and Jerome were charged with two counts of felony murder in the first degree predicated on robbery and three counts of assault in the first degree.

Prior to trial, Jerome moved to exclude the video from evidence, arguing that his brothers' recorded statements were testimonial and, given that neither would testify at trial, admission of the video violated his confrontation clause rights. The trial court ruled that given the casual environment, the brothers' relationship with their uncle, and the nature of the conversation, the statements were not testimonial and thus did not fall within the scope of the confrontation clause.

Jury trials were held for both James and Jerome in 2018 and again in 2019. Both juries proved unable to reach unanimous decisions. After a third jury trial, beginning in September 2019, James and Jerome were convicted as charged.

Jerome appeals.

II

Jerome contends that the admission of the recording of his brothers discussing the shootings violated his right to confront the witnesses against him, guaranteed to him by the Sixth Amendment to the United States Constitution.[6]

The confrontation clause guarantees an accused the right to confront the witnesses against him. U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 42, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." Crawford, 541 U.S. at 50. Such a practice denies the defendant a chance to test accusers' assertions "in the crucible of cross-examination." Crawford, 541 U.S. at 61.

Jerome asserts that his brothers' utterances, as recorded on the video, implicated the confrontation clause, and that, as he had no opportunity to cross-examine his brothers,[7] the admission of the recording violated his confrontation clause rights.

A

The State first responds by asserting that James's and J.K.T.'s utterances did not implicate the confrontation clause because they became Jerome's

[6] We review a confrontation clause challenge de novo. State v. O'Cain, 169 Wn. App. 228, 234 n.4, 279 P.3d 926 (2012).

[7] Neither James nor J.K.T. testified at trial.

adoptive admissions, and Jerome does not have a right to confront himself or his own statements. We disagree.

After ruling that the challenged statements were nontestimonial and thus did not implicate the confrontation clause, the trial court ruled that the statements were admissible exceptions to the rule against hearsay as they constituted adoptive admissions, explaining that "[t]his was a joint conversation where they did not contradict each other, therefore, I find that it would be reliable."

Adoptive admissions are excluded from the definition of hearsay. State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725 (1988). An adoptive admission is "a statement of which the party has manifested an adoption or belief in its truth." ER 801(d)(2)(ii). A party can manifest the adoption of a statement by silence. Neslund, 50 Wn. App. at 550; State v. Pisauro, 14 Wn. App. 217, 221, 540 P.2d 447 (1975). Silence constitutes the adoptive admission of a statement when (1) the party heard an accusatory or incriminating statement and was mentally and physically able to respond, and (2) the statement and circumstances were such that it is reasonable to conclude that the party-opponent would have responded had there been no intention to acquiesce. Neslund, 50 Wn. App. at 551. To admit an adoptive admission by silence, the trial court must make a preliminary determination that "there are sufficient foundational facts from which the jury reasonably could conclude that the defendant actually heard, understood, and acquiesced in the statement." Neslund, 50 Wn. App. at 551. The trial court must also instruct the jury that it may consider the statements at issue to be adoptive admissions if it finds that the circumstances establish that the party

heard, understood, and acceded to the statements. Neslund, 50 Wn. App. at 551.

Prior to Crawford, there was "general agreement that adoptive admissions of the defendant do not implicate the right of confrontation." Neslund, 50 Wn. App. at 554. But Crawford requires a new analysis. As will be explained, infra, Crawford counsels that the confrontation clause is directed to those who "bear witness against" the accused. Crawford also rejects judicially-determined reliability as the linchpin of admissibility.

Here, insofar as resolving the adoptive admission question was concerned, James and J.K.T. plainly were "bearing witness" against Jerome. Indeed, Jerome's silence, by itself, proved nothing. Only if meaning was legally imputed to Jerome's silence did his silence matter. This meaning was provided by the admission into evidence of his brothers' challenged utterances. Only the combination of the utterances and Jerome's silence in the face of them tended to prove a fact in issue in the case against Jerome.

Had Jerome adopted his brothers' admissions in a manner other than by silence, the confrontation calculus might be different. But here, when it was his silence that was admitted to incriminate him, the speakers who gave meaning to his silence—James and J.K.T.—were witnesses against him who were never subject to cross-examination. To determine whether the brothers' utterances fell within the ambit of the right to confrontation, accordingly, it remains necessary to determine whether the utterances were testimonial. The adoptive admission

ruling, relying as it does on the evidentiary hearsay rules, does not provide the answer.

As mentioned, the trial court's determination that the statements were reliable is insufficient to resolve the confrontation clause challenge.

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. Cf. 3 BLACKSTONE, COMMENTARIES, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of truth"); M. HALE, HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

Crawford, 541 U.S. at 61-62.

Thus, we must next consider whether the challenged utterances of James and J.K.T. were testimonial statements subject to the confrontation clause.

B

Confrontation clause jurisprudence underwent a dramatic shift following the United States Supreme Court's 2004 decision in Crawford. Hemphill v. New York, 595 U.S. __, 142 S. Ct. 681, 690, 211 L. Ed. 2d 534 (2022).

In Crawford, the Supreme Court abandoned its previous approach—that out-of-court statements by a declarant who did not testify at trial did not violate the confrontation clause so long as the statement was reliable. 541 U.S. at 68-69 (abrogating Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)). Rather, the Court explained that the admission of an out-of-court statement by an unavailable declarant violates the confrontation clause when the statement is testimonial and the witness has not been subject to previous cross-examination. Crawford, 541 U.S. at 53-54.

The Court reasoned that the confrontation clause applies to "'witnesses' against the accused—in other words, those who 'bear testimony.' 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Crawford, 541 U.S. at 51 (alteration in original) (citation omitted) (quoting 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Accordingly, the confrontation clause gives defendants the right to confront those who make testimonial statements against them. Crawford, 541 U.S. at 53-54. The Crawford Court did not "spell out a comprehensive definition of 'testimonial,'" but did note that, at a minimum, testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." 541 U.S. at 68.[8]

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[8] The Crawford Court offered three possible formulations of the core class of testimonial statements:

> "[(1)] *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; [(2)] "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; [(3)] "statements that

In the decade following Crawford, the Court "labored to flesh out what it means for a statement to be 'testimonial.'" Ohio v. Clark, 576 U.S. 237, 244, 135 S. Ct. 2173, 192 L. Ed. 2d 306 (2015). This determination is of paramount importance because "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In that decision, the Court introduced what has become known as the "primary purpose" test to "determine more precisely which police interrogations produce testimony."

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822.

However, the Court also noted that statements that are not the result of interrogations are not always nontestimonial—and, significantly, that "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the

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were made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial."

Crawford, 541 U.S. at 51-52 (third alteration in original) (citations omitted) (quoting White v. Illinois, 502 U.S. 346, 365, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992) (Thomas, J., concurring in part)).

Confrontation Clause requires us to evaluate." Davis, 547 U.S. at 823, n.1.

Several years later, the Court sought to give instruction as to the primary purpose inquiry. In Michigan v. Bryant, 562 U.S. 344, 370, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), the Court announced that when a court must determine whether the confrontation clause bars the admission of a statement at trial, "it should determine the 'primary purpose of the interrogation' by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs." To do so, a court must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." Bryant, 562 U.S. at 359. The Court should be mindful that, "[i]n addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." Bryant, 562 U.S. at 367. This is so, the Court explained, because

> [i]n many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers. To give an extreme example, if the police say to a victim, "Tell us who did this to you so that we can arrest and prosecute them," the victim's response that "Rick did it" appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.

Bryant, 562 U.S. at 367-68.

By considering both participants, the Court in Bryant sought to solve the problem arising from the fact that both police officers and those whom they

question will often have mixed motivations underlying their utterances. 562 U.S. at 368.

In addition, the Bryant Court reiterated that "there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." 562 U.S. at 358. These circumstances could be evidenced by the formality and structure of the interrogation (or absence of such). Bryant, 562 U.S. at 377. A "formal station-house interrogation" is more likely to result in testimonial statements. Bryant, 562 U.S. at 366, 377. "[L]ess formal questioning is less likely to reflect a primary purpose aimed at obtaining testimonial evidence against the accused." Clark, 576 U.S. at 245 (citing Bryant, 562 U.S. at 366, 377).

Applying these considerations, the Court in Bryant concluded that a dying gunshot victim's responses to a responding officer's questions were not testimonial, given the circumstances—the questioning took place in an exposed public area and in a disorganized fashion, as opposed to a formal, structured interrogation at a police station, and the victim's statements were made while he was so badly injured that he had difficulty breathing and talking. 562 U.S. at 375, 377.

The Court revisited this area of law several years later. In that case, Ohio v. Clark, the Court concluded that utterances made by a three-year-old child in a conversation[9] with his preschool teacher, in which the child indicated that his

[9] In Clark, the Court used the word "conversation" whereas in the past it had used the word "interrogation." See e.g., 576 U.S. at 245 ("In the end, the question is whether, in light of all

mother's boyfriend was responsible for injuries on his body, were not testimonial. 576 U.S. at 246. In this decision, the Court declined to adopt a categorical rule that statements made to people other than law enforcement officers are not testimonial. Instead, it observed that "such statements are much less likely to be testimonial than statements to law enforcement officers." Clark, 576 U.S. at 246. The Court explained:

> Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.

Clark, 576 U.S. at 249 (citation omitted).

While the Court made its determination on the basis that "neither the child nor his teachers had the primary purpose of assisting in Clark's prosecution," Clark, 576 U.S. at 240, the Court observed that statements by very young children "will rarely, if ever, implicate the Confrontation Clause," because "[f]ew preschool students understand the details of our criminal justice system." Clark, 576 U.S. at 247-48.[10]

Herein, the declarants (James and J.K.T.) and their "interrogator" (Lucky) had vastly disparate—and conflicting—purposes during the interaction in which James and J.K.T. made the challenged utterances. Lucky was aware that he was recording his nephews to assist a law enforcement investigation, while

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the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'create[e] an out-of-court substitute for trial testimony.'" (alteration in original) (quoting Bryant, 562 U.S. at 358)).

[10] Clark also holds that "the primary purpose test is a necessary, but not always sufficient, condition for the exclusion of out-of-court statements under the Confrontation Clause." 576 U.S at 237.

James, Jerome, and J.K.T. were not aware that they were being recorded, instead believing that they were speaking to a trusted relative in an informal setting. However, as observed by Justice Scalia, the Supreme Court has not instructed us as to how to proceed when parties to a conversation have conflicting motives. Bryant, 562 U.S. at 383 (Scalia, J., dissenting) ("And the Court's solution creates a mixed-motive problem where (under the proper theory)[11] it does not exist—viz., where the police and the declarant each have one motive, but those motives conflict. The Court does not provide an answer to this glaringly obvious problem.").

In addition, our State Supreme Court did not recognize the primary purpose test as the applicable standard until 2019, at which time it abrogated many previous state decisions. State v. Scanlan, 193 Wn.2d 753, 766, 445 P.3d 960 (2019). Washington appellate case law prior to 2019, therefore, cannot be relied upon to answer this question.[12]

Hence, in order to determine how to resolve the question before us, we first look to indications (hints) in the pertinent United States Supreme Court decisions.

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[11] Justice Scalia opined that only the primary purpose of the declarant should matter in determining whether the utterance was testimonial.

[12] At oral argument, Jerome's counsel referenced Justice Gordon McCloud's concurrence in State v. Burke, 196 Wn.2d 712, 744-65, 478 P.3d 1096 (2021). In her concurrence, Justice Gordon McCloud explained why she considered a conversation between a rape victim and a sexual assault nurse examiner (SANE) to be testimonial:

> [F]our main factors make clear that the objective primary purpose of the examination was to establish or prove past events potentially relevant to later criminal prosecution: (1) the objective manifestation of K.E.H.'s intent in undergoing the exam, (2) the objective manifestation of Frey's intent in conducting the exam, in light of the history and purpose of SANE nursing and the Washington statutory scheme, (3) the lack of ongoing emergency, evidenced by the bifurcated nature of the exam, and (4) the exam's formality.

Burke, 196 Wn.2d at 750-51 (Gordon McCloud, J., concurring). However, there is no discussion of how courts should resolve conflicting motivations between participants in a conversation. The concurrence does not, thus, aid in our inquiry.

We will then review the holdings, results, and analyses of other courts who have addressed similar scenarios and seek to identify decisional commonalities.

i

One indication that appears in Supreme Court confrontation clause jurisprudence is the Court's continued approval of the result in Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987). In explaining that the scope of the confrontation clause needed to be analyzed in a manner that substantially differed from the Court's prior approach, Justice Scalia nevertheless sought to emphasize that, for the most part, the results of the Court's prior decisions had "remained faithful to the Framers' understanding," of the clause, as that understanding was explained in Crawford. 541 U.S. at 59. One particular decision that was cited with approval because its result "hew[ed] closely to the traditional line," Crawford, 541 U.S. at 58, was Bourjaily, 483 U.S. 171, in which the Court affirmed the introduction at trial of pretrial utterances made unwittingly by a coconspirator to a Federal Bureau of Investigation informant.

Soon thereafter, in Davis, in which the Court announced the primary purpose test, the Court again cited the result in Bourjaily with approval, describing "statements made unwittingly to a Government informant" as "clearly nontestimonial." 547 U.S. at 825. It is thus apparent that it was not the Court's intention to impose a means of analysis that resulted in statements made unwittingly to an informant being deemed testimonial.

Furthermore, as the Court continued to develop the primary purpose test framework in Bryant and Clark, it did not disclaim the notion that unwitting statements to an informant are "clearly nontestimonial." Rather, the Court in Bryant described its approach as consistent with the primary purpose test introduced in Davis. 562 U.S. at 370. Similarly, the Court in Clark did not describe its analysis as shifting away from Davis's primary purpose test but, rather, as refining it. 576 U.S. at 243-46.

In sum, it is apparent that the Court believed statements made unwittingly to an informant fell outside the category of "testimonial statements" when it announced the primary purpose test. There is no indication that the further development of the test altered this view.

The second hint that we discern appears in a series of footnotes. In Davis, the Court, in a footnote, explained:

> Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations—which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation. (Part of the evidence against Sir Walter Raleigh was a letter from Lord Cobham that was plainly *not* the result of sustained questioning. Raleigh's Case, 2 How. St. Tr. 1, 27 (1603).) *And of course even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.*

547 U.S. at 822 n.1 (second emphasis added).

In other words, when there is an interrogation, the analysis turns on the purpose of the challenged statement—not the question that prompted it.

Several years later, in Bryant, the Court revisited this footnoted commentary, concerned that it "caused confusion about whether the inquiry prescribes examination of one participant to the exclusion of the other." 562 U.S. at 367 n.11. The Bryant Court explained that

> this statement in footnote 1 of Davis merely acknowledges that the Confrontation Clause is not implicated when statements are offered "for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S., at 60., n.9. An interrogator's questions, unlike a declarant's answers, do not assert the truth of any matter. The language in the footnote was not meant to determine *how* the courts are to assess the nature of the declarant's purpose, but merely to remind readers that it is the statements, and not the questions, that must be evaluated under the Sixth Amendment.

562 U.S. at 367 n.11.

Thus, the interrogator's questions—and the interrogator's purpose in asking them—may constitute part of the circumstances that courts must reference in order to "assess the nature of the declarant's purpose." Bryant, 562 U.S. at 367 n.11. However, it remains the answers to the questions which "must be evaluated under the Sixth Amendment," because the confrontation clause is not implicated by the interrogator's questions, which are not offered for the truth of the matter asserted. See Bryant, 562 U.S. at 367 n.11.

The third hint that we discern appears in Clark. Again, in Clark, the Court held that "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." 576 U.S. at 249. The Court reasoned that "[i]t is common sense that the relationship between a student and his teacher is very different from that between a citizen and the

police," and instructed courts that they "must evaluate challenged statements in context, and part of that context is the questioner's identity." Clark, 576 U.S. at 249.

This focus on the relationship between the questioner and the declarant as context for the conversation suggests that how the declarant perceives the questioner is an important part of the inquiry. Indeed, in setting forth its analysis, the Clark Court explained:

> There is no indication that the primary purpose of the conversation was to gather evidence for Clark's prosecution. On the contrary, it is clear that the first objective was to protect L.P.[13] *At no point did the teachers inform L.P. that his answers would be used to arrest or punish his abuser.* L.P. never hinted that he intended his statements to be used by the police or prosecutors. And the conversation between L.P. and his teachers was informal and spontaneous. The teachers asked L.P. about his injuries immediately upon discovering them, in the informal setting of a preschool lunchroom and classroom, and they did so precisely as any concerned citizen would talk to a child who might be the victim of abuse. This was nothing like the formalized station-house questioning in Crawford or the police interrogation and battery affidavit in Hammon.[14]

576 U.S. at 247 (emphasis added).

Thus, in Clark, not only was the environment informal, and the declarant of such an age that he was unlikely to have a conception of the criminal legal system, but he was speaking with trusted adults *who did not make him aware* that his statements could be used for a law enforcement purpose. Applying this logic to the scenario at issue leads us to the conclusion that, viewed objectively, persons speaking with a trusted family member—who does not make the

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[13] The court used the initials L.P. when referencing the child at issue.

[14] Hammon v. Indiana is the companion case to Davis v. Washington, 547 U.S. 813.

declarants aware that their statements will be used by law enforcement—is unlikely to make testimonial statements.

Thus, all indications from the United States Supreme Court point us toward the conclusion that the challenged statements herein, made in a casual setting to the declarants' uncle, were not testimonial, despite Lucky's secret purpose in acquiring recorded statements for possible use by law enforcement personnel.

ii

The published case law from other jurisdictions is overwhelmingly in accord with this view. Indeed, every federal circuit that has dealt with statements unwittingly made by coconspirators, codefendants, or accomplices to informants or undercover agents has reached the conclusion that these statements are not testimonial because, viewed objectively, they are not made under circumstances that would lead an objective witness to a reasonable belief that the declarant's statements would be available for later use at a trial. See Brown v. Epps, 686 F.3d 281, 283 (5th Cir. 2012); United States v. Dale, 614 F.3d 942, 956 (8th Cir. 2010); United States v. Smalls, 605 F.3d 765, 778 (10th Cir. 2010); United States v. Johnson, 581 F.3d 320, 325 (6th Cir. 2009); United States v. Watson, 525 F.3d 583, 589 (7th Cir.2008); United States v. Udeozor, 515 F.3d 260, 269-70 (4th Cir. 2008); United States v. Underwood, 446 F.3d 1340, 1347-48 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182-84 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir.2004) (Sotomayor, J.).

Several state supreme courts have reached the same conclusion. See, e.g., State v. Smith, 161 Idaho 782, 391 P.3d 1252, 1260 (2017); State v. Brist, 812 N.W.2d 51, 57 (Minn. 2012).

The reasoning in these opinions is consistent with the indications that we observed in the United States Supreme Court decisions. Many courts relied on the declarant's complete absence of purpose to create a stand-in for trial testimony. See Brown, 686 F.3d at 288 (unidentified men whose statements were secretly recorded by a government agent were "unaware that their conversations were being preserved, so they could not have predicted that their statements might subsequently become 'available' at trial"); Dale, 614 F.3d at 956 (codefendant's statement to confidential informant not testimonial because he "had no idea Smith was wearing a wire, or that the incriminating statements he made to Smith would ultimately be used against him at trial. Had [codefendant] known the authorities were listening in, he likely would not have admitted to committing two unsolved murders. In this sense, we cannot say that [codefendant], in making the statements, 'would reasonably expect [the statements] to be used prosecutorially'"); Johnson, 581 F.3d at 325 ("Because [codefendant] did not know that his statements were being recorded and because it is clear that he did not anticipate them being used in a criminal proceeding against Johnson, they are not testimonial, and the Confrontation Clause does not apply."); Watson, 525 F.3d at 589 ("The closest match [to a type of testimonial statement] would be if [codefendant] had reasonably believed that the statement would be preserved for later use at a trial, but he couldn't have

thought this because he did not know that the FBI was secretly recording the conversation."); Udeozor, 515 F.3d at 269 ("Second, [defendant's husband]'s statements are not testimonial because, objectively viewed, no reasonable person in [defendant's husband]'s position would have expected his statements to be used later at trial. [Defendant's husband] certainly did not expect that his statements would be used prosecutorially; in fact, he expected just the opposite."); Underwood, 446 F.3d at 1347 ("Had [accomplice] known that Hopps was a confidential informant, it is clear that he never would have spoken to her in the first place."); Smith, 391 P.3d at 1260 ("There is nothing indicating that [codefendant] knew he was talking to detectives or that he reasonably understood that his statements to them would be used in a criminal prosecution.").

Several of these courts also assigned significance to the absence of formality during the conversations at issue. See Brown, 686 F.3d at 288; Smalls, 605 F.3d at 777; Smith, 391 P.3d at 1259.

In addition, several courts cited the Supreme Court's description of statements made unwittingly to a government informant as "clearly nontestimonial." See Smalls, 605 F.3d at 778 ("[T]he Court expressed the view that 'statements made unwittingly to a Government informant' . . . are 'clearly nontestimonial.'" (quoting Davis, 547 U.S. at 825)); Saget, 377 F.3d at 229 ("We need not attempt to articulate a complete definition of testimonial statements in order to hold that [declarant]'s statements did not constitute testimony, however, because Crawford indicates that the specific type of statements at issue here are

nontestimonial in nature. The decision cites Bourjaily, [483 U.S. 171,] which involved a co-defendant's unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination."); Brist, 812 N.W.2d at 57 (recording of statement made by nontestifying coconspirator to confidential informant during drug transaction not testimonial because "[t]he holding of Bourjaily—that admission of a nontestifying coconspirator's unwitting statements to a government informant does not violate the Confrontation Clause—is still good law and is binding on this court").

The only court cited to us by Jerome that has reached a different conclusion is the Superior Court of Pennsylvania in Commonwealth v. Cheng Jie Lu, 2019 PA Super 339, 223 A.3d 260 (2019). We find that decision to be an unpersuasive outlier.

In Cheng Jie Lu, an undercover officer visited an "alleged house of prostitution" and asked a female employed there questions concerning which sexual services were available and who the man he had seen downstairs was. 223 A.3d at 262-63. The sex worker indicated that oral and vaginal sex could be provided (but not anal sex) and that the man downstairs was the manager. Cheng Jie Lu, 223 A.3d at 263, 266.

The superior court concluded that as the primary purpose of the officer's interrogation—from the officer's perspective—was "'to establish or prove past events potentially related to later criminal prosecution,'" the sex worker's responsive statements were testimonial. Cheng Jie Lu, 223 A.3d at 265-66

(quoting Davis, 547 U.S. at 822). However, in reaching this conclusion, the court did not consider the sex worker's purpose in answering questions posed by a person she believed to be an ordinary customer, nor did it explain its reasons for not doing so. Cheng Jie Lu, 223 A.3d at 265-66. The court also did not consider circumstances such as the informal setting of the interrogation (immediately after the officer received a massage in a house of prostitution). Rather, the Cheng Jie Lu court appears to have given exclusive and controlling weight to the intentions of the police officer. This is contrary to the explicit teaching of Bryant, which advised that "giv[ing] controlling weight to the 'intentions of the police'" is a "misreading of [its] opinion." 562 U.S. at 369. We are not persuaded by the reasoning or holding of the Pennsylvania opinion.

iii

We conclude that when the primary purpose test is applied to an utterance unknowingly made by a coconspirator, codefendant, or accomplice to an informant, the informant's secret purpose in gathering or recording evidence for possible use at a later trial does not transform such an utterance into "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" See Crawford, 541 U.S. at 51 (quoting 2 NOAH WEBSTER, supra). The interrogator's purpose in asking questions does not control the analysis. See Bryant, 562 U.S. at 367-68. Instead, the authority is nearly uniform that an objective viewer, aware of all of the circumstances, would reasonably credit the utterer's motives as having greater weight than the conflicting motivations of others.

The trial court's ruling herein is consistent with that observation. The video at issue demonstrates that the conversation was extraordinarily casual and took place outdoors in a homeless encampment in which James, Jerome, and J.K.T. lived. Various other people entered and left the area. See Bryant, 562 U.S. at 377. As far as J.K.T. and James knew, their questioner was their uncle, a trusted older family member, who was there to counsel and admonish them—not an agent of law enforcement. See Clark, 576 U.S. at 249. And the only challenged statements that the State sought to introduce for the truth of the matter asserted were those made by J.K.T. and James, who clearly did not have a purpose of creating a record for trial. See Davis, 547 U.S. at 822 n.1; Bryant, 562 U.S. at 367 n.11, 368-69. The trial court correctly concluded that the statements at issue—J.K.T.'s and James's utterances regarding the shootings—were not testimonial. We thus affirm the trial court's confrontation clause ruling.[15]

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions.

III

Jerome next contends that the trial court erred by admitting the video recording because it was obtained in violation of Washington's privacy act, chapter 9.73 RCW. Jerome makes assertions identical to those offered by his brother and co-defendant James in a linked appeal arising from the same

[15] In his briefing, Jerome makes no attempt to establish that the Washington Supreme Court has in any way announced or indicated that the understanding of the term "testimonial statements" differs under the Washington Constitution and the Sixth Amendment. Accordingly, we do not explore this question.

proceeding. See State v. Ta'afulisia, No. 81735-3-I, slip op. (Wash Ct. App. May 9, 2022) (unpublished), http://www.courts.wa.gov/opinions/pdf/817353.pdf. In the opinion resolving James's appeal, we concluded that

> [b]ecause the application sufficiently established both probable cause that James had committed a felony and that normal investigative procedures were unlikely to be successful, the application was sufficient to support the order authorizing the interception and recording of the conversation with James and his brothers.

Ta'afulisia, No. 81734-3-I, slip op. at 13.

We adopt the reasoning and analysis explained in the linked case, as well as that expressed in our opinion affirming the admission of the same video recording in the youngest Ta'afulisia brother's trial before the juvenile court. J.K.T., 11 Wn. App. 2d at 551-57. On these bases, we conclude that the recording was admissible. No trial court error is established.

IV

Jerome next contends that the trial court abused its discretion by admitting evidence that he and his brothers possessed a nonoperational .25 Erma Werke pistol and a stun gun. This evidence, Jerome asserts, was inadmissible as evidence of prior bad acts. See ER 404. Moreover, he claims, the trial court erred by not balancing on the record the probative value against the unfair prejudicial effect of the evidence. We agree that the trial court erred by not conducting an on the record balancing, but conclude that the error was harmless.

We review the trial court's evidentiary decision for abuse of discretion. State v. Bajardi, 3 Wn. App. 2d 726, 729, 418 P.3d 164 (2018). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on

untenable grounds or reasons. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019).

The pertinent rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b).

Before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The trial court must conduct its balancing analysis on the record. State v. Lillard, 122 Wn. App. 422, 431, 93 P.3d 969 (2004). However, the failure to do so constitutes harmless error when (1) the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence, or (2) considering the untainted evidence, the appellate court can conclude that the result would have been the same even if the trial court had not admitted the evidence at issue. State v. Carleton, 82 Wn. App. 680, 686-87, 919 P.2d 128 (1996).

When J.K.T. was arrested inside a tent at the encampment in which the brothers lived, three weapons were found in the tent, next to and on top of one

another—a .22 caliber handgun (later determined to have been used during the shootings), a nonoperational .25 Erma Werke pistol, and a stun gun. Pursuant to ER 404(b), Jerome moved to exclude evidence that the weapons not connected to the shootings—the nonoperational pistol and the stun gun—were found in the tent. The parties' oral argument on the issue centered on the relevance of the weapons, and the trial court conducted no on the record balancing. The trial court ruled that the weapons were admissible to support the inference that the brothers also knowingly possessed the gun used in the shootings.

The State asks us to hold that the evidence of the other weapons was admissible as res gestae evidence. Res gestae evidence, as "evidence that completes the story of the crime charged or provides immediate context for events close in both time and place to that crime[,] is not subject to the requirements of ER 404(b)." State v. Sullivan, 18 Wn. App. 2d 225, 237, 491 P.3d 176 (2021). The State argues that, as the weapons are discussed and passed around during the encampment recording video and found with a gun used during the shootings, they are part of the "complete story." We disagree. The presence of the weapons in a video recorded during the investigation does not make them part of the story of the crime charged, nor does it provide context for events that transpired during the shootings. ER 404(b) applies and the trial court should have conducted a balancing analysis on the record.

However, the trial court's failure to do so was harmless. As the jury saw the stun gun in the encampment recording video, and heard the brothers discuss the nonoperational gun, the jury would have been aware that the brothers

possessed these weapons.[16] Furthermore, in the context of the other evidence admitted—eyewitness identification of the brothers as the shooters as well as Lucky's testimony and the video in which the brothers admitted to participating in the shootings, in addition to the fact that one of the guns used in the shootings was discovered in their tent, it is extremely unlikely that evidence of the additional, unrelated weapons in the tent had an impact on the jury's decision. Accordingly, we conclude that the result would have been the same, even if the evidence had been excluded. The error was harmless.

V

Finally, Jerome contends that his attorneys were ineffective by not objecting to a ballistic expert's testimony that bullets removed from victims were "identified" as being from certain guns. We disagree.

In order to establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the defense was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defendant bears the burden to prove ineffective assistance of counsel. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "To combat the biases of hindsight, our scrutiny of counsel's performance is highly deferential and we strongly presume reasonableness." In re Pers. Restraint of Lui, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). "For many

[16] At trial, Jerome successfully sought to exclude evidence of a discussion of the brothers' past crimes in the video. However, there is discussion in the video of the nonoperational gun and the stun gun while the brothers discuss the shooting at issue. Both the stun gun and the discussion of the nonoperational gun appear in the redacted version of the encampment video that was presented to the jury.

reasons . . . the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). "[T]he presumption of adequate representation is not overcome if there is any 'conceivable legitimate tactic' that can explain counsel's performance." In re Det. of Hatfield, 191 Wn. App. 378, 402, 362 P.3d 997 (2015) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

"Decisions on whether and when to object to trial testimony are classic examples of trial tactics." State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689. "To prove that failure to object rendered counsel ineffective, Petitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (footnotes omitted).

Jerome's counsel sought and obtained a pretrial ruling limiting the use of the words "match" and "certainty" during the expert witness's testimony about ballistics. Jerome's counsel explained that

> [t]he jury hears "match," "match" means the same things with firearms as it means with DNA. They're not going to engage in

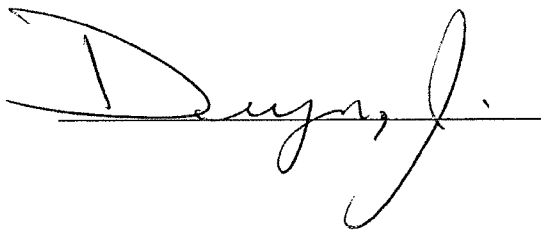
> some sort of specific analysis. What they have is a firearms examiner who works for the Washington State Patrol Crime Lab who says it's a match, it's a match, it's forever to be a match.

The trial court granted defense counsel's request with regard to the word "match." At trial, the ballistics expert did not use the word "match" in her testimony.

Jerome argues that by explaining that firearm toolmark examination is a science that is supported by hundreds of years of research and that by using the word "identified"—as in, "[the bullet] was identified as being fired from the Colt pistol,"—the expert's testimony "undermined the spirit"[17] of the ruling.

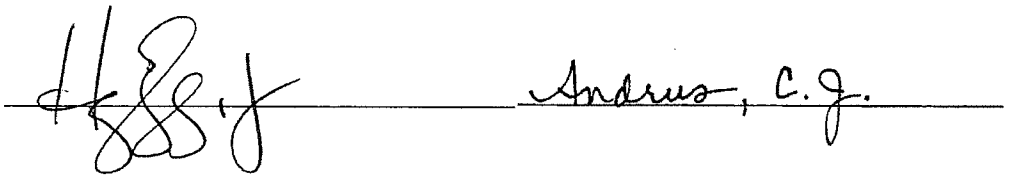
Even assuming that Jerome is correct and that an objection would have been successful, it was a reasonable trial tactic not to object. Jerome's counsel cross-examined the ballistics expert and attempted to cast doubt on her findings by discussing other potential weapons from which the bullets could have come, and that no clothing had been examined for gunshot residue. This was an acceptable tactical choice, conceivably employed for its potential to persuade the jury that the ballistics examination lacked the level of accuracy needed to be reliable. Accordingly, we conclude that Jerome's trial counsel's performance has not been shown to be deficient. Jerome's claim of error fails.

Affirmed.



[17] Br. of Appellant at 47.

WE CONCUR:



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

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