No. 97145-5

77833-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

EBRIMA DARBOE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

MOTION FOR DISCRETIONARY REVIEW, RAP 13.1(a)

Ebrima Darboe

DOC# 404269, Unit H2
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520-9504

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A. IDENTITY OF PETITIONER

EBRIMA DARBOE, asks this court to accept review of the decision or part of the decision designated in part B of this motion.

B. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of appeals in case:

It stated: State of Washington v. Ebrima Darboe, Snohomish County, Cause No. 16-1-00815-6 "Affirmed in part and remanded.

a copy of that decision is attached to this motion as Appendix ___.

C. ISSUES PRESENTED FOR REVIEW

To justify review, a COA decision must be in conflict with a Supreme Court decision, RAP 13.4(b)(1), another COA, (b)(2), present a significant question of law under a constitution, (b)(3), or involve an issue of substantial public interest, (b)(4).

(1) Police interviewed an eye witness to a vehicle prowl and theft. The witness provided police the license plate number and gave a description of the car that the suspect left in. Police used this information to identify and track appellant, the registered owner of the car. Appellant was eventually charged with vehicle prowl, three counts of theft of an access device, and eight counts of ~~identity~~ identity theft - all stemming from the vehicle prowl incident. At trial, the state never called the eye witness to testify. Defense counsel asked for a missing witness instruction. The state said it had subpoenaed the witness and had been in touch with him and his family several times. However, shortly before trial, the prosecutor informed the family that there would be no repercussions if the witness did not show up. When it came time for the witness to testify, the witness decided to go bear hunting and could not be reached. Appellant asked for a missing witness instruction. The court denied this request. Was this error?

(2) Defense counsel objected to an officer testifying as to what an eye witness told police about the suspect's vehicle (i.e. license plate number and vehicle description). The state claimed it was not offering these statements for the ~~those~~ truth of the matter. The trial court agreed, and it also stated that appellant's objection went to the weight of the evidence, not its admissibility. Did the trial court err in admitting testimonial heresay evidence where appellant had no opportunity to cross examine the witness?

(3) Appellant sought a first-time offender wavier (FTOW) sentencing alternative. The trial court denied the request. It informed appellant it has a personal policy of withholding such wavier unless the defendant establish~~es~~ he will benefit from counseling or treatment or he has some other means of engaging in community restitution. It also claimed the seriousness level of the offense was too high to permit a(FTOW). However, the statue does not make the availability of (FTOW) dependent on the seriousness level of an offense or proving certain community custody ~~be~~ benefits. Did the trial court err in denying appellants request for a (FTOW)?

D. STATEMENT OF THE CASE

On April 25, 2016, the Snohomish County prosecutor charged appellant Ebrima Darboe with one count of second degree identity theif. CP 115-16. An amended information was later filed, which added seven counts of second degree identity theif, three counts of second degree thef~~t~~ of an access device, one count of vehicle prowling, and one count of bail jumping. CP 96-98. A jury convicted Darboe on all counts. CP 55-44.

The trial court sentenced Darboe to 50 months for each identity theft conviction, 22 months for each theft, 364 days suspended sentence for the vehicle prowl, and 51 months for bail Jumping. RP 22-23; CP 8, 19. He was ordered to serve an actual term of 51 months. CP 19.

~~Boilerplate Facts attached~~

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED under RAP 13.4(b)

Under the missing witness doctine, where a party fails to call a witness to provide testimony that would properly be a part of the party case, and the witness is within the control of the party in whose interest it would be natural to produce that testimony, the jury may draw an inference that the testimony would be unfavorable to that party. State v. Montgomery, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). The missing witness doctrine applies when the witness' testmony is material and not cumulative; the witness is particularly explained. Id. at 598-99. Where the missing witness is particularly available to one party; and the witness's absence is not adequately explained. Where the missing witness instruction is requested by a party and given by the court, the judge informs the jury that if a person who could have been a witness at the trial is not called to testify, the jury may infer that the person's testimony would have been unfavorable to the party who would naturally have called that witness. State v. Sundberg, 185 Wn. 2d 147, 154, 370, P3d 1 (2016)

See Attachments on back!

F. CONCLUSION

For the reasons stated above, this court should reverse appellant's convictions. Alternatively, it should remand for resentencing so the trial court may properly exercise its discretion under RCW 9.94A.650 Moreso, in appellant's opening brief, Darboe asks that this Court to reversed.

Respectfully submitted this _____ day of _____, 201__.

Ebrima Darboe

Print name:

DOC # 404269
Stafford Creek Correction Center, Unit: H2
191 Constantine Way
Aberdeen, Washington 98520

Argument Why Review Should Be Accepted under RAP 13.4(b)

- Here, the State failed to call the only eyewitness to the vehicle prowl incident, Justin Taylor. It is naturally expected that the State will produce eye witness to alleged crimes to testify to first-hand facts. Taylor's testimony was material to the question of identity which was at the center of this case. His testimony was not cumulative. There was no other witness to the break-in and theft.

Taylor was peculiarly within the State's power to produce Availability is based upon the facts and circumstances of that witness' relationship to the parties, not merely physical presence or accessibility. State v. Cheatam, 150 Wn.2d 626, 653, 81 P.3d 830, 844 (2003). In this case, Taylor had come forward to law enforcement to provide information. The was in contact with the witness. Prosecutors met with Taylor in person on one occasion, had frequent contact with his parents, and spoke directly with him shortly before trial. RP 95, 158. The State had forged a working relation-ship with this witness and his family. RP 95, 157-58. The prosecutor issued a subpoena, and Taylor received it. RP 158.

However, shortly before trial, the prosecutor inexplicably conveyed there would be no consequences if Taylor disregarded a subpoena. RP 95. Safe in this knowledge, Taylor decided to go bear hunting throughout the duration of the trial, and he could no longer be reached. RP. 158 By telling Taylor it would not enforce the subpoena, the State assumed a peculiar power over whether the witness would make himself available at trial. The State created a relationship between itself and the witness that placed the State in control of wheather there was any incentive for the witness to remain availble. No longer could the defense ~~under~~ reach him.

Under these circumstances, the State could not provide a satisfactory explanation for why Taylor was not available to testify. The State essentially let him shirk his duty to testify at trial, and consequently, he chose to engage in a sporting activity where he was ultimately could not be reached. This witness' availability was particularly within the power of the state, and there was no good reason for why it would telegraph to this young man that there would be no consequences if he failed to appear.

In sum, the facts and circumstances show the State had a peculiar control over Taylor's availability. This was an eye witness who was under subpoena by the State, but who was also advised there would be no consequences if he ignored the subpoena. In this way, Taylor was uniquely available to the State, and the State was particularly responsibly for his unavailability to the defense during trial. Under these facts, the trial court erred in denying the defense's request for a missing witness instruction.

II. DARBOE'S RIGHT TO CONFRONTATION WAS VIOLATED WHEN THE TRIAL COURT ADMITTED TESTIMONIAL HEARSAY OVER HIS OBJECTION.

Because Talyor was unavailable to testify at Darboe's trial, the State sought to introduce his statements through the testimony of the responding officer. As explained below, these statements were testimonial hearsay. Darboe had no chanee to test these through cross examination. As such, the admission of Taylor's statements resulted in a violation of Darboe's constitutional rights.

Relevant Facts

Officer Christine White responded to the scene of the

vehicle prowl. RP 99. She located the car that had been broken into and observed a shattered window. RP 100-01. She contacted Justin Taylor, the only witness. RP 101. He provided her with a license plate number and a description of a white Jeep. RP 102. From this information, White discovered that the Jeep was registered to Darboe. RP 102-03

At trial, Darboe objected to White being able to testify as to Taylor's statements. RP 94-95. The State responded that the information was not being offered for the truth of the matter and was the only way to explain how the investigation led to Darboe. RP 95. The trial court permitted the evidence to come in because the information came from a "civilian source" and was acted upon as part of the investigation. RP. 96 It concluded that any defense concerns about Taylor's statements went to weight rather than admissibility. RP 97.

Legal Argument

A primary interest secured by the confrontation Clause of the sixth Amendment is the right of an accused in a criminal prosecution to cross-examine witness against him or her. Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). "[T]he 'principle evil' at which the clause was directed was the civil-law system's use of ex-parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases." State v. Jasper, 158 Wn. App. 518, 526, 245 P.3d 228, 237 (2010). This practice "denies the defendant the opportunity to test his accuser's assertions 'in the crucible of cross-examination.'" Crawford v. Washington, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)

In Crawford, the Supreme Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. Subsequently, the Supreme Court clarified what was meant by

testimonial statements:

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 v. Washington, 547 U.S 813, 822, 126 S.Ct 2266, 165 L.Ed.2d 224 (2006). The Supreme Court futher clarified that:

(W)hen a court must determine ~~whether~~ 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. The existences of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirements of confrontation.

Michigan v. Bryant, 562 U.S. 344, 369, 131 S. Ct. 1143, 1148, 179 L.Ed.2d 93 (2011)

Here, the statements were offered for the truth of the matter and were testimonial. First Taylor's statements were offered to prove that taylor had seen the suspect driving a jeep with a specific license plate number. The state was not offering these statements for the purpose

of establishing that Taylor had observed just any generic license plate number. The evidence was only useful to the state if the jury believed as true that Taylor saw the specific license plate number he reported to police. This fact did more than just explain the investigation. It was offered as a significant piece of evidence establishing Darboe's identity as the alleged perpetrator.

Second, the statement was testimonal. The record reflects that Taylor made these statements to police officers who arrived after the incident to investigate. There was no ongoing crime or emergency. There was no threat to Taylor or anyone else in the area.

Darboe was entitled to cross examination. Cross-examination of Taylor would not have been an empty formalism. Certainly, the defense counsel would have come up with a question or two to ask a live witness in such a situation. See, Jasper, 158 Wn. App. at 535 (rejecting the claim that cross examination would have been an empty formalism).

Unfortunately, the record show the trial court failed to meaningfully consider the importance of Darboe's right to cross-examine Taylor. Instead, it decided to throw this untested evidence to the jury to asses its weight.

Finally, the trial courts admission of Taylor's testimonial statements was not harmless. Constitutional error is presumed to be prejudicial, and the state bears the burden of proving that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-191 607 P.2d 304 (1980). A constitutional error is harmless only if the ~~appellate~~ appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reach the same result in the absence of the error. State v. Guloy, 104, Wn.2d 412, 425, 705 P.2d 1182 (1985) The surveillance videos where not conclusive on identity. And Jabang's

testimony did not support the state's claims. Given this, the state cannot show beyond a reasonable doubt that the outcome would have been the same without Taylor's statements which tied Darboe's car to the incident. As such, reversal is required.

The trial court abused its discretion when it failed to meaningfully consider appellant's request for a first-time offender waiver.

RELEVANT FACTS

During the sentencing hearing on November 20, 2017 Darboe sought a (FTOW). RP. 322 The trial court denied the request. RP. 323-24. The judge explained that it is her personal perspective that such waivers are only appropriate when "an individual benefits from some opportunities of counseling or treatment or have some other means of community restitution that are inconsistent with the more traditional means of being held accountable for a time." RP. 323-324. She also concluded that the seriousness level of the crimes were not consistent with either the policy of the first time offender waivers for individuals." RP 324

Legal Argument

The record shows the trial court did not meaningfully consider Darboe's request for a (FTOW). Rather than denying his request for case-specific reasons, the judge applied her own idiosyncratic policy, which is not supported by statue. This was blaten and clear error.

Generally, offenders may not appeal sentences within the standard range for their offenses. RCW 9.94A. 585(1). But "an offender may always challenge the procedore by which a sentence was imposed." State v. Grayson, 154

Wn.2d 333, 338, 111 P.3d 1183 (2005). Where a defendant has requested a sentencing alternative authorized by statue, the categorical refuseal to consider the sentence, or the refuseal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." Id., 342

FTOWs are a type of sentencing alternative. The trial court may waive the imposition of a standard range sentence for offenders who have not previously been convicted of a felony and whose current conviction is not for a violent or sexual offense, driving under the influence, or a crime related to drug dealing. RCW 9.94A.650(1), (2) Instead, the trial court imposes up to 90 days of confinement and up to six months of community custody. RCW 9.94A.650(2),(3).

The trial court has broad discretion in deciding whether to grant an offender's request for a FTOW. State v. Johnson, 97 Wn. App. 679, 682, 988 P.2d 460 (1999). However, the court abuses its discretion if "its decision is manifestly unreasonable or is based upon untenable grounds or reasons." State v. Adamy, 151 Wn. App. 583, 587, 213 P.3d 627 (2009). A decision is based on untenable grounds if it rests on facts unsupported by the record or was reached using wrong legal standard if it bases it decision on its own beliefs rather than statutory standards. Id. at 665.

The record show the trial court abused its discretion in two ways: (1) it relied on its a personal practice of denying FTOWs to offenders who do not establish they can benefit from treatment or they can perform community restitution, and (2) it categorically refused to grant a FTOW based on the seriousness level of the offense. The statute does not support either of these approaches.

RCW. 9.94A.650 does not require the defendant make a particular showing that he can benefit from treatment or can perform some form of community restitution before a FTOW may be ordered. The statute permits, but

but does not require as a prerequisite, a sentencing court to order treatment or perform community restitution work as a condition of community custody. RCW 9.94A.650 Thus, trial court's personal policy is not consistent with the statue.

Finally, contrary to the trial court's ruling, the Legistature has not made eligibility for FTOW's contingent upon the seriousness level of the offense. Here, the trial court's ruling was predicated in large part upon the fact the crimes Darboe was convicted of were at too high a seriousness level. This amounts to nothing more than a categorical approach apparently denying FTOW's to all offenders who have committed crimes a seriousness level of three or more. However, such an approach is ~~not~~ unsupported by the statute. RCW. 9.94A.650 The trial court failed to exercise the broad discretion given it by the Legislature which is itself an abuse of discretion.

Because the trial court abused its discretion when considering Darboe's request for a FTOW, this court should remand for resentencing.

Dated 28th day of April 2019
Respectfully submitted
[signature] #DOC 404269

FILED
4/15/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON , Respondent, v. EBRIMA DARBOE, Appellant.	DIVISION ONE No. 77833-1-I UNPUBLISHED OPINION FILED: April 15, 2019

DWYER, J. — Ebrima Darboe was tried and convicted by jury verdict of identity theft in the second degree, theft in the second degree—access device, vehicle prowling, and bail jumping. He appeals, asserting that the trial court erroneously denied a requested missing witness jury instruction, allowed the admission of testimonial hearsay in violation of his Sixth Amendment rights, erroneously declined to grant a first-time offender waiver at his sentencing, and imposed certain legal financial obligations in violation of current law. While we find his first three contentions to be without merit, we remand for amendment of his judgment and sentence to delete the requirement that he pay a criminal filing fee.

I

Hurnake Johal left his wallet, which contained his driver's license, credit and debit cards, and other personal items, in his vehicle. His son borrowed the vehicle and parked it in the parking lot at the LA Fitness in Mill Creek. While his son was inside the gymnasium, one of the vehicle's windows was shattered by a thief, who removed Johal's wallet, cash, and a phone charging cable.

Justin Taylor, a bystander, witnessed the theft and reported it to the police. Officer Christine White of the Mill Creek Police Department arrived at the scene and observed shattered glass both inside and outside of Johal's vehicle. Officer White used the license plate number to determine that the vehicle belonged to Johal. She also spoke with Taylor, who said that he had seen the break-in occur and saw the thief fleeing in a white Jeep. He provided Officer White with the Jeep's license plate number.

Officer White researched the Jeep's license plate number and determined that it was registered to Ebrima Darboe.

After Johal's son exited the gymnasium, he met with Officer White, saw the broken window, and contacted his father. Johal then contacted the banks that had issued his credit cards to report the theft. He was informed that his credit cards had already been used.

Johal went to the scene of the theft. Once there, Officer White informed him that, in her experience, a thief will generally use stolen credit cards quickly to make fraudulent purchases. Johal confirmed that he had been provided with a list of unauthorized transactions by the cards' issuing banks. Johal reviewed a

list of fraudulent transactions with the police that involved specific purchases on multiple of his credit cards.

The next day, Detective Tara Hoflack continued the Mill Creek Police Department's investigation. She obtained surveillance video from several stores documenting fraudulent use of the credit cards. Officers thereafter located Darboe's Jeep, had it towed to the police station, and applied for a search warrant.

That afternoon, Darboe called the police to report the Jeep as stolen. Detective Hoflack responded and met him in the parking lot adjacent to his apartment complex. When Hoflack told him that she was investigating fraudulent charges made on stolen credit cards, Darboe stated that his friend "Jaba" had borrowed the Jeep and returned it in the early morning.

During their conversation, Hoflack noticed Darboe's distinctive clothing: black jeans with a white T-shirt, a Seattle Seahawks cap with a reflective sticker on the brim, and teal, high-top Nike sneakers. Darboe stated that Jaba had been wearing the same clothes the previous night and had given them to Darboe as a gift for letting him borrow the Jeep. Later review of the security footage from stores where the fraudulent transactions were recorded showed Darboe wearing these clothes. Police also determined that the time stamps in security footage of Darboe's transactions matched the recorded time of fraudulent purchases reported by Johal and the issuing banks.

Searching the Jeep, Detective Hoflack and Detective Tyrone Hughes observed that the vehicle's license plate was placed upside down in the front

window, similar to the positioning of the plate in a security video from the night before. Hughes also noted the presence of a phone charging cable.

Subsequently, Darboe was arrested. Darboe was charged with identity theft in the second degree; an amended information added seven more counts of identity theft in the second degree, three counts of theft in the second degree—access device, a count of vehicle prowling, and a count of felony bail jumping.

Before trial, the State subpoenaed Justin Taylor and contacted him and his parents, with whom he lived, in an attempt to ensure that he would be able to testify as to what he had seen. While the prosecuting attorney stated that Taylor's appearance was not optional, he also informed Taylor's family that he would probably not be arrested solely for ignoring the subpoena. On the day Taylor was supposed to testify, his parents informed the prosecutor that he had gone hunting. Taylor was unreachable by telephone. He did not testify. The trial court allowed Officer White to relate Taylor's statement about the Jeep's license plate number in her testimony, ruling that the statement was not being offered for the truth of the matter asserted.

At the close of trial, Darboe requested that the jury receive a "missing witness" instruction, which would expressly allow the jury to infer that Taylor's testimony would have been damaging to the State's case. The trial court denied this request.

Ultimately, Darboe was convicted on all charges. The trial court imposed standard range sentences of 50 months on each identity theft conviction, 22 months for each conviction of theft of an access device, 51 months for bail

jumping, and a suspended sentence for vehicle prowling. The actual term of confinement imposed was 51 months. He now appeals.

II

Darboe first contends that the trial court abused its discretion by denying his request for a missing witness instruction. Darboe asserts that, because the State did not call Taylor as a witness, he was entitled to an instruction that the jury could infer that Taylor's testimony would have been unfavorable to the State's case against him. We disagree.

A trial court's refusal to issue a requested instruction, when based on the evidence in the case, is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion only when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A missing witness instruction informs the jury that it may infer from a witness's absence at trial that his or her testimony would have been unfavorable to the party who would have logically called that witness. State v. Flora, 160 Wn. App. 549, 556, 249 P.3d 188 (2011). Such an instruction is proper when the witness is peculiarly available to one of the parties, Flora, 160 Wn. App. at 556, and the circumstances at trial establish that, as a matter of reasonable probability, the party would not have knowingly failed to call the witness "unless the witness's testimony would be damaging." State v. Davis, 73 Wn.2d 271, 280, 438 P.2d 185 (1968), overruled on other grounds by State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012). However, no such inference is warranted when the

witness is unimportant or the testimony would be cumulative. State v. Blair, 117 Wn.2d 479, 489, 816 P.2d 718 (1991). The party against whom the missing witness rule would operate is also entitled to explain that witness's absence to the court and thereby avoid operation of the inference. Blair, 117 Wn.2d at 489; accord State v. Montgomery, 163 Wn.2d 577, 599, 183 P.3d 267 (2008).

Whether a witness is peculiarly available to a party depends upon the nature of the relationship between the witness and that party. Davis, 73 Wn.2d at 277. In Davis, the court determined that an uncalled witness, a member of the law enforcement agency that had investigated the defendant, "worked so closely and continually with the county prosecutor's office with respect to this and other criminal cases as to indicate a community of interest between the prosecutor and the uncalled witness." 73 Wn.2d at 278. Similarly, in Blair, the court determined that missing witnesses were peculiarly available to the defendant when the names of the witnesses—with whom the defendant had both personal and business relationships—were "known to defendant alone." 117 Wn.2d at 490.

Here, the trial court did not abuse its discretion by refusing to give a missing witness instruction. First, Taylor was not shown to have been peculiarly available to the State. A witness is not peculiarly available merely by virtue of being subject to the subpoena power. Blair, 117 Wn.2d at 490. Rather, as our state Supreme Court has explained:

> For a witness to be "available" to one party to an action, there must have been *such a community of interest* between the party and the witness, or the party must have *so superior an opportunity* for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would

> have been called to testify for such party except for the fact that his testimony would have been damaging.

Davis, 73 Wn.2d at 277 (emphasis added).

Here, in contrast, Taylor had no professional relationship with the prosecutor. Indeed, Darboe's attorney conceded that "Mr. Taylor . . . is not peculiarly available to the State, given he is not law enforcement." The parties had equal access to witness information.

The State subpoenaed Taylor, whose parents confirmed his receipt of the subpoena. The prosecutor called Taylor's parents at least three times in an attempt to ensure that Taylor would be available to testify at trial. The prosecutor told them that the subpoena meant that failure to appear was "not an option." The fact that the prosecutor admitted that the State would probably not direct its limited resources to arrest Taylor for failure to comply with the subpoena does not negate the fact that he was equally available to both parties.

The reason that Taylor was not called to testify was satisfactorily explained on the record. The prosecutor explained to the trial court the efforts made to secure Taylor's testimony, that Taylor had appeared at the prosecutor's office for an interview, and that the prosecutor thought that Taylor would be present to testify at trial. Further, the prosecutor stated that much of his communication with Taylor had been facilitated by Taylor's parents, who informed him of Taylor's decision to leave for a camping and hunting excursion, and that Taylor was without telephone reception. The record thus shows that the State made a good faith effort to ensure that Taylor would be available at trial, an

effort that failed solely due to Taylor's unilateral decision, which was satisfactorily explained to the trial judge.

The trial court had these facts before it when it determined not to give the missing witness instruction, concluding that Taylor was not "peculiarly available" to the State and that his absence was explained. These were tenable grounds for the court's decision. Thus, there was no abuse of discretion.

III

Darboe next contends that Taylor's statements to the police, in which he offered a description of Darboe's vehicle and license plate number constituted testimonial hearsay. Thus, he avers, testimony as to the statements violated his confrontation clause rights. The State responds that Taylor's comments were not offered for their truth, that they were thus not testimonial, and that, even if the statements were testimonial, their admission was harmless error in light of the abundant other evidence that Darboe committed the crime. Because the trial court correctly concluded that the statements were not offered for the truth of the matters asserted, there was no error.

We review de novo an alleged violation of the confrontation clause. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). The confrontation clause bars the admission of "testimonial" hearsay in criminal trials unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Hearsay is defined as "a statement, other than one made by the declarant while

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). The confrontation clause does not preclude the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Crawford, 541 U.S. at 60 n.9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)).

"Testimony" has been defined as "'[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Crawford, 541 U.S. at 51 (alteration in original) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Whether a statement is testimonial is determined by "whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.'" Ohio v. Clark, ___ U.S. ___, 135 S. Ct. 2173, 2180, 192 L. Ed. 2d 306 (2015) (alteration in original) (quoting Michigan v. Bryant, 562 U.S. 344, 358, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)).

Among the factors employed in determining this primary purpose are whether the statement is made to assist in response to an ongoing emergency and the informality of the situation in which the interrogation took place. State v. Burke, ___ Wn. App. 2d ___, 431 P.3d 1109, 1118 (2018) (citing Clark, 135 S. Ct. at 1280). Neither factor, however, conclusively establishes the primary purpose of a conversation. Bryant, 562 U.S. at 366.

It is reasonable to infer that the primary purpose of Taylor's statements were testimonial. An objective evaluation of the "circumstances in which the encounter occurs and the statements and actions of the parties" demonstrates

that the primary purpose of Officer White's investigation was not to meet an ongoing emergency. Bryant, 562 U.S. at 359. The record does not indicate that the vehicular break-in was occurring in the same instant as Taylor's initial telephone call to the police. The only ongoing emergency was the unauthorized use of Johal's credit cards, which Officer White addressed by informing Johal of the break-in and advising him of appropriate steps to take. Darboe, having left the scene, did not pose a physical threat to Taylor, Johal, or Officer White.

Although Officer White's conversation with Taylor may have been informal and took place at the scene of the crime, "informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." Bryant, 562 U.S. at 366. The other circumstances existing at the time of the conversation clearly indicate that the statements concerning the description and license plate number of Darboe's vehicle were not made to assist in addressing an ongoing emergency but to obtain evidence potentially relevant in a later criminal proceeding.

Determining that the statements' primary purpose was testimonial, however, does not end our inquiry. To give rise to a confrontation clause violation, the statements must also have been offered for their truth. Crawford, 541 U.S. at 60 n.9. The record indicates that Taylor's statements were not offered to prove that Darboe was the person who drove to the LA Fitness parking lot and broke into Johal's vehicle. Rather, they were offered to show why Officer White took the subsequent investigative steps that were undertaken.

Darboe's confrontation clause rights were not violated. There was no error.

IV

In calculating the standard sentence range for a felony offense, the sentencing court must consider the defendant's criminal history and the seriousness of the criminal offense. RCW 9.94A.505(1), (2)(a), .510. However, the first-time offender waiver statute, RCW 9.94A.650, provides, in pertinent part, "In sentencing a first-time offender the court *may* waive the imposition of a sentence within the standard sentence range." RCW 9.94A.650(2) (emphasis added). Whether to grant a request for a first-time offender waiver sentence is thus discretionary. State v. Johnson, 97 Wn. App. 679, 682, 988 P.2d 460 (1999). However, "where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal." State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Darboe contends that the trial court denied his request for a first time offender waiver based only on "the seriousness level of the offense" and his failure to show that he would benefit from treatment or community custody. In doing so, he misstates the trial court's ruling. With regard to Darboe's request for the waiver, the trial judge stated:

> First time offender waivers from my perspective can be an appropriate sentence structure for an individual when that individual benefits from some opportunities of counseling or treatment or have

> some other means of community restitution that are inconsistent with the more traditional means of being held accountable for a time, that means time in custody or prison or jail. The seriousness of these offenses are not consistent with either [the] policy of first time offender waiver[s] as I understand it, or my practice of allowing first time offender waivers for individuals.

These statements indicate that the trial court did not categorically refuse to grant the waiver based on the mechanical application of an arbitrary rule. Rather, the court carefully considered Darboe's personal situation, weighed the benefits of granting his request, and concluded that a standard range sentence was more appropriate. Darboe's offender score after his convictions was 10—serious enough to be a tenable basis for the trial court to rule out the requested alternative. Thus, the trial court did not abuse its discretion. There was no error.

V

The statute in effect at the time of Darboe's sentencing, former RCW 36.18.020(2)(h), provided for the mandatory assessment of a $200 filing fee upon a criminal's conviction or plea of guilty. This was amended effective June 7, 2018, to exclude indigent defendants from its scope. These changes are applied retroactively. State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Darboe asks that we remand to strike the filing fee. The State concedes that this is necessary. Thus, we remand for amendment of the judgment and sentence to strike the filing fee.

Affirmed in part and remanded.

WE CONCUR:

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