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NO. 63742-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

YUSSUF ABDULLE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA MACK

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS.....	1
2. CrR 3.5 FACTS .....	2
3. TRIAL FACTS .....	7
C. <u>ARGUMENT</u> .....	9
1. ABDULLE'S STATEMENT TO POLICE WAS MADE AFTER HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS.....	9
a. Abdulle Reinitiated The Conversation With Police.....	11
b. Abdulle Waived Any Claim Of The "Missing Witness" Rule.....	15
c. The "Missing Witness" Rule Does Not Apply.....	18
2. THE SENTENCING COURT WAS REQUIRED TO IMPOSE A \$100 DNA COLLECTION FEE.....	21
a. The Savings Clause Does Not Apply.....	23
b. The <i>Ex Post Facto</i> Clause Does Not Apply.....	28
D. <u>CONCLUSION</u> .....	31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Davis v. United States, 512 U.S. 452,  
114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).....11

Edwards v. Arizona, 451 U.S. 477,  
101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).....11, 13

Michigan v. Mosley, 423 U.S. 96,  
96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).....12

Miranda v. Arizona, 384 U.S. 436,  
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)... 1, 4, 6, 9-11, 17-20

Oregon v. Bradshaw, 462 U.S. 1039,  
103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).....12, 14

United State v. Barrett, 703 F.2d 1076  
(9th Cir.1983) .....16

United States v. Batchelder, 442 U.S. 114,  
99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).....24

Washington State:

In re Hopkins, 137 Wn.2d 897,  
976 P.2d 616 (1999) .....27

In re Metcalf, 92 Wn. App. 165,  
963 P.2d 911 (1998) .....30

In re Personal Restraint of Sietz, 124 Wn.2d 645,  
880 P.2d 34 (1994) .....26

In re Young, 122 Wn.2d 1,  
857 P.2d 989 (1993) .....29

<u>Johnson v. Morris</u> , 87 Wn.2d 922, 557 P.2d 1299 (1976) .....	29
<u>Millay v. Cam</u> , 135 Wn.2d 193, 955 P.2d 791 (1998) .....	26
<u>State v. Baxter</u> , 68 Wn.2d 416, 413 P.2d 638 (1966) .....	16
<u>State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991) .....	19
<u>State v. Blank</u> , 80 Wn. App. 638, 910 P.2d 545 (1996) .....	30
<u>State v. Blank</u> , 131 Wn.2d 230, 930 P.2d 1213 (1997) .....	30
<u>State v. Brewster</u> , ___ Wn. App. ___, 218 P.3d 249 (2009) .....	21, 23, 28
<u>State v. Broadaway</u> , 133 Wn.2d 118, 942 P.2d 363 (1997) .....	13
<u>State v. Catlett</u> , 133 Wn.2d 355, 945 P.2d 700 (1997) .....	30
<u>State v. Davis</u> , 73 Wn.2d 271, 438 P.2d 185 (1968) .....	16, 18, 19
<u>State v. Denton</u> , 58 Wn. App. 251, 792 P.2d 537 (1990) .....	13
<u>State v. Earls</u> , 116 Wn.2d 364, 805 P.2d 211 (1991) .....	13
<u>State v. Ellison</u> , 36 Wn. App. 564, 676 P.2d 531, <i>rev. denied</i> , 101 Wn.2d 1010 (1984) .....	10
<u>State v. Erho</u> , 77 Wn.2d 553, 463 P.2d 779 (1970) .....	16, 18, 19

<u>State v. Fanger</u> , 34 Wn. App. 635, 663 P.2d 120 (1983) .....	16
<u>State v. Grant</u> , 89 Wn.2d 678, 575 P.2d 210 (1978) .....	24, 25, 26
<u>State v. Haack</u> , 88 Wn. App. 423, 958 P.2d 1001 (1997) .....	18, 19
<u>State v. Harris</u> , 39 Wn. App. 460, 693 P.2d 750, <u>rev. denied</u> , 103 Wn.2d 1027 (1985) .....	27
<u>State v. Humphrey</u> , 91 Wn. App. 677, 959 P.2d 681 (1998), <u>reversed on other grounds</u> , 139 Wn.2d 53, 983 P.2d 1118 (1999) .....	29
<u>State v. Kane</u> , 101 Wn. App. 607, 5 P.3d 741 (2000) .....	23, 24
<u>State v. McDonald</u> , 89 Wn.2d 256, 571 P.2d 930 (1977) .....	10
<u>State v. Mendez</u> , 137 Wn.2d 208, 970 P.2d 722 (1999) .....	11
<u>State v. Pierce</u> , 23 Wn. App. 664, 597 P.2d 1383 (1979) .....	12
<u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007) .....	24
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984) .....	13
<u>State v. Smith</u> , 117 Wn.2d 263, 814 P.2d 652 (1991) .....	27
<u>State v. Thompson</u> , ___ Wn. App. ___, ___ P.3d ___ 2009 WL 4021935 (Wn. App., Div. 1, Nov. 23, 2009).....	21, 23, 28, 31

<u>State v. Valladares</u> , 99 Wn.2d 663, 664 P.2d 508 (1983) .....	16
<u>State v. Vannoy</u> , 25 Wn. App. 464, 610 P.2d 380 (1980) .....	10
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994) .....	29, 30
<u>State v. Wolfer</u> , 39 Wn. App. 287, 693 P.2d 154 (1984), <i>rev. denied</i> , 103 Wn.2d 1028 (1985) .....	10
<u>State v. Zornes</u> , 78 Wn.2d 9, 475 P.2d 109 (1970) .....	24, 25
<u>Thorndike v. Hesperian Orchards</u> , 54 Wn.2d 570, 343 P.2d 183 (1959) .....	11

#### Constitutional Provisions

##### Federal:

U.S. Const. art. 1, § 10, cl. 1 .....	28
---------------------------------------	----

##### Washington State:

Const. art. I, § 23 .....	28
---------------------------	----

#### Statutes

##### Washington State:

RCW 9.94A .....	21, 22
RCW 9.94A.345 .....	23
RCW 10.01.040 .....	24

RCW 43.43.754 .....	21, 22, 27, 28
RCW 43.43.7541 .....	21, 22, 26, 27, 28, 30

Rules and Regulations

Washington State:

CrR 3.5 .....	2, 15, 16, 20
RAP 2.5 .....	16

Other Authorities

2SHB 2713 Final Bill Report .....	30
5 Wayne R. LaFave, <i>Search and Seizure</i> , § 11.1(a) at 8.....	16

A. ISSUES

1. A defendant's statement is admissible if, after asking for a lawyer, he then voluntarily reinitiates the conversation with police. Abdulle told Detective Hoover he again wanted to talk about the case, and his decision to do this was made without police coercion. Did the trial court properly admit Abdulle's statement?

2. A trial court may apply the "missing witness" rule when it finds that another officer overheard the Miranda process and failed to testify, without explanation, to corroborate a challenged fact. Here, Abdulle did not raise the "missing witness" rule at trial, and the facts do not support it. Has Abdulle waived this issue on appeal, and does it even apply to this case?

3. This Court has recently held that the DNA collection fee is mandatory for any sentence occurring after June 12, 2008. The trial court imposed the DNA collection fee at the sentencing hearing in this case, a year after that date. Was that proper?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Yussuf Abdulle was charged by amended information with two counts of Forgery, and a third count of Theft in

the First Degree, for stealing two checks valued at over \$1500 and presenting them fraudulently to banks. CP 6-7. A CrR 3.5 pretrial hearing was held regarding the admissibility of Abdulle's statement to police, which the trial court found admissible since it was made knowingly, intelligently, and voluntarily. CP 73. A trial was held before the Honorable Barbara Mack beginning on May 11, 2009. The jury convicted Abdulle as charged. CP 58-60. At his sentencing, on June 12, 2009, Abdulle told the trial court that he had "made a mistake" and requested a first-time offender waiver. 4RP<sup>1</sup> 4-6. The trial court imposed a first-time offender waiver sentence, which included a \$100 DNA collection fee. CP 62-69; 3RP 9. Abdulle now appeals his conviction and sentence. CP 74-82.

## 2. CrR 3.5 FACTS

Bellevue Police Department Detective Steven Hoover, a 28-year police veteran, investigated a case of theft and forgery involving Yussuf Abdulle. 1RP 8. As a part of this investigation, Hoover met with several employees of the Puget Sound Security

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<sup>1</sup> The Verbatim Report of Proceedings will be referred to in accordance with the system set out in the Brief of Appellant at page 1: 1RP (05/11/09 Pretrial); 2RP (05/12/09 Trial); 3RP (5/13/09 Trial); 4RP (06/12/09 Sentencing).

(PSS) business at which Abdulle worked, where employee checks had gone missing. 1RP 8-9. Hoover also went to two local banks, one in the First Hill neighborhood and another in the International District neighborhood of Seattle. 1RP 8-9, 23. At these banks, he obtained video photographs of Abdulle coming to a teller to present these stolen employee checks in an effort to deposit them into an account. 1RP 9.

On August 13, 2008, Hoover went to an IBM building where Abdulle worked in a new security guard job. 1RP 9-10. Abdulle spoke with Hoover on the phone and told him that he was willing to talk to him about the case. 1RP 58. When Hoover arrived, Abdulle was outside waiting in a parking garage with Abdulle's security guard manager and Detective Newell. Id. Hoover told Abdulle that he was being placed under arrest and took Abdulle's security badge and gave it to the security guard manager. 1RP 27-28. At Abdulle's request, to avoid public view, Hoover put him in the backseat of his unmarked police car. 1RP 10, 27-28. Newell got in the driver's seat, and Hoover joined Abdulle in the back. 1RP 10-11.

Hoover asked Abdulle some preliminary questions to make sure he understood English well enough to understand his rights.

1RP 12. After Abdulle answered that he had been in the United States since 1996 and had attended community college and Devry University, Hoover determined that Abdulle had no trouble understanding the conversation. Id.

As Newell began to drive the car to the police station, Hoover read to Abdulle his full Miranda<sup>2</sup> rights. 1RP 13-14. Abdulle was attentive during the reading of the rights and did not express any confusion regarding them. 1RP 14-15. Hoover then asked Abdulle about the checks that he took from PSS and tried to deposit. 1RP 15. Abdulle responded that he did not take or cash any checks. 1RP 16. Hoover said that he had photographs from the banks where Abdulle tried to deposit the checks. Id. Hoover began to show him the surveillance photos and other case evidence in his file. 1RP 17. Abdulle then said he wanted to talk to an attorney. 1RP 16.

In response, Hoover said that was fine and that if Abdulle wanted to speak about the case he would have to contact Hoover. Id. At that point Hoover stopped talking about the case and would have closed his notebook, making sure that Abdulle could not see

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

any photographs. 1RP 17-18. Other than some "chit-chat," where Hoover answered Abdulle's questions about where they were going, there was no more conversation between Hoover and Abdulle. 1RP 18-19. Hoover did not question Abdulle further about the case. 1RP 18-19.

Within 10-15 minutes, while they were still driving in the car, Abdulle told Hoover that if he were given a cigarette and a glass of water, he would talk to Hoover about the case. 1RP 18. The car arrived at the police department parking garage, and Hoover gave Abdulle a cigarette and water. 1RP 19-20. Before beginning any questions, Hoover again asked Abdulle if he was sure he wanted to talk with Hoover because he had previously asked for an attorney. 1RP 20. Abdulle affirmed that he wanted to talk. 1RP 20-21.

Abdulle said that PSS was out to get him and that they fired him for no reason. 1RP 22. He explained that he was mad about this and needed some money, so he took a check from PSS and tried to cash it at the International District bank. 1RP 22-23. Abdulle said he only remembered doing it at that one bank. 1RP 23. Hoover then showed him the surveillance photographs showing Abdulle at both banks, and Abdulle confirmed that he was in both bank photographs. 1RP 24. Abdulle clarified that the name

he gave on the deposit slip was his cousin. 1RP 24. At no time was Abdulle promised anything or threatened in exchange for his statement. 1RP 25.

Abdulle testified at the pretrial hearing. 1RP 50. He explained how he was arrested at the IBM building and then read his Miranda rights. Id. After that, he was shown many photographs by Hoover. Id. Abdulle said that as a result, he asked for an attorney, intending to remain silent. Id. Abdulle claimed that despite asking for an attorney, Hoover would not relent in his questions about the theft. 1RP 51-54, 61-62. During their time together, he claimed that the interrogation did not stop. 1RP 53-54, 61-62. Abdulle said that he kept asking for a lawyer and told Hoover to stop with his "trick questions," but to no avail. Id. Abdulle said he never agreed to talk to Hoover about the case. Id.

The trial court did not find this version of events by Abdulle as credible or reliable as Hoover's testimony. CP 72. The trial court found that Abdulle voluntarily reinitiated the conversation with Hoover when he offered to speak with him in the police department parking garage, and there was nothing unduly coercive about the circumstances that led to that. CP 72. As a result, the trial court found Abdulle's statements made to Hoover at the police station

were admissible since they were made knowingly, intelligently, and voluntarily. CP 73.

### 3. TRIAL FACTS

Abdulle worked for PSS as a security guard for about six months before being terminated on June 9, 2008. 2RP 14, 18. During his termination meeting, he was left alone in a room with a mail basket that contained employee payroll checks. 2RP 29, 70. Two of these checks in the basket belonged to employees Michael Wittemann and Lauren Burns. 2RP 66-69. The value of these two checks totaled over two thousand dollars. Id.

Yisel Anguiano was a teller at the First Hill bank where Abdulle first presented these stolen checks. 2RP 132. At trial, she identified Abdulle in court and explained how he tried to deposit the forged checks in the account of "Hiback Omar." 2RP 141-42, 154. This presentation at both the First Hill bank and then at the International District bank was caught on surveillance tape. 2RP 101-27, 146. Shortly after, Anguiano was able to positively identify

Abdulle in a 6-person photographic montage.<sup>3</sup> 2RP 148; 3RP 16-20.

When Abdulle attempted to deposit the checks at the International District bank, they were confiscated by the teller, Mohammad Siddique, who first contacted his manager after finding it suspicious that they were being deposited into a third-party account. 2RP 161, 172. Abdulle left the bank during Siddique's conversation with the manager. 2RP 161. While not having the same level of certainty as the other teller, Siddique also selected and was able to recognize Abdulle in the same 6-person photo montage. 2RP 165, 180-87; 3RP 16-20.

The next day, the bank manager contacted PSS about the suspicious checks. 2RP 31-32, 77, 174. These two checks belonged to Wittemann and Burns and bore their "signatures" with endorsement to "Hiback Omar," who was a reference for Abdulle when he first applied to work at PSS. 2RP 16, 75-76. Neither Burns nor Wittemann signed these checks. 2RP 81-95. They also did not know Omar. Id.

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<sup>3</sup> The trial court later did not admit the montage exhibit following Abdulle's objection, but the court held it was not excluding or striking Anguiano's prior testimony about her montage identification. 3RP 42.

Detective Hoover, who investigated the case, contacted Abdulle and arrested him. 3RP 23. Abdulle gave his statement to Hoover at the police department parking garage. 3RP 28-29.

C. ARGUMENT

1. ABDULLE'S STATEMENT TO POLICE WAS MADE AFTER HE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHTS

Abdulle claims that the trial court erred in finding that his statement to police was knowingly, intelligently, and voluntarily made, because, he argues, he did not waive his right to remain silent after asking for an attorney. Specifically, he claims that the State should have called another "missing witness" to corroborate Hoover's testimony that Abdulle reinitiated their conversation.

Because sufficient evidence supports the trial court's finding that Abdulle voluntarily reinitiated the conversation with police after being given Miranda warnings, his claim fails. Additionally, because Abdulle did not argue at trial that another officer needed to be called to corroborate this fact, and there is no independent evidence in the record that another officer engaged in the Miranda

conversation, the "missing witness" rule has been waived and does not apply to this case.

Miranda requires that a waiver of one's constitutional rights be made "voluntarily, knowingly, and intelligently." Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The State bears the burden of establishing a knowing, voluntary and intelligent waiver of Miranda rights. State v. Vannoy, 25 Wn. App. 464, 610 P.2d 380 (1980); State v. Ellison, 36 Wn. App. at 571. The voluntariness of a waiver need not be shown beyond a reasonable doubt but only by a preponderance of the evidence. State v. Wolfer, 39 Wn. App. 287, 290, 693 P.2d 154 (1984), *rev. denied*, 103 Wn.2d 1028 (1985); State v. Ellison, 36 Wn. App. 564, 571, 676 P.2d 531, *rev. denied*, 101 Wn.2d 1010 (1984). The test for a knowing and intelligent waiver is whether a person knew that he had the right to remain silent, and that anything he said could be used against him in a court of law, not whether he understood the precise legal effect of his admissions. State v. McDonald, 89 Wn.2d 256, 264, 571 P.2d 930 (1977).

a. Abdulle Reinitiated The Conversation With Police.

Abdulle argues that the trial court erred in its finding that he reinitiated his conversation with police. Specifically, he claims that Hoover did not scrupulously honor Abdulle's invocation of the right to counsel when he engaged in "chit-chat" in response to Abdulle's question of where they were going.

A finding of fact supported by substantial evidence will not be overturned on appeal. Thorndike v. Hesperian Orchards, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). This Court reviews de novo whether the findings of fact support the trial court's conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The right to counsel during questioning arises from the Fifth Amendment protections against self-incrimination in the federal constitution. Miranda, 384 U.S. at 469. Once a suspect in custody requests counsel, he may not be questioned until a lawyer has been made available or the suspect himself reinitiates conversation. Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981); Davis v. United States, 512 U.S. 452, 458, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). The

defendant's choice to remain silent must be "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). However, the defendant may voluntarily change his mind and talk again even after initially invoking his right to remain silent by asking for a lawyer. Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983). When a defendant reinitiates the conversation, it amounts to a voluntary waiver of one's right to remain silent. Id.

A waiver of one's right to counsel before making a statement need not be explicit, but simply must be voluntarily made. State v. Pierce, 23 Wn. App. 664, 668-69, 597 P.2d 1383 (1979). A defendant may implicitly waive his right to silence by voluntarily reinitiating a conversation. Bradshaw, 462 U.S. at 1045. For example, in Bradshaw, the United States Supreme Court found that the defendant clearly broke his silence when he initiated a conversation with police by asking, "Well, what is going to happen to me now?" Id. The Court reasoned that the defendant's question showed his desire to discuss the investigation because the question was not merely a necessary inquiry arising out of the incidents of the custodial relationship. Bradshaw, 462 U.S. at

1045-46 (followed by State v. Denton, 58 Wn. App. 251, 259-60, 792 P.2d 537 (1990)).

Ultimately, whether a waiver is valid "depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." State v. Earls, 116 Wn.2d 364, 379, 805 P.2d 211 (1991) (quoting Edwards, 451 U.S. at 482). These circumstances include the defendant's condition, his mental abilities, and police conduct. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). The test for voluntariness is "whether, under the totality of the circumstances, the confession was coerced." Broadaway, 133 Wn.2d at 132 (citing State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984)).

In this case, the trial court factually found that "the circumstances of the arrest were not unduly coercive." CP 72. The trial court also specifically found that the statement given by Abdulle occurred after he "voluntarily reinitiated conversation with Detective Hoover." CP 72.

Substantial evidence supports these findings. Abdulle was college-educated, a security guard, and had no problem understanding his right to silence. 1RP 11-14. In fact, he invoked

his rights after being presented with the incriminatory photographs. 1RP 12-16. After Abdulle asked for an attorney, Hoover said that was fine. 1RP 16; CP 71. Hoover stopped talking about the case and told Abdulle that Abdulle would have to contact Hoover if he wished to talk more. 1RP 16-17; CP 72. Hoover asked nothing more about the case and indicated that he would have then closed his notebook. 1RP 17-18; CP 72. The only "chit-chat" that then occurred between them was when Abdulle asked Hoover what they were doing and where they were going. 1RP 18-19, 29; CP 72. Even though this alone constituted a voluntary attempt to reinitiate the conversation, Hoover still did not ask any more questions about the case. See Bradshaw, 462 U.S. at 1045.

Within 10-15 minutes, on his own initiative, Abdulle explicitly told Hoover that he would talk to him about the case. 1RP 18-20; CP 72. Abdulle wanted a glass of water and a cigarette first, but testified that he did not believe he had to give a statement in exchange for these items. 1RP 52; CP 71-72. Hoover again clarified Abdulle's voluntary decision, asking if Abdulle wanted to talk to police even though he had previously exercised his rights. 1RP 19; CP 72. Abdulle confirmed that he wanted to talk. 1RP 19-20; CP 72. Abdulle then gave his statement to police, while

smoking a cigarette and having a glass of water in a parking garage at the police station. 1RP 19-20; CP 72.

All this evidence substantiates the trial court's conclusion that there was nothing unduly coercive or involuntary about Abdulle's decision to reinitiate a conversation about the case. Abdulle knew his rights and invoked them. His decision to start talking again was made explicitly and clearly. The evidence showed that Hoover honored Abdulle's rights at every point of their contact. The trial court was correct in finding that this decision was made knowingly, intelligently, and voluntarily.

b. Abdulle Waived Any Claim Of The "Missing Witness" Rule.

Abdulle raises the issue of the "missing witness" rule for the first time on appeal. While a CrR 3.5 hearing was held, this "missing witness" issue was never raised during it. Abdulle now claims that the trial court erred in not applying the "missing witness" rule, even though Abdulle never raised it before the trial court. Because he failed to raise this issue at trial, his claim is waived on appeal.

Generally, “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). Unless there was a “manifest error affecting a constitutional right,” this Court may decline to review the matter. RAP 2.5(a)(3). See State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983) (an appellate court may even decline review of an error of constitutional magnitude if the issue is specifically waived in the trial court). Permissible waivers can include a CrR 3.5 hearing. State v. Fanger, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). When a defendant seeks to suppress evidence at a pretrial hearing, he cannot then assert a significantly different theory for evidence suppression on appeal. United State v. Barrett, 703 F.2d 1076, 1086 n.17 (9th Cir.1983) (court refuses to address grounds for suppression not raised at trial level); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); 5 Wayne R. LaFave, *Search and Seizure*, § 11.1(a) at 8.

Abdulle, for the first time on appeal, challenges the trial court for not raising the “missing witness” rule during his CrR 3.5 hearing, pursuant to Erho and Davis). State v. Erho, 77 Wn.2d 553, 557-58, 463 P.2d 779 (1970), and State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968). However, Abdulle never requested that the trial court

apply the "missing witness" rule at that time. Thus, he denied the trial court the opportunity to exercise its discretion on this "missing witness" issue.

Because Abdulle did not raise the issue at trial, the record does not inform us: whether Newell even heard any aspect of the conversation between Hoover and Abdulle, where Newell was when Abdulle reinitiated the conversation, and whether there was an explanation by the prosecutor as to why he did not call Newell. Especially since the "missing witness" rule can only be raised after a defendant testifies contrary to the police officer, the State would need an opportunity to address these issues on rebuttal when a challenge is raised.

To bring this "missing witness" issue now on appeal, this Court is left without any findings by the trial court as to these factual questions; the trial court was never given an opportunity to exercise its discretion on the ultimate issue, and the record does not allow this Court to conclude that Newell would even have provided any independent evidence about the Miranda process.

Because Abdulle never raised the "missing witness" issue at the trial court level, he has waived the claim, and should not be allowed to bring it for the first time on appeal.

c. The "Missing Witness" Rule Does Not Apply.

Abdulle relies on Erho and Davis to support his premise that the trial court should have applied a "missing witness" rule for the State's failure to produce or explain the absence of another officer to corroborate Hoover's testimony. Erho, 77 Wn.2d at 553; Davis, 73 Wn.2d at 271. His reliance on these cases is misplaced.

In Davis and Erho, "the court held that where the defendant disputes the giving of the Miranda warnings and the State fails, without explanation, to call other officers who were present during the interrogation to corroborate that the warnings were given, the statement is inadmissible." State v. Haack, 88 Wn. App. 423, 433, 958 P.2d 1001 (1997) (distinguishing Davis and Erho because the case involved no claim that the Miranda warnings were defective). Davis and Erho clarified the importance of a full application of Miranda, which was mandated by the U.S. Supreme Court only two years earlier. See Erho, 77 Wn.2d at 557-58.

Our Supreme Court recognized that prior to the Miranda opinion, our Court was primarily concerned with the voluntariness of a defendant's statement. Davis, 73 Wn.2d at 284. In light of the new Miranda opinion, however, our Supreme Court created a new

"missing witness" rule to consider whether the accused was informed of these new Miranda constitutional rights, and therefore intelligently waived these rights prior to his statement. Id. In such a situation, the trier of fact may draw the inference that this "missing witness" testimony would have been unfavorable to the State as to this issue, since it is presumed that otherwise the State would have called the witness to prove that the defendant was informed of his rights. Id. at 275-76; State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991).

However, this Court "does not read Davis and Erho as requiring independent corroboration of the testimony of a police officer in every instance in which the defendant disputes the giving of the warnings and intelligent waiver of the right to remain silent." Haack, 88 Wn. App. at 433. If independent corroborating evidence exists, its absence must be presented or explained on the record. Id. Only when there is such independent evidence does the "missing witness" rule apply. Id. at 434-44.

This case does not involve independent evidence to support an application of this missing witness rule. There are no findings by the trial court, and the record does not provide sufficient evidence to establish that there was anyone who heard a defect with the

administration of Miranda. In fact, the full reading of Miranda is not disputed by Abdulle. He agrees these rights were read in full.

There are also no findings by the trial court that show Newell was even engaged in the conversation between Hoover and Abdulle.

Abdulle simply relies on the fact that Newell was driving the unmarked car as the sole basis to presume that Newell was engaged in the backseat conversation, or lack of conversation, between Abdulle and Hoover. The record does not support this presumption.

Indeed, during the relevant contact between Hoover and Abdulle, when Hoover reminded Abdulle of his rights and Abdulle confirmed that he wanted to talk, it appears that Newell was fetching a glass of water and a cigarette from inside the police station. 1RP 19-20. Not only is there no independent evidence that anyone overheard a defective administration of Miranda, but the record shows that there may not even have been a "missing witness." Because the record does not establish that independent evidence exists as to any relevant aspect of the Miranda process, and at the key moment of the conversation's reinitiation there may not even have been a "missing witness," there is no basis to apply a "missing witness" rule now to the earlier CrR 3.5 pretrial hearing.

2. THE SENTENCING COURT WAS REQUIRED TO IMPOSE A \$100 DNA COLLECTION FEE.

Abdulle contends that the \$100 DNA collection fee is not mandatory, and therefore either the trial court improperly sentenced Abdulle believing the fee was mandatory, or his trial counsel was ineffective for failing to argue the fee was not mandatory.

Abdulle's argument rests on his belief that the imposition of the DNA collection fee is permissive. As this Court has recently ruled, it is not. See State v. Brewster, \_\_\_ Wn. App. \_\_\_, 218 P.3d 249 (2009); State v. Thompson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ 2009 WL 4021935 (Wn. App., Div. 1, Nov. 23, 2009).

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

*Every sentence* imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.

RCW 43.43.7541 (emphasis added).

This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (2008 c 97 § 3, eff. June 12, 2008). Abdulle

committed his crimes on June 8, 2008, was found guilty on May 14, 2009, and sentenced on June 12, 2009.

Abdulle asserts that because he committed his criminal acts on June 9, 2008,<sup>4</sup> prior to the new statute's effective date on June 12, 2008, a former version of RCW 43.43.7541 is applicable, a version of the statute that made the imposition of the DNA fee permissive rather than mandatory.<sup>5</sup>

RCW 43.43.7541 requires the trial court to impose the fee for all sentences occurring after enactment of the statute, regardless of the date of offense or conviction. Contrary to Abdulle's arguments, the statute does not violate the savings

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<sup>4</sup> Abdulle inadvertently references his incident date in error as being "in February 2008" instead of the correct June 8, 2008. CP 6-7; Appellant's Brief at 26.

<sup>5</sup> The former version reads in pertinent part:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4).

clause, *ex post facto* clause, or RCW 9.94A.345. Abdulle's arguments are not consistent with the current law.

a. The Savings Clause Does Not Apply.

Abdulle argues that the savings clause applies to the DNA collection fee. However, this Court has recently held that "[t]he saving clause does not apply to the DNA collection fee statute." Brewster, 218 P.3d at 251-52 (2009). A trial court properly applies the version of the statute in effect at the time of sentencing, not at the time of offense. Id.; Thompson, *supra*.

The savings clause provides that a criminal or penal statute in effect on the date a crime is committed controls, unless the amended or new statute declares otherwise.<sup>6</sup> See State v. Kane, 101 Wn. App. 607, 612-13, 5 P.3d 741 (2000).

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<sup>6</sup> In pertinent part, the savings clause reads as follows:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be

In State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007), a similar claim was made, that the savings clause prohibited the Legislature's new procedures, with juries finding facts for purposes of imposing an exceptional sentence. The Supreme Court rejected this claim, holding that RCW 10.01.040 applies only to substantive changes to the law, not to procedural ones. Pillatos, 159 Wn.2d at 472.

In applying RCW 10.01.040, the Supreme Court does "not insist that a legislative intent to affect pending litigation be declared in express terms in a new statute;" rather, such intent need only be expressed in "words that fairly convey that intention." Kane, 101 Wn. App. at 612 (citing State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)); see also State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

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punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

In Zornes, the Supreme Court held that a newly enacted drug law controlled cases pending at the time of the enactment of the statute, even though the law was not in effect at the time of the commission of the crime. The Zornes, a husband and wife, were convicted under a drug statute pertaining to "narcotic drugs," for their possession of marijuana. The particular amendment to the drug statute, enacted while the Zornes' case was pending, stated that "the provisions of this chapter [the narcotic drug statute] shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. The Court found it could reasonably be inferred that the Legislature intended the amendment, by use of this language, to apply to pending cases as well as those arising in the future. Zornes, at 13-14, 26.

In Grant, a new statute provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." Grant, 89 Wn.2d at 682. The policy behind the statute was that alcoholics and intoxicated persons should receive treatment rather than punishment. Grant was convicted of being intoxicated on a public highway. The Supreme Court held that this new statute applied to Grant's case that was pending at the time of the enactment of the statute. The

Court found that the language of the statute fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684.

Here, the statutory language clearly shows that the Legislature intended RCW 43.43.7541 to apply to "every sentence" imposed after the effective date of the statute, regardless of the date the offense was committed. In the original version of RCW 43.43.7541, the Legislature put in specific language that indicated that the statute applied only to crimes "committed on or after July 1, 2002." In amending the statute, the Legislature removed any reference to when the crime was committed. This in itself indicates that the Legislature did not intend the date a crime is committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the Legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the Legislature thought such a provision necessary, it would have included it within the statute's text).

In addition, the statute specifically says it applies to "[e]very sentence" imposed under the Sentencing Reform Act. The term

"every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985).<sup>7</sup>

Finally, the amendment to the statute pertaining to the DNA collection fee is consistent with, was done in conjunction with, and refers directly to, the amendment to RCW 43.43.754, the statutory provision regarding the actual collection of DNA samples. Under RCW 43.43.7541, the DNA collection fee is mandatory for crimes specified in RCW 43.43.754. The 2008 amendment to RCW 43.43.754 expanded the crimes for which a DNA sample is required to be taken. See RCW 43.43.754 (2008 c 97 § 2, eff. June 12, 2008). The Legislature stated, in pertinent part, that "[t]his section applies to. . .[a]ll adults and juveniles to whom this section applied prior to June 12, 2008." RCW 43.43.754(6)(a). The former version of RCW 43.43.754 referred to by the 2008 amendment applied to "[e]very adult or juvenile individual convicted of a felony." Former RCW 43.43.754(1) (2002 c 289 § 2). Thus, the Legislature made it

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<sup>7</sup> See also In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) ("*Expressio unius est exclusio alterius*, 'specific inclusions exclude implication.' In other words, where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions.").

clear that RCW 43.43.7541 and RCW 43.43.754 applied to crimes committed both before and after June 12, 2008.

For these reasons, and as the Court recently held in Brewster and Thompson, the mandatory DNA collection fee does not violate the savings clause.

b. The *Ex Post Facto* Clause Does Not Apply.

Abdulle also argues that imposition of the DNA collection fee violates *ex post facto* laws. This Court has recently held that "state and federal constitutional prohibitions against *ex post facto* laws are not a basis for avoiding the application of the 2008 [DNA collection fee] amendment." Thompson, 2009 WL 4021935 ¶ 36. This is because "the *ex post facto* clauses of the federal and state constitutions apply only to punitive laws . . . and the DNA fee is not punitive." Id.

The *ex post facto* clause of the federal and state constitutions<sup>8</sup> forbids the State from enacting a law that imposes a

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<sup>8</sup> U.S. Const. art. 1, § 10, cl. 1; WA Const. art. I, § 23.

punishment for an act that was not punishable when the crime was committed, or that increases the quantum of punishment for the crime beyond that which could have been imposed when the crime was committed. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Not every sanction or term of a criminal sentence constitutes a criminal penalty or punishment, and if a sanction or term is not a penalty or punishment, the *ex post facto* clause does not apply. Ward, 123 Wn.2d at 498-99; Johnson v. Morris, 87 Wn.2d 922, 928, 557 P.2d 1299 (1976); In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

For example, the Legislature's increase of the mandatory victim penalty assessment from \$100 to \$500 was held not to constitute punishment, and thus, imposition of the \$500 amount for crimes committed before the increase in the amount was not a violation of the *ex post facto* clause. State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998), reversed on other grounds, 139 Wn.2d 53, 62, 62 n.1, 983 P.2d 1118 (1999) (the Supreme Court stating that the assessment was not a "penalty" and "would

not, therefore, constitute punishment for the purposes of an *ex post facto* determination").<sup>9</sup>

In determining if a term of sentence imposes a "punishment," courts look first for legislative intent. If the Legislature intended the sanction as punishment, then the inquiry stops, and the *ex post facto* clause applies. Metcalf, 92 Wn. App. at 178. Abdulle cannot show a punitive effect here because the Legislature clearly did not intend either the collection of the DNA sample, or the imposition of the \$100 collection fee, to be a criminal penalty. As the 2SHB 2713 Final Bill Report states, the purpose of the creation of a DNA database is to "help with criminal investigations and to identify human remains or missing persons." The fee is simply intended to fund the creation and maintenance of the database. See 2SHB 2713 Final Bill Report; RCW 43.43.7541.

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<sup>9</sup> See also State v. Blank, 80 Wn. App. 638, 640-42, 910 P.2d 545 (1996) (law requiring convicted indigent defendants to pay appellate costs not punishment and did not violate *ex post facto* provisions), cited with approval in, State v. Blank, 131 Wn.2d 230, 250 n.8, 930 P.2d 1213 (1997); Ward, 123 Wn.2d at 488 (law requiring sex offenders to register was not punishment and did not violate *ex post facto* provisions); In re Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998) (law requiring deductions from prisoner's wages and funds to pay for cost of incarcerations not punishment and did not violate *ex post facto* provisions); State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (law authorizing civil forfeiture of property used to facilitate drug offenses not punishment and did not violate *ex post facto* provisions).

For these reasons, and as this Court recently held in Thompson, the \$100 DNA collection fee is not punitive, and thus the *ex post facto* clause does not apply. The trial court properly imposed the DNA collection fee at sentencing.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Abdulle's conviction and sentence.

DATED this 23rd day of December, 2009.

Respectfully submitted,

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