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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'l 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

[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]

[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

[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

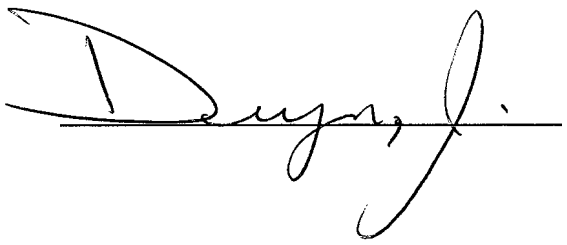
> some sort of specific analysis. What they have is a firearms examiner who works for the Washington State Patrol Crime Lab who says it's a match, it's a match, it's forever to be a match.

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: