

NO. 36984-2-II

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY *TR*
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DONNELL W. PRICE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 06-1-04159-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where the court conducted individual questioning of a juror in open court, on the record, did the court violate the defendant's right to a public trial or the right of the public to attend his trial?
2. Whether the note written by the victim qualified as an exception to the hearsay rule as a statement under belief of impending death?
3. Whether the defendant's right to confront a witness prevented admission of the note in evidence?
4. If admission of the note was error, was it harmless error?
5. Whether any error in the court's finding that the defendant forfeited his confrontation right by wrongdoing was harmless error?

B. STATEMENT OF THE CASE.

1. Procedure

On September 5, 2006, the State charged Donnell Price, hereinafter referred to as the defendant, with one count of murder in the first degree and one count of unlawful possession of a firearm (UPF). For the purpose of a firearm sentencing enhancement (FASE), the State alleged that the

defendant was armed with a firearm. The State also alleged aggravating factors of deliberate cruelty and intimidation of a witness. CP1.

On August 13, 2007, the case was assigned to the Hon. Frederick Fleming for trial. RP. During jury selection, juror 31 requested to discuss an issue in private. 8/15/07. RP 55. Jury selection continued. Later, the court excused the rest of the venire panel for the day so that juror 31 could be questioned privately. 8/15/07 RP 73. Juror 31 was examined and excused for cause. 8/15/07 RP 79.

Before trial began, the parties argued the admissibility of a handwritten note found at the scene. The state sought admission of the note as a dying declaration. RP 137-143. The defendant opposed admission of the note. RP 146-152. The court ruled that the note would be admissible, provided the State could lay the proper foundation. RP 153-155.

At the conclusion of the trial, the jury found the defendant guilty of murder in the first degree and UPF, as charged. CP 85, 86. In special verdicts, the jury also found that the defendant was armed with a firearm and that the crime was committed to intimidate a witness. CP 87, 89.

On October 19, 2007, the court sentenced the defendant to a total of 494 months in prison. CP 90-101. The sentence included 60 months for the FASE. The court also imposed an additional 60 months exceptional sentence, per the jury finding that the crime was for the purpose of intimidating a witness. CP 111-113.

On November 16, 2007, the defendant filed a Notice of Appeal from this judgment. CP 102-103.

2. Facts

On September 3, 2006, at 5:13 a.m., Tacoma 911 got a call from a woman, who later identified herself as Olga Carter, reporting domestic violence involving her boyfriend. 3 RP 191.¹ The call abruptly ended. Minutes later, she called back and reported that her boyfriend, Donnell Price, was the perpetrator. Exh. 10 (Appendix A). The 911 operator could hear the defendant yelling in the background. Carter told 911 that she had to go. Carter asked for help and told 911 that the defendant had a gun. *Id.* Based upon the 911 calls, Tacoma Police were dispatched to the defendant's home, 4507 So. Sheridan, in Tacoma. 3 RP 191.

Police officers arrived at the house minutes later, at approximately 5:18 a.m. The officers approached cautiously, watching the front of the house. 4 RP 221. They could see a man come to the door and stand in the open door, his arm partially out the door. 4 RP 222. Officers could hear a man and woman arguing. 4 RP 223. A male voice said something about seeing flashlights outside. A female voice responded that no one was outside. 4 RP 224.

¹ Report of the trial proceedings will be referred to by volume and page number. They are labeled Vol. 1 of 14, etc. The pages of all 14 volumes are numbered sequentially, beginning with 1. This will help distinguish the trial record from the Report of the jury selection proceedings, labeled Vol. 1 of 3, etc. Those pages are also numbered sequentially, beginning with 1.

Police then saw a black male, later identified as the defendant, come to the door and momentarily step out. 4 RP 225. Officer Borges shined his flashlight on him and announced “Tacoma Police.” 4 RP 226. The defendant went inside and slammed the door. *Id.*

A few seconds later, police heard a woman scream. 4 RP 227. Three officers quickly approached the front door. 4 RP 229. Two went to cover the back of the house. 4 RP 338. At the front door, Officer Kelly loudly knocked on the door and announced the presence of the police. 5 RP 382. He demanded the occupants come to the door. 5 RP 384.

The officers at the front door decided to breach the door. Officer Kelly kicked in the door. 5 RP 382. Officer Ovens stepped across the doorway into the small house. 4 RP 313. As he did so the officers heard one gunshot. 4 RP 230, 5 RP 386. Officer Kelly continued to announce police presence and to direct the occupants to come out. 5 RP 387. Police took up defensive positions back by the street.

Additional officers arrived, including a negotiator. 4 RP 317. Officer Thiry used the siren, lights, and public address system of his patrol car to announce the police presence and to call on the occupants of the house to come out. 5 RP 390, 6 RP 493. For 30 minutes, Officer Thiry repeated requests over the PA system that the occupants either come out or pick up the phone to speak with the negotiator. 6 RP 495. No one responded.

At approximately 8 a.m., the defendant finally came out the front door. 5 RP 394, 395, 6 RP 516. Police entered the house to clear it. 5 RP 396. Olga Carter was found on the floor in the utility room. 5 RP 397. She was dead. 5 RP 400. Her body was in a large pool of blood. Her skin was ashen. 5 RP 398.

Olga Carter died of the single gunshot wound. 7 RP 673. The fatal wound was a contact gunshot wound to her neck. 7 RP 661. The gun had been placed against her neck, pointed upward. 7 RP 661, 665. The bullet traveled upward, through her throat, cervical vertebrae and spinal cord. 7 RP 669-670. It broke up and entered her brain, damaging several different parts. 7 RP 670.

Police found a handwritten note on a table. 8 RP 731. The note was in Olga Carter's handwriting. 4 RP 281, 297. It was on paper torn from a notebook in her purse. 7 RP 589. It had her fingerprints on it. 8 RP 738.

The note read:

"To AuBriana / From: Olga / Mommy / Mommy Luv. . .
Mr. Price / Shot Me Dead. . . He thought / I Fooled Around
/ A Gun to my Head."

Exh. 4 (Appendix B).

The evidence showed that the defendant was in extreme close proximity to Carter when he shot her. The defendant had blood on his hands and "blow-back" powder from the gun on his shirt. 6 RP 556, 559. The defendant had held the gun so close when he shot Carter that there

were powder burns on his shirt and chest. 6 RP 556, 598, 693. There was blood transfer on the defendant's jeans and t-shirt. 8 RP 742.

C. ARGUMENT.

1. WHERE THERE WAS NO CLOSURE OF THE COURTROOM, THERE WAS NO VIOLATION OF THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL.

Criminal defendants have a right to a public trial. The *Sixth Amendment* to the United States Constitution, and article I, section 22 of the Washington Constitution, both protect a defendant's right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); *Waller v. Georgia*, 467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984); *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). The right to a public trial applies not only to the evidentiary phase of a criminal trial, but also to other proceedings such as jury voir dire. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L.Ed.2d 608 (1999); *Press-Enterprise v. Superior Court of California*, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984) ("Press-Enterprise I"); *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

Without weighing the five factors listed in *State v. Bone-Club*, *supra*, the court may not close the trial or courtroom to the public. The *Bone-Club* factors are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

128 Wn.2d at 258-59.

The 5 factor test for an open courtroom as part of a public trial was first articulated in a press-access case, *Seattle Times v. Ishikawa*, 97 Wn. 2d 30, 640 P.2d 716 (1982). There, the two Seattle newspapers were covering a murder trial. The defendant had brought a motion to dismiss and wanted the courtroom closed during argument. After the prosecutor and defense counsel discussed the issue in chambers with the judge, the court reconvened to give the press representatives an opportunity to be heard. The court then excluded the press and public. It heard the testimony and arguments in a closed courtroom and sealed the record.

The Supreme Court held that the trial court should have conducted a more detailed inquiry before closing the courtroom. The Court articulated the 5 factor test later adopted in *Bone-Club. Ishikawa*, 97 Wn. 2d at 37-39.

A few years later, in *Allied Newspapers v. Eikenberry*, 121 Wn. 2d 205, 848 P.2d 1258 (1993), the Supreme Court was again presented with a press access issue. There, the issue was not a closed courtroom but a recently enacted statute limiting press access to witness information. The statute was intended to protect child victims of sexual assault by prohibiting disclosure of their names to the press or public. The Supreme Court struck down the statute as unconstitutional. In so holding, the Court repeated the principles of public trials regarding news organizations and repeated the 5 factor test from *Ishikawa. Eikenberry*, 121 Wn. 2d at 210-211.

In *Bone-Club*, the defendant was charged with several drug felonies. In a pretrial suppression hearing, the state requested that the courtroom be cleared before an undercover officer testified. The court ordered all spectators out of the courtroom. After his conviction, the defendant appealed, arguing that the full closure of the courtroom without balancing the interests involved violated his constitutional right to a public trial. The Supreme Court agreed. It held that the trial court could not close the courtroom without conducting the 5 part test articulated in *Eikenberry* and *Ishikawa. Bone-Club*, 128 Wn. 2d at 259.

The Supreme Court first applied the *Bone-Club* analysis to jury selection in *In re Orange, supra*. There, the defendant was charged with several violent felonies including murder in the first degree, attempted murder in the first degree, and assault in the first degree. The trial court tried to balance or resolve space limitations for the venire panel with the interests of both the defendant's and victim's families to attend the trial. The court was also faced with trying to keep the families separated to avoid potential conflict. The court ruled that no family members or spectators would be allowed in the courtroom during jury selection. 152 Wn. 2d at 802. Using the *Bone-Club* analysis, the Supreme Court reversed, holding that the trial court erred by closing the courtroom during jury selection. *Orange*, at 812.

The following year, the Supreme Court addressed a similar issue in *State v. Brightman*. Brightman was charged with murder in the second degree. As in *Orange*, the trial court had to deal with trying to fit a large venire panel into the limited space of the courtroom and try to accommodate the wishes of family members or interested parties who wished to attend the proceedings. The court resolved the issue by excluding "the friends, relatives, and acquaintances" during jury selection. *Brightman*, 155 Wn. 2d at 511. The Supreme Court reversed the conviction, holding that the trial court was required to do a *Bone-Club* analysis before closing the courtroom during jury selection. *Brightman*, at 509.

The line of cases that discuss the right of the defendant and the public to open trials of course assumes that the courtroom was closed, or, in the most recent line of cases, including *State v. Frawley*, 140 Wn. App.713, 167 P.3d 593 (2007), persons were in some way excluded. The *Bone-Club* factors discuss what a *proponent* must demonstrate, a *proponent's* interest, opportunity of those present to object to *closure*, and the breadth of the court's *order*. 128 Wn. 2d at 258-259.

To determine if a courtroom is closed, courts look to the plain language of the closure request and order. *In re Orange*, 152 Wn.2d at 808 (“Looking solely at the transcript of the trial court's ruling..., the court ordered a permanent, full closure of voir dire”). There, the court clearly ordered that the families and spectators would be excluded: “That’s my ruling.” *Id.* In *State v. Brightman*, 155 Wn.2d at 516 (“[O]nce the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed.”). There, the court brought up the issue of limited space and excluded them, saying “...they can’t observe that.” *Id.*, at 511. In *State v. Easterling*, 157 Wn. 2d 167, 137 P.3d 825 (2006), the closure occurred in a pretrial motion by the co-defendant, rather than in jury selection. There, co-defendant’s counsel requested, and the court ordered, the courtroom cleared for the motion. *Id.*, at 172. Similarly, in *Bone-Club*, the prosecutor

requested the courtroom be cleared for the pretrial hearing, and the court so ordered. 128 Wn. 2d at 256. *See, also United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (“The denial of a defendant’s Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.”) (quoting *United States v. Al-Smadi*, 15 F.3d 153, 155 (10th Cir. 1994)).

The individual questioning of the juror in the current case is similar to the circumstances in *State v. Vega*, 144 Wn. App. 914, 184 P.3d 677 (2008). There, individual questioning occurred in an open courtroom outside the presence of the rest of the venire panel. The Court of Appeals held that no weighing of the *Bone-Club* factors was necessary. *Id.*, at 917.

In the present case, the defense counsel asked juror 31 about living near the crime scene. Juror 31 asked if they could discuss the issue “in back”, indicating that he wished to discuss it in private. 8/15/07 RP 55. The court and parties continued with general questioning.

Later, the court excused the venire panel for the day, except for juror 31. All the parties were still in the open courtroom. Unlike most of the cases discussing the open trial issue, no action was taken to exclude anyone. Unlike *Bone-Club* or *Easterling*, neither counsel requested the court be cleared or closed. Unlike *Orange* or *Brightman*, the court did not order it. The court did not order anything. The judicial assistant asked who

the person in court was, and whether she was a witness. 8/15/07 RP 73. The prosecuting attorney identified her as the victim's mother. *Id.* The prosecutor then asked her, the only spectator present, if she had any objection to "stepping out" while they questioned the juror. 8/15/07 RP 74. The spectator had no objection. She asked and was informed when general jury selection would begin again. 8/15/07 RP 74. No one told her to leave. No one told her not to come back.

The court in the present case remained in the courtroom, on the record. This approach was approved by the Court of Appeals, Division III in *Vega*, and by Division II in *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008). In *Erickson*, while reversing the conviction for conducting individual juror questioning in the jury room, the Court noted that "the better practice is to question individual jurors regarding sensitive topics separate from the rest of the prospective jurors but within the courtroom." *Id.*, at 211, n.8, citing *Vega*, at 679.

Several recent Court of Appeals cases have discussed the proper procedure for conducting private questioning of jurors in compliance with the principle of a public trial, and with *Bone-Club*. In each case, the trial court conducted private questioning of jurors on the record, but in chambers or the jury room. While the circumstances involved in the cases are similar to each other, the holdings differ. In *State v. Momah*, 141 Wn. App. 705, 171 P.3d 1064 (2007), the defendant was tried on two counts of

indecent liberties, one count of second degree rape, and one count of third degree rape. Defense counsel asked that all jurors be questioned individually so that if one potential juror had information that would disqualify him as a juror, the rest of the jury venire would not be contaminated. *Id.* at 710. Additionally, some jurors specifically requested to be questioned individually. *Id.* Over the course of the day, the court individually interviewed prospective jurors, first in chambers and later in the jury room. *Id.* at 710, 711. During at least one interview the chambers' door was closed, however, the record is silent in subsequent interviews whether the door was open or closed. *Id.*

In *Momah*, the Court of Appeals, Division I, noted the trial court did not close the courtroom in violation of controlling case law. *Id.* at 711. Instead, the trial court allowed individual voir dire 1) to avoid the questioning of one prospective juror from tainting the other members of the jury venire, and 2) in response to the express request of individual jurors for individual questioning. *Id.* at 712.

In reviewing the trial transcript, the *Momah* court determined that the trial court made no statement or order to close the courtroom which would have triggered the application of the *Bone-Club* factors, or shifted the burden to the State to prove the proceeding was open. *Id.* at 714. "There is simply no indication in the record that individual questioning was for the purpose of excluding either the press or the public from this

trial.” *Id* at 712. The **Momah** court also noted that the record did not indicate that any member of the public or press attempted to enter the courtroom and was excluded. *Id*.

In the present case, like **Momah**, the trial court made no order or ruling to close the courtroom from the public or the press. 8/15/07 RP 73-74. As in **Momah**, the courtroom was not closed, therefore the trial court did not need to engage in a **Bone-Club** analysis, nor did the burden shift to the State to prove the proceeding was open.

At nearly the same time that Division I was considering and deciding **Momah**, Division III had two similar cases before it. **State v. Frawley**, 140 Wn. App. 713 167 P.3d 593 (2007) was a murder case. Prospective jurors filled out a questionnaire. The trial court, counsel and the court reporter interviewed some of the prospective jurors in chambers regarding some of the answers to their respective questionnaires. Even though the defendant had waived his right to this public trial aspect of jury selection, the Court of Appeals held that the procedure violated the constitutional principle of a public trial and the holdings in **Brightman** and **Orange. Frawley**, at 720. The Court reversed the conviction.

In **State v. Duckett**, 141 Wn. App. 797, 173 P.3d 948 (2007), the defendant was charged with two counts of rape and one count of first degree burglary. As in **Frawley**, the trial court conducted individual juror interviews in the jury room. The interviews were regarding their responses

to a questionnaire that asked about personal experiences with sexual abuse. Again, Division III held that the procedure resulted in a closed courtroom. *Duckett*, at 801. The Court reversed the conviction, citing *Bone-Club. Id.*, at 804.

In *State v. Erickson*, *supra*, Division II agreed with the holdings in *Frawley* and *Duckett*. The Court held that private questioning of the jurors in the jury room acted as closure of the courtroom for purposes *Bone-Club. Erickson*, 146 Wn. App. at 209.

State v. Hagler, 147 Wn. App. 97, 193 P.3d 1108 (2008) involved a *Batson*² challenge, not private questioning of jurors. However, the court heard the arguments in the jury room, out of the presence of the venire panel and the public. Again, Division II held that this procedure violated the defendant's right to a public trial. *Id.*, at 106.

In *State v. Wise*, 148 Wn. App. 425, 200 P.3d 266 (2009), Division II held that the trial court was not required to do a *Bone-Club* analysis before conducting private juror questioning in chambers. *Id.*, at 436. The Court went on to hold that even if the trial court improperly closed the courtroom, the defendant, by conduct, waived his right to have all the jury questioning done in open court. *Id.*, at 437. The Court went on to find that the defendant lacked standing to assert the public's right to his public trial. *Id.*, at 443.

² *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In the present case, the trial court did not excuse, remove, or ban any family members, press, or other spectators from the courtroom. The court did not conduct individual juror questioning in chambers or the jury room. The court did not close the courtroom. It committed no error.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE VICTIM'S HANDWRITTEN NOTE AS A STATEMENT UNDER BELIEF OF IMPENDING DEATH.

Statements made by persons under their belief of impending death, also referred to as “dying declarations”, have long been an exception to the hearsay rule. *See*, ER 804(b)(2): *Crawford v. Washington*, 541 U.S. 36, 56, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State v. Shafer*, 156 Wn.2d 381, 389 n. 7, 128 P.3d 87 (2006).

A court's determination of the admissibility of a dying declaration is reviewed for abuse of discretion. *State v. Johnson*, 113 Wn. App. 482, 490, 54 P.3d 155 (2002). Abuse of discretion occurs where the court's decision is manifestly unreasonable or based on untenable grounds. *Id.* The defendant has the burden to prove that a court abused its discretion in admitting evidence as an exception to the hearsay rule. *State v. Williams*, 137 Wn. App. 736, 743, 154 322 (2007).

A statement under belief of impending death need not be made immediately before death, or while the declarant is “breathing her last”. *State v. Power*, 24 Wash. 34, 44, 63 P. 1112 (1901). In *Power*, the woman victim made her statement 2 days before her death.

Power was charged with manslaughter resulting from a death from abortion treatment. The victim was described as weak and without strength shortly after the treatment. There was testimony that she felt she “could not last long” and “had given up hope”. However, the defense elicited that the victim never said that she believed that she was going to die, nor that she said anything to demonstrate that she believed death was impending. *Id.*, at 44. The trial court admitted her statements as dying declarations. In affirming the trial court’s decision that the statement was admissible under the exception, even though made days before the declarant’s death, the Supreme Court stated that:

The rule is satisfied when it is shown that the declarant died in the course of the illness from which she was suffering at the time they were made, and that the illness from which she was suffering was the direct and proximate result of the original injury which the declarations tend to illustrate.

Id., at 44-45.

The statement can be a writing made by another. *State v. Swartz*, 108 Wash. 21, 182 P. 953 (1919). In *Swartz*, the victim went to the defendant doctor’s “sanitarium” for an abortion. The defendant conducted a procedure and administered drugs to the girl. The treatment left the girl

weak and bleeding. She was taken home. Another doctor was called to treat her injuries. That doctor took down a summary from the girl as to what had happened, and what Dr. Swartz had done as far as the girl could remember. The girl later died from the effects of the abortion treatment. Although the case reflects that the girl felt ill, the case does not say that the girl thought death was impending.

Dr. Swartz was charged with manslaughter. The trial court admitted the written statement against Swartz as a dying declaration. Swartz was convicted. She appealed. The Supreme Court agreed that the victim's statement to the second doctor was admissible as a dying declaration. *Id.*, at 25-26. The conviction was reversed on grounds other than the dying declaration.

Olga Carter used her cell phone to call 911 from the home of the defendant three times in short succession. The calls reflect fear and a desperate situation. Ms. Carter said that she was reporting "domestic violence," and that she "can't talk right now." Exh. 10 (Appendix A).

At approximately 5:16 a.m., Ms. Carter again called 911 from her cell phone. In this call, she gave the defendant's address, and repeated that "domestic violence" is going on. She told the operator that she was upstairs, and he was downstairs. She identified herself. She then said: "I gotta go." A male voice could then be heard in the background. She confirmed that the male voice is "him," and identified him as Donnell Price. She then repeated that she had to go. She repeated the defendant's

address, and told the operator that her green Grand Am car was in front of the residence. Her last words on the tape recording of the 911 call were: “Please. Thank you, come on, he has a gun please.” She then hung up. Again, toward the end of that call, a male voice could be heard in the background. Exh. 10 (Appendix A).

On a high table in the kitchen, not far from where Ms. Carter was found, a note was discovered. 8 RP 731. The note was on a piece of paper that had been torn from a planner or address book in her purse. 7 RP 589; Exh. 4 (Appendix B). The note read:

“To AuBriana / From: Olga / Mommy / Mommy Luv. / Mr.
Price / Shot Me Dead / He thought I Fooled Around A
Gun to my Head.”

Carter’s daughter, who was 16 years old at the time, is named Aubriana. 4 RP 289.

The trial court had before it the 911 tape, the transcript and the written note. Ms. Carter was in great fear. In fear for her life, she wrote a hasty note to her daughter, explaining what she believed was about to happen to her. The writing itself and content and circumstances of the 911 calls support the court’s conclusion that Ms. Carter believed her death was imminent. Because the writing pertained only to the cause or circumstances of her death, the note was properly admitted as a dying declaration.

3. **CRAWFORD** DOES NOT PREVENT ADMISSION OF THE VICTIM'S NOTE INTO EVIDENCE.

- a. Because the dying declaration exception to the hearsay rule is long-established and pre-existing the Sixth Amendment, **Crawford** does not apply.

In his brief, the defendant essentially argues for the end of the dying declaration as an exception to the hearsay rule. App. Br. at 32-33. However both the U.S. and the Washington Supreme Courts recognize the significance and acceptance of this long-standing exception.

In **Crawford**, the Supreme Court noted the almost unique nature of the dying declaration as a historical exception to the hearsay rule. 541 U.S. at 56, n. 6. Recognizing the longtime existence of the exception, the Court stated: "Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are." *Id.* Recently, in **Giles v. California**, -- U.S. --, 128 S. Ct. 2678, 171 L.Ed 2d 488 (2008), the U.S. Supreme Court again recognized that the right of confrontation did not prevent the admission of a dying declaration. 128 S. Ct. at 2682.

Long before **Crawford**, the Washington Supreme Court recognized that because of the historical acceptance of the dying declaration as an exception to the hearsay rule, the constitutional provision for confrontation of witnesses did not exclude them. **State v. Baldwin**, 15 Wash. 15, 19, 45

P. 650 (1896). In *Shafer, supra*, the Washington Supreme Court noted that *Crawford* recognized dying declarations as a type of statement considered non-testimonial. 156 Wn. 2d at 389, n.7. Despite opportunities to discuss, limit, or even dispense with the dying declaration as a hearsay exception, neither the U.S. nor Washington Supreme Courts have done so.

b. The note is not “testimonial” under *Crawford v. Washington*.

In *Crawford v. Washington*, the United States Supreme Court held that, where testimonial hearsay is at issue, the *Sixth Amendment* confrontation clause applies. 541 U.S. at 69. However, while the court gave some examples, the Court chose not to define “testimonial”. *Id.*, at 68. Earlier in the opinion, the Court gave some examples of a “core class” of testimonial statements, such as affidavits, depositions, custodial examinations, and confessions. *Id.*, at 51-52. The Court also described statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial as being testimonial. *Id.*, at 52.

In *State v. Shafer*, 156 Wn. 2d 381, 389 n. 7, 128 P.3d 87 (2006), the defendant was charged with child rape. The trial court permitted the victim’s mother to testify as to the statements the victim made in

disclosing the abuse. The Washington Supreme Court used the examples given in *Crawford*. Even though the child victim was reporting wrongdoing to her mother and a family friend, the Court held that the statements were not testimonial under *Crawford. Shafer*, 156 Wn. 2d at 389-390.

On their face, the child victim's statements regarding abuse would not seem to be a "casual remark" to an acquaintance or family member as described in *Crawford*. However, the *Shafer* court looked at the child's statements in that context. *Shafer*, 156 Wn. 2d at 389-390. The Court noted that a common theme for determining whether a statement is testimonial is some degree of involvement by a government official. *Id.*, at 388-389. The Court noted that the police were not involved in taking the statement and that the child had no reason to expect her statements would be used at trial. *Id.*, at 390.

In *State v. Hopkins*, 137 Wn. App. 441, 154 P.3d 250 (2007), the facts were similar to *Shafer*. The defendant was also charged with raping a young child. The child did not testify, but the trial court had admitted the child's statements to family members. Although reversing on other grounds, the Court of Appeals found that the child's statements to family members were not testimonial under *Crawford. Id.*, at 454, citing *Shafer*.

The Washington and U.S. Supreme courts have held that certain statements actually made to law enforcement are not testimonial under *Crawford*. In *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L.Ed 2d 224 (2006), a woman called 911 to report that her boyfriend was beating her. The 911 operator called her back and questioned her regarding the facts of the incident, and information regarding the defendant's identity, description, and location. The U.S. Supreme Court held that these statements were not testimonial under *Crawford*.

In *State v. Ohlson*, 162 Wn. 2d 1, 168 P.3d 1273 (2007), two girls were standing on a sidewalk. The defendant drove his car onto the sidewalk directly at them. Police were called and responded to the scene. The first officer on scene questioned the girls. The defendant was charged with assault. At trial, the officer testified as to the statements the girls made. Despite being made to a police officer investigating a crime, the Supreme Court held that the statements were not testimonial under *Crawford*. The Court discussed the "primary purpose" test to determine which police interrogations produce testimonial statements. *Ohlson*, at 11-12.

The content and context of the note in the present case show that it is not testimonial. It does not fall under any of the categories of typical testimonial statements discussed in *Crawford*. The statements directly

made to law enforcement in *Davis* and *Ohlson* were far more “testimonial” in that an objective person would think that those statements would be available for later use at trial, yet those statements were held to be non-testimonial. If anything, Carter’s note is analogous to the statements in *Shafer* and *Hopkins*, where the non-testifying person is reporting an incident to a family member, not for the purpose of alerting law enforcement or later use at trial.

It was unnecessary for Carter to leave a note to identify her assailant or tell police what had happened. Carter had called 911 at least twice to report the domestic violence occurring and to request police help. She had identified the defendant as her assailant and reported that he had a gun. She knew the police were outside the house. Officers were knocking loudly, identifying themselves. Police breached the door and began to enter. They were just down the hall when the defendant shot Ms Carter. The defendant was the only person in the house other than Carter. There was no question regarding the identity of her assailant.

The note is addressed specifically to a family member, Carter’s daughter, not to police or even to whomever found the note. It contains an expression of affection and an explanation of the circumstances of her death. The note was meant to explain to her daughter how she died, not provide information to police or a court later.

4. EVEN IF ADMISSION OF THE NOTE WAS ERROR, IT WAS HARMLESS ERROR.

Erroneous admission of hearsay evidence may be harmless. Under the “overwhelming untainted evidence” test, the appellate court can avoid reversal on merely technical or academic grounds. *State v. Watt*, 160 Wn. 2d 626, 636, 160 P.3d 640 (2007), citing *State v. Guloy*, 104 Wn. 2d 412, 426, 705 P.2d (1985). *See, also State v. Mason*, 160 Wn. 2d 910, 927, 162 P.3d 396 (2007), abrogated on other grounds by *Giles v. California*, -- U.S. --, 128 S. Ct. at 2688.

There is no question in this case that the defendant killed Olga Carter. He was the only other person in a house surrounded by police when the fatal shot was fired. He was holding Carter so close that the powder from the gunshot burned through his shirt and burned his chest. He had Carter’s blood on his clothes. His gun had Carter’s blood and tissue in it.

Premeditation requires thought of “more than a moment in time...however long or short, in which a design to kill is deliberately formed.” WPIC 26.01.01. *See, State v. Clark*, 143 Wn. 2d 731, 24 P.3d 1006 (2001). In this case, jurors heard Carter’s 911 calls where she was terrified of the defendant. Carter reported that the defendant was committing domestic violence. The tape showed that she was terrified and

begging for help. Her last words were: "He has a gun. Please." The tape reflected that she was frightened that the defendant would find out that she had called police. This was born out when police arrived and Carter had to re-assure the defendant that there was no one outside. Once the police announced their presence, the defendant slammed the door.

It took a matter of seconds for police to reach the door. It took more seconds for police to knock and announce at the door. Again, seconds passed as police breached the door and called on the defendant to surrender. Then the defendant put the gun to Carter's neck and killed her. The jury could easily conclude from all the evidence that the defendant was planning to kill Carter for calling the police.

5. ANY ERRONEOUS FINDING BY THE COURT OF FORFEITURE OF CONFRONTATION BY WRONGDOING WAS HARMLESS.

Washington adopted the doctrine of forfeiture by wrongdoing in *State v. Mason*, 160 Wn. 2d at 925. Shortly thereafter, in *Giles v. California*, the U.S. Supreme Court narrowed the application of that doctrine to cases where the defendant specifically acted to prevent the witness from testifying. *Giles*, 128 S. Ct. at 2688.

In the present case, the prosecutor cited the then-recent *Mason* case and discussed forfeiture by wrongdoing among his reasons for admissibility of the note. 3 RP 143. The court found that the defendant had forfeited his Sixth Amendment confrontation objection to admission of the note by wrongdoing; i.e. killing the writer of the note. 3 RP 155. The parties did not argue and the court did not find that the defendant had killed Carter to prevent her from testifying, as *Giles* later required.

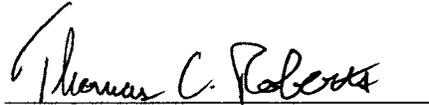
The focus of argument and the court's decision below, as on appeal, were the substantive issues of whether the note was a dying declaration and the application of *Crawford*. 3 RP 137-155. Any error in finding forfeiture by wrongdoing is harmless because, as argued above, the note was admissible. *Crawford* does not apply to a dying declaration and the statement was not testimonial.

D. CONCLUSION.

The defendant received a full, fair trial where ample evidence was admitted to convict him of the crime charged. For the reasons argued above, the State respectfully requests that the conviction be affirmed.

DATED: May 5, 2009.

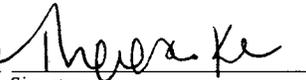
GERALD A. HORNE
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/5/09 
Date Signature

CLERK
COURT OF APPEALS
PIERCCE
COUNTY - 5 PM 2:15
STATE OF WASHINGTON
BY  KSC

APPENDIX “A”

911 Tape Transcript

911 Tape Transcript
Case Number 06-2460259

Sieverson: This cassette tape is recorded from the Master Logging Recorder in the LESA Communications Center by Tape Research Analyst Denise Sieverson. It records Incident Number 06-2460259, which was reported at 0513 hours on 9/3/06.

911 911, what are you reporting? Hello?

Caller Hello?

911: This is 911, what are you reporting?

Caller: Domestic violence.

911: Going on where?

Caller 4507.

911 I'm sorry, 4507 what?

Caller I can't talk...talk right now.

911 I need...

Caller (Inaudible)

911 Okay, maybe..

Caller 4507 Sheridan Street.

911 Is that house, apartment, or mobile home?

911 Is that house, apartment?

Dial tone

Your call has been forwarded to an automatic voice message system. (Pause) is on the phone, to page this person, press...

**911 Tape Transcript
Case Number 06-2460259**

911 911, what are you reporting? Hello?

Caller (Inaudible)

Dial tone

Your call has been forwarded to an automatic voice message system. (Pause) is on the phone, to page this...

911 911, what are you reporting?

Caller 4507 Sheridan Street

911 What's going on?

Caller A domestic violence.

911 Are you involved?

Caller Yeah, I'm upstairs, he's downstairs.

911 Okay, what's your name?

Caller My name is OLGA (unintelligible) CARTER. I've gotta' go.

911 Can you tell me what his name is?

Caller DONNELL PRICE.

911 Is that him right there?

Caller Yeah, yeah, I have, I gotta' go.

911 Okay.

Caller 40, 4507 Sheridan Street, my green car, Grand Am's in front, in front. Please.
Thank you, come on, he has a gun please.

911 Tape Transcript
Case Number 06-2460259

911 Um, is it your...

Disconnect.

End of recording.

APPENDIX “B”

Note

COPY

Name	To Rubina 1/2	
Address		
Home	Office	10/10/01
Fax	Cellular	
E-mail	mommy	
Name	mommy Luv	
Address		
Home	Office	
Fax	Cellular	
E-mail	MR. Price	
Name	Shot me	
Address		
Home	Office	
Fax	Cellular	
E-mail	DEAD	
Name	The shadow	
Address		
Home	Office	
Fax	Cellular	
E-mail	I Took a d Gun Tomy Head	

000127