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Court of Appeals No. 40534-2-II  
Cowlitz County No. 09-1-01167-0

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**TIMOTHY DOBBS**

**Appellant.**

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**BRIEF OF APPELLANT**

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*pm 12-30-10*

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**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

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**C. STATEMENT OF THE CASE**

Casey Rodriguez and Timothy Dobbs were in an on again, off again relationship. RP, p. 66. The relationship turned sour and on November 7<sup>th</sup>, 2010, and November 10<sup>th</sup>, 2010, the Longview Police responded to a series of calls from Ms. Rodriguez's residence in

Longview. Because Ms. Rodriguez did not appear to testify at trial, the majority of the information obtained about the events on November 7<sup>th</sup> and November 10<sup>th</sup> came to light through the testimony of police officers to whom Ms. Rodriguez spoke. Report of Proceedings. Officer Headley of the Longview Police Department contacted Ms. Rodriguez on November 7<sup>th</sup>. RP, p. 90. He described her as “somewhat nervous.” Id. Ms. Rodriguez said that her boyfriend, “Tim St. Louis,”<sup>1</sup> had come to her door wanting to come in and she told him to leave. RP, p. 91-92. She told the Officer Headley that after she thought he had left she heard a hissing noise and she found her tires were flat when she came out. RP, p. 92. Mr. Dobbs was not, however, charged with malicious mischief. Ms. Rodriguez told Headley that she thought Mr. Dobbs had been following her for the past few days and that she “knew” he carried a weapon. RP, p. 94. She told Headley she had seen him carrying a black handgun. Id. Ms. Rodriguez also told Headley that Mr. Dobbs had threatened to shoot her for ending their relationship. RP, p. 95.

During her conversation with Officer Headley, Ms. Rodriguez showed Mr. Headley text messages that she was receiving, which she claimed were coming from Mr. Dobbs. RP, p. 95. In the text messages the person who was supposedly Mr. Dobbs was calling her names. RP, p.

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<sup>1</sup> “St. Louis” was proffered as an a.k.a. for Mr. Dobbs. RP, p. 93.

96. She also received a phone call while she was speaking with Officer Headley. Id. She put the call on speaker and Officer Headley listened to the conversation. RP, p. 97. Officer Headley has never heard Mr. Dobbs' voice and only believed it to be him because Ms. Rodriguez told him it was Mr. Dobbs. RP, p. 104. The parties argued during the call and the male voice asked "why did you call the police?" RP, p. 97. As the call concluded, the male voice said "You're going to get it." Id. Ms. Rodriguez told Headley she was in fear of Mr. Dobbs, and believed he would carry out his threats. RP, p. 98-99. According to Ms. Rodriguez, Mr. Dobbs also threatened to shoot at the house. RP, p. 99.

James Applebury is Casey Rodriguez's landlord, and Ms. Rodriguez is the cousin of his girlfriend, Sarah Ellis. RP, p. 35, 65. Mr. Applebury and Ms. Ellis live in the main house, and Ms. Rodriguez lives in a garage apartment. RP, p. 35. On November 10<sup>th</sup>, Mr. Applebury was in his upstairs home office and heard gunshots outside. RP, p. 36. Ms. Rodriguez had called him just prior to that and asked him if Mr. Dobbs had left. RP, p. 39. He looked out the window and saw a car and an African-American man. RP, p. 39. He didn't see the man's face, but assumed it was Mr. Dobbs because he was about the same height as Mr. Dobbs and was in a car he had seen Mr. Dobbs previously drive. RP, p. 39. After ending the call with Ms. Rodriguez he looked outside and saw a

car pulling up the alley and then heard gunshots. RP, p. 40. He then called the police. RP, p. 42.

Detective Sgt. Hallowell examined the outside of the garage where Ms. Rodriguez lives and observed bullet holes he opined to be fresh. RP, p. 167-174. He studied the trajectory and opined that the bullets were fired from the alley. Id.

Officer Woodward of the Longview Police contacted Ms. Rodriguez twice on November 10<sup>th</sup>. RP, p. 108. During the first call she was “hysterical,” and said words to the effect that if Mr. Dobbs is not found, they would find her dead. RP, p. 108. On the second call he encountered a suspect matching the description of Mr. Dobbs who fled on foot when told to “stop.” RP, p. 110-113. Although he did not see Mr. Dobbs jump over a neighboring fence, he saw him on the other side of the fence. RP, p. 113. Later on, the neighbor on the other side of the fence found a gun in his yard. RP, p. 139-40. Woodward talked to Ms. Rodriguez again during this second call and she was hysterical again. RP, p. 115. She told Woodward that Mr. Dobbs had shot at the house earlier in the day, that he had pushed her door open and forced his way inside, and that he had a gun. RP, p. 116. She also told Woodward “I told you you were going to find me dead.” RP, p. 116.

Ms. Rodriguez also provided Officer Woodward with a note that she identified as having been written by Mr. Dobbs. RP, p. 118-19. She said the note had been left earlier that day. Id. The note said: “Last days. The countdown on your ass. You should know me by now, Casey. You fucked up and tripped with the wrong brother. You will regret what you did and said to me. You never loved me. You never cared about me and now you will reap a world of trouble and pain. Number 1, you can apologize to me and talk with me face-to-face or number 2, you know you can’t and won’t be (inaudible) here in Longview or Washington. I’m going all out on this with you. You’re fucked up, bitch.” RP, p. 120. On the back of the note it said “D” with some empty spaces next to it, and then “is on you, bitch.” RP, p. 120.

The following day, November 11<sup>th</sup>, Officer Woodward spoke with Ms. Rodriguez again. RP, p. 122. At that time she told him about two voice mails she had received from Mr. Dobbs the previous day. RP, p. 123. One message was left before his arrest on the evening of the 10<sup>th</sup>,<sup>2</sup> and the second was left after his arrest. RP, p. 123. She claimed he called her from jail. Id. In the first message, the person she identified as Mr. Dobbs said “You heard that. That was me and that’s what I can do.” Ms. Rodriguez told Woodward that she assumed he was referring to the shots

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<sup>2</sup> After fleeing from police on foot, Mr. Dobbs was apprehended shortly thereafter in a Laundromat.

fired at the house earlier that day. RP, p. 123. In the second voicemail, the male caller pleaded with Ms. Rodriguez not to press charges against him, and said words to the effect of “you’ll regret it.” RP, p. 123.

Ms. Rodriguez also told Woodard about two more text messages she received, which she claimed came from Mr. Dobbs. RP, p. 124. Both messages were sent *before* the initiation of criminal charges against Mr. Dobbs. RP, p. 127. The first text said “Next time it is on you, bitch. On, Bloods.” RP, p. 126. The second one said “Bitch, you move and there will be hell to pay. Plus, my bro lives down there and he’s a known figure. You can’t get away from me. I told you you’re mines (sic).” RP, p. 126-27. The person who sent these messages identified himself as “Smokey.” RP, p. 133.

This case came on for trial about two and a half months after the alleged incident giving rise to these charges occurred. Report of Proceedings. On the morning of the non-jury trial the State informed the court that Casey Rodriguez had been contacted the previous evening by Officer Headley and told to appear that morning at 9:00 a.m. RP, p. 18 105. However, the subpoena that had been served on her instructed her to appear at 10:30 a.m. RP, p. 18. Ms. Rodriguez told Officer Headley she thought court was at 2:00 p.m. RP, p. 105. She did not make any comments to Officer Headley about being in fear of Mr. Dobbs or not

wanting to testify. RP, p. 105. She indicated she would appear in court. RP, p. 106. Ms. Rodriguez made several appointments to meet with Sgt. Hallowell prior to trial but she never showed up for the appointments. RP, p. 241.

The prosecutor argued at trial that all of Ms. Rodriguez's statements should be considered by the court as substantive evidence because Mr. Dobbs forfeited his Sixth Amendment right to confront Ms. Rodriguez, as well as his right to object to hearsay. RP, p. 251. The prosecutor went so far as to argue that even though statements which are deemed to be hearsay, which can only be admitted if they satisfy one of the many hearsay exceptions outlined in ER 803 and ER 804 (depending on which rule the statements fall under), are admissible under the forfeiture doctrine even when they don't fall within one of those exceptions. *Id.* The prosecutor made no reference to any conduct allegedly committed by Mr. Dobbs *after* the initiation of criminal proceedings except, by inference, the lone voice mail Ms. Rodriguez received on the night of, but after, Mr. Dobbs arrest. RP, p. 251-52.

Defense counsel objected to the court considering Ms. Rodriguez's statements, and noted that the State had presented no evidence that the reason Ms. Rodriguez failed to testify was because Mr. Dobbs had procured her non-appearance with conduct designed to prevent her from

testifying. RP, p. 252. Defense counsel further noted that the only foundation for note, the text messages, and the voice mails came from the statements of Ms. Rodriguez. Id. There was no independent testimony which would provide foundation or authenticity for these items. RP, p. 252-53. Defense counsel also argued that even if forfeiture was found, Mr. Dobbs did not waive his right to demand that the hearsay that would be admitted should nevertheless fall under an identified hearsay exception. RP, p. 279-80.

The court ruled that the State had presented clear, cogent, and convincing evidence that Mr. Dobbs actions had caused Ms. Rodriguez's unavailability. RP, p. 254-55. The court said, in relevant part:

I'm satisfied that there is a sufficient basis that the defendant's conduct is the fact to why she is not here. There is testimony that she felt he was—the defendant was following her. She knew he carried a weapon. Others had seen a black handgun...he had threatened to shoot her in the past, if she wouldn't let him be her boyfriend. She said she was receiving text messages calling her names. There is evidence that...she believed it was the defendant that punctured her tires. She said she believed the defendant would...hurt her because of what she had said in the past...she believed he would shoot her. He had a handgun. So, I think that based upon the evidence that is in front of this Court, it is clear, cogent and convincing that she was afraid of him and that's why she isn't here to testify.

RP, p. 255-56. The court also ruled that footnote 34 of *State v. Fallentine*, 149 Wn.App. 614, 215 P.3d 945 (2009) provides the authority for the admission of all statements, even if they would have been otherwise

inadmissible under the hearsay rules for failing to meet an exception to the rule had the declarant testified. RP, p. 282. The court stated:

I don't find that these are excited utterances. I don't think they meet the level. There is some nervousness, there is some anxiety. There is not—she is not hysterical. So, I don't think it rises to the level of trustworthiness that you would necessarily find as that exception to the hearsay rule. All, all the exceptions do require that if you are looking at exceptions to the hearsay rule, which apparently, under *Fallentine*, we're not.

Id. The court was referring, above, to the statements made to Officer Headley. RP, p. 283. The Court also admitted Ms. Rodriguez's written statements, exhibits 35 and 37, noting that although they would not be admissible as *Smith* Affidavits, they were admissible because *Fallentine* says so (in a footnote). RP, p. 284. The court also admitted the written note (the contents of which were read into the record and detailed above), which Rodriguez told Woodard that Mr. Dobbs wrote, because, again, the *Fallentine* footnote allows it. RP, p. 285. The trial court found Mr. Dobbs guilty of Stalking (count I), felony harassment (count II) and intimidating a witness (count III). RP, p. 306-307, CP 1-4. He was given a standard range sentence and filed this timely appeal. CP 22.

#### **D. ARGUMENT**

##### **I. THE TRIAL COURT VIOLATED MR. DOBBS' SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN IT RULED THAT MS. RODRIGUEZ'S STATEMENTS WERE ADMISSIBLE UNDER THE DOCTRINE OF FORFEITURE BY WRONGDOING, WHERE THE STATE PRESENTED**

**NO PROOF THAT DOBBS' ALLEGED WRONGDOING IN  
FACT CAUSED MS. RODRIGUEZ'S UNAVAILABILITY.**

The Confrontation Clause of the Sixth Amendment protects an accused person from use by the government of “testimonial” statements at a criminal trial without an opportunity for confrontation. *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2273 (2006); *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354 (2004); U.S. Const. amend. VI. In *Crawford*, the Court identified the “core class” of testimonial statements which require confrontation: (1) ex-parte, in-court testimony; (2) “extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,” and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford* at 51-52 (quoting *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736 (1992) (Thomas, J., concurring in part). In *Davis*, the Court stated:

Statements taken by police officers in the course of interrogations...are testimonial when the...circumstances objectively indicate that there is no...ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Davis*, 126 S.Ct. at 2273-74. “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford* at 51.

An exception to the right of confrontation safeguarded by the Sixth Amendment is the doctrine of “forfeiture by wrongdoing.” The doctrine cancels the Sixth Amendment right of confrontation on equitable grounds, on the theory that “one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” *Davis*, 126 S.Ct. at 2280; *Crawford* at 62.

The Court has not defined the parameters of the exception. As such, various state and federal courts have reached disparate conclusions about whether the State should be required to simply show the defendant caused the unavailability of the witness, or whether there must be an additional showing that the defendant’s actions were undertaken for the purpose of preventing the witness from testifying. C.F. e.g. *United States v. Dhinsa*, 243 F.3d 635, 651-53 (1<sup>st</sup> Cir. 2001) with *People v. Giles*, 40 Cal. 4<sup>th</sup> 833, 152 P.3d 433, 443, 55 Cal.Rptr. 3d 133 (2007), *cert. granted*, *Giles v. California*, 2008 U.S. Lexis 748 (2008). The United States Supreme Court granted certiorari in *Giles* to resolve this question. The Supreme Court in *Giles* held that for the exception to apply, the government must demonstrate that the defendant acted with the purpose of

causing the unavailability of the witness and the defendant in fact caused the unavailability of the witness. See *Giles v. California*, 544 U.S 353, 374-77 128 S.Ct. 2678 (2008).

The *Giles* majority spent a fair portion of the opinion ridiculing the dissenters' suggestion that the doctrine should be liberally applied, taking particular exception to the dissenters' suggestion that a "forfeiture rule which ignores *Crawford*" would be particularly helpful in domestic violence cases:

Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

*Giles* at 376.

In *State v. Mason*, 160 Wn.2d 910, 940, 162 P.3d 396 (2007), overruled in part, *Giles v. California*, 544 U.S 353, 128 S.Ct. 2678 (2008), the Washington Supreme Court formally adopted the forfeiture by wrongdoing doctrine. The Court both refused to limit the doctrine's application to cases where the accused acted with the purpose of preventing testimony and found no difficulty with reflexive forfeiture.

*Mason* at 926-27. The Court held, however, that because “‘a defendant’s loss of the valued Sixth Amendment confrontation right constitutes a substantial deprivation’...the stakes are simply too high to be left to a mere preponderance of the evidence standard.” *Mason* at 926, (quoting *People v. Geraci*, 85 N.Y.2d 359, 367, 649 N.E.2d 817 (1995)). The Court held:

[I]n deciding whether to apply the doctrine of forfeiture by wrongdoing, the trial court must decide whether the witness has been made unavailable by the wrongdoing of the accused based upon evidence that is clear, cogent, and convincing. We recognize that this is not an easy standard to meet, but the right of confrontation should no be easily deemed forfeited by an accused.

*Mason* at 926-27.

Although *Mason* was overruled by *Giles* insofar as it held the government was not required to demonstrate that the defendant’s conduct was both *designed* to keep the witness from testifying and in fact *caused* the witness not to testify, but was merely required to show causation, (see *State v. Fallentine*, 149 Wn.App. 614, 620, 215 P.3d 945 (2009)) its holding that the government must prove the exception applies by clear, cogent, and convincing evidence remains intact.

In this case, the State failed to present direct evidence of any action taken by Mr. Dobbs to procure Ms. Rodriguez’s unavailability, or a causal link between Mr. Dobbs’ alleged malfeasance and Rodriguez’s absence

from the trial. The entirety of the evidence presented by the State consisted of actions taken *before* the initiation of criminal proceedings against Mr. Dobbs.

The court's ruling that Mr. Dobbs forfeited his Sixth Amendment right to confrontation by wrongdoing was erroneous. First, the State did not prove by clear, cogent, and convincing evidence that Mr. Dobbs actions were *designed* to prevent Ms. Rodriguez from testifying at this trial. Second, assuming arguendo a threat had been made, the State did not prove the threat was the reason Ms. Rodriguez refused to testify, as opposed to the opposite and more likely conclusion that she had recommenced her relationship with Mr. Dobbs and did not want him to go to prison. This is not only possible, given that this is a domestic violence case, but likely. How do we know that Mr. Dobbs and Ms. Rodriguez, who had broken up and gotten back together in the past, were not back "in love?"

The Washington Supreme Court has held that where the evidence adduced in support of a claim sustains two equally plausible theories, each of which "could as reasonably have been adopted as the other," the party with the burden of proof has failed to meet its burden. *Wilkie v. Simonson*, 51 Wn.2d 875, 877-78, 322 P.2d 870 (1958). Particularly here, given the "substantial deprivation" occasioned by the "loss of the valued Sixth

Amendment right” to confront witnesses (*Mason* at 926), it is improper to sanction the introduction of testimonial hearsay on so casual an evidentiary showing.

Courts and commentators have agreed that where alternative, plausible bases exist for the witness’s refusal to cooperate, courts should not admit testimonial hearsay under the forfeiture by wrongdoing doctrine. See e.g. *United States v. Williamson*, 792 F. Supp. 805, 810-11 (M.D. Ga. 1992) (government did not prove forfeiture by clear and convincing evidence where defendant paid witness’ legal fees, as witness may have invoked Fifth Amendment privilege due to pending appeal, not defendant’s influence), *aff’d*, 981 F.2d 1262 (11<sup>th</sup> Cir. 1992), *rev’d on other grounds*, 512 U.S. 594 (1994); Tom Lininger, *Yes, Virginia, There is a Confrontation Clause*, 71 Brooklyn L. Rev. 401, 408 (2005) (expansive application of forfeiture by wrongdoing exception in domestic violence context would cause the exception to swallow the rule of confrontation).

Many courts have also refused to apply the doctrine to cases where the defendant is charged with the very same conduct that allegedly caused the witness to be unavailable, referred to as “reflexive forfeiture,” as in this instance “the court must assume the defendant’s guilt *prior* to trial, an assumption which offends the presumption of innocence imbedded in our state and federal constitutions.” (*Mason* at 940 (Sanders, J. dissenting,

emphasis in original)). See e.g. *People v. Maher*, 89 N.Y. 2d 456, 677 N.E.2d 728 (1997) (refusing to apply forfeiture by wrongdoing doctrine where to do so would require the trial court to decide the ultimate question for the jury in the same case); *United States v. Lentz*, 282 F.Supp.2d 399, 426 (E.D. Va. 2002) (application of exception would undermine presumption of innocence and “deprive a defendant of his right to a jury trial [by] allow[ing] for a judge to preliminarily convict a defendant of the crime on which he was charged”), *affirmed in part, reversed in part on other grounds*, 383 F.3d 191 (4<sup>th</sup> Cir. 2004).

As noted above, the Washington Supreme Court, in *Mason* de facto approved of reflexive forfeiture because *Mason* was a murder case. In murder cases, the act of murder will always be the *reason* a victim is unavailable to testify, even if preventing testimony in a criminal proceeding was not the motive for the murder.<sup>3</sup>

However, it is not clear that the Supreme Court, in *Giles*, specifically approved the doctrine of reflexive forfeiture.

The boundaries of the doctrine seem to us intelligently fixed so as to avoid a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty (after less than a full trial, mind you, and of course before

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<sup>3</sup> *Mason* was perhaps the purest case for forfeiture by wrongdoing in that it was not only murder that prevented the victim from testifying, but the murder was committed for the purpose of preventing the victim from testifying against the defendant in a separate criminal case. See *Mason* at 916.

the jury has pronounced guilt) should be deprived of fair-trial rights, lest they benefit from their judge-determined wrong.

We do not say, of course, that a judge can never be allowed to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling. That must sometimes be done under the forfeiture rule that we adopt-when, for example, the defendant is on trial for murdering a witness in order to prevent his testimony. But the exception to ordinary practice that we support is (1) needed to protect the integrity of court proceedings, (2) based upon longstanding precedent, and (3) much less expansive than the exception proposed by the dissent.

*Giles* at 374.

In domestic violence cases, in particular, the use of reflexive forfeiture could cause a situation in which anyone charged with an act of domestic violence forfeits his or her right to confrontation by virtue of the nature of the act alone. Tim Lininger, writing for the Brooklyn Law Review, observed:

In the wake of *Crawford*, some prosecutors are attempting to avoid confrontation requirements entirely by invoking the doctrine of forfeiture by wrongdoing. Adam Krischer of the American Prosecutors Research Institute has gone so far as to argue that “domestic violence almost always involves forfeiture.” (internal citation omitted)...Mr. Krischer...would transform the forfeiture doctrine into a silver bullet that would slay *Crawford* in virtually any domestic violence prosecution...

[B]ut not every assault carries with it the threat of reprisals if the victim cooperates with law enforcement. If courts were to presume such tampering in every domestic violence case, **the forfeiture exception would swallow the rule of confrontation.** Tom Lininger, *Yes, Virginia, There is a Confrontation Clause*, 71 Brooklyn L. Rev. 401, 408 (2005). (Emphasis added).

Indeed, Mr. Dobbs submits that is precisely what happened in this case. Unlike the defendant in *Mason*, there is no evidence that Mr. Dobbs, *after being charged* with these offenses, had any contact with Ms. Rodriguez or took any action intended to intimidate her or dissuade her from testifying. The night before the trial Ms. Rodriguez was contacted by Officer Headley and she said she would be there. The State did not elicit any evidence that she appeared fearful, or related any recent threats by Mr. Dobbs. This is a pure case of reflexive forfeiture, and an example of the slippery slope that the commentator above fears (and that the Adam Krischer of the American Prosecutors Research Institute to whom he cites, relishes). It is difficult to imagine a domestic violence case that would not involve threats or actions designed to cause fear in the recipient. What the court was required to find was that Mr. Dobbs' actions were *designed* to procure Ms. Rodriguez's non-appearance at this trial, not merely that they *caused* her unavailability (which Mr. Dobbs contests).

Mr. Dobbs is not attacking the doctrine of forfeiture by wrongdoing, nor even that it must be applied reflexively in some cases, e.g., murder cases. Mr. Dobbs submits, however, that in cases of domestic violence, where the right of confrontation could be extinguished by judicial fiat in every case, the State should at least be required to produce more evidence than was presented here. Here, the State proved that the

parties had a violent relationship, and that Ms. Rodriguez failed to testify. The State never proved, nor even suggested, that Mr. Dobbs conduct was *designed* and intended to prevent her from testifying at this trial, nor did the State prove that his conduct *caused* her non-appearance. The State was required to prove both, not one or the other. As any practitioner of domestic violence prosecution or defense will attest, victims frequently avoid testifying because they have re-engaged in their romantic relationship with a defendant, the propriety of such a decision notwithstanding.

The State failed to meet its burden of proving by clear, cogent, and convincing evidence that Mr. Dobbs' conduct was designed to procure Ms. Rodriguez's unavailability for trial, and that it in fact caused her unavailability for trial. The trial court's ruling that Mr. Dobbs forfeited his right to confrontation was error. Further, the error was not harmless beyond a reasonable doubt because the convictions for counts I, II, and III rest entirely on Ms. Rodriguez's statements.

Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error analysis. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *State v. Stephens*, 93 Wash.2d 186, 190-91, 607 P.2d 304 (1980). However, a constitutional error may be "so unimportant and insignificant" in the setting of a particular case that the error is harmless beyond a reasonable doubt. *State v. Wells*, 72 Wash.2d

492, 500, 433 P.2d 869 (1967) (emphasis omitted) (quoting *Chapman*, 386 U.S. at 21-22, 87 S.Ct. 824). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). Where the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. *Guloy*, 104 Wash.2d at 426, 705 P.2d 1182. A conviction should be reversed “where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.” *Guloy*, 104 Wash.2d at 426, 705 P.2d 1182.

*State v. Jasper*, 240 P.3d 174, 183 -184 (Wash.App. Div. 1,2010).

Here, the State cannot demonstrate to this Court beyond a reasonable doubt that the trier of fact would have reached the same result on any of these counts absent those statements. Mr. Dobbs' convictions on counts I, II, and III should be reversed and his case remanded for a new trial.

**II. ASSUMING, ARGUENDO, THE TRIAL COURT DID NOT ERR IN APPLYING THE DOCTRINE OF FORFEITURE BY WRONGDOING, THE TRIAL COURT ERRED WHEN IT HELD THAT THE DOCTRINE RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT THE HEARSAY STATEMENTS WERE RELIABLE BY FALLING WITHIN A FIRMLY ROOTED HEARSAY EXCEPTION.**

The State argued that statements which were both hearsay and otherwise inadmissible under the hearsay rule because they did not meet one of the hearsay exceptions outlined in ER 803 were nevertheless

admissible because Mr. Dobbs forfeited his right to object by wrongdoing.

The prosecutor argued that *State v. Fallentine, supra*, held as much.

However, the only discussion in *Fallentine* of hearsay going hand in hand with confrontation came in footnote 34, as was *dicta. Fallentine* at 623.

The Court merely noted that the appellant in that case had conceded “that a finding of forfeiture by wrongdoing prohibits a challenge to the admissibility of statements on hearsay as well as confrontation grounds.”

The Court then cited to *Giles* at page 2686.

However, a review of Washington Evidence Rule 804 suggests a different result under Washington law. ER 804 says:

**Rule 804. Hearsay Exceptions; Declarant Unavailable**

**(a) Definition of Unavailability**

“Unavailability as a witness” includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
- (6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Thus, under ER 804 (a) (6), a declarant is deemed *not* unavailable when his or her failure to testify was procured by the wrongdoing of the party objecting to the admission of the statement. Because the declarant is deemed not unavailable, the exceptions which would govern admissibility of those statements falls under ER 803, not 804. Thus, the rule contemplates that such statements would fall under ER 803 which outlines 23 specific exceptions which would make hearsay statements, where the availability of the declarant is immaterial, admissible.

Had Ms. Rodriguez testified, the Confrontation Clause would not have been implicated and her statements to others, provided they met one of the exceptions outlined in ER 803, would have been admissible. The State argued, and the trial court agreed, that statements made by Ms. Rodriguez, which would have been *inadmissible* had she testified, became admissible under the doctrine of forfeiture by wrongdoing. Among these statements were the two written statements, which the State would have been precluded from admitting, had she testified, unless her testimony had rendered the statements admissible as *Smith* Affidavits.<sup>4</sup> In other words, the State, in this context, gains access to *better* evidence than it would have if she had testified. While the doctrine of forfeiture by wrongdoing

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<sup>4</sup> There are many requirements for admission of a statement as a *Smith* Affidavit, the most notable being that the witness's in-court testimony must contradict that which she wrote in the statement. See *State v. Nelson*, 74 Wn.App. 380, 874 P.2d 170 (1994).

certainly makes sense insofar as it is designed to prevent unjust enrichment by a defendant, it makes no sense to suggest it allows unjust enrichment by the State. There is nothing in *Fallentine*, or the Washington Evidence Rules, which suggests that statements made by the declarant, which become admissible in spite of the Confrontation Clause, are also admissible even where they can't be deemed reliable by meeting one of the exceptions to the hearsay rule outlined in ER 803.

Professor Tegland discusses the doctrine of forfeiture by wrongdoing in the following excerpt, written *after* the issuance of the opinions in *Mason*, *Giles*, **and** *Fallentine* (which was issued after *Giles*):

**§ 1300.14 Waiver, forfeiture by wrongdoing:**

**Forfeiture by wrongdoing.** A relatively recent development, at least in Washington, has been the adoption of the doctrine of forfeiture by wrongdoing. The doctrine holds that if a criminal defendant is responsible for the witness's absence at trial (typically because the defendant killed the witness), the defendant forfeits the Sixth Amendment right to confrontation and cannot object on constitutional grounds if the State offers the witness's out-of-court statements at trial. The doctrine of forfeiture by wrongdoing was adopted in Washington by a divided vote in *State v. Mason*.

In a case decided in June of 2008, the United States Supreme Court placed new restrictions on the doctrine of forfeiture by wrongdoing. By a sharply divided vote, the court in *Giles v. California* held that the defendant forfeits the right to confrontation only if the prosecution is able to show that the defendant killed the victim with a specific intent to prevent the victim from testifying as a witness at trial. Thus, the court held, no forfeiture occurs in a typical murder case in which the defendant kills the victim for some other reason.

In the leading Washington case of *State v. Mason* (above), the defendant *did* kill the victim to prevent the victim from testifying as a

witness. Thus, the outcome in *Mason* is consistent with *Giles* and would be the same today, even after *Giles* was decided.

*Giles*, however, disapproved of the dictum in *Mason* that a forfeiture may occur even if the defendant killed the victim for some reason other than to prevent the victim from testifying as a witness. On this point, *Giles* supersedes *Mason* and changes Washington law.

The court in *Giles* seemed to strain a bit in an effort to assure readers that its holding would not unduly hamper the prosecution of domestic violence cases. Post-*Giles* Washington cases are consistent with *Giles*. A remaining question is whether a defendant who forfeits the right to confrontation also forfeits the protection of the hearsay rule. Suppose, for example, that the defendant kills a witness to prevent the witness from testifying. Under *Giles*, the defendant has forfeited the right to confrontation, and the prosecution can introduce the witness's out-of-court statements without violating the Sixth Amendment. But suppose the witness's statements are also hearsay and are not within any exception to the hearsay rule. **Has the defendant also forfeited the protection of the hearsay rule? In the federal courts, the answer is usually yes, the defendant has forfeited the protection of the hearsay rule. The question, however, remains unresolved in Washington.**

5C WAPRAC § 1300.14. (Emphasis added).

What is notable about Professor Tegland's analysis is not only that he suggests that the doctrine of forfeiture by wrongdoing is intended to apply only to murder cases, but that he opines that the question of whether "a defendant who forfeits the right to confrontation also forfeits the protection of the hearsay rule," is an "unresolved" question in Washington. Professor Tegland expressed this opinion after the infamous *Fallentine* footnote that the trial court in this case believed answered this question decisively. Mr. Dobbs submits that not only was footnote 34 not part of the holding in *Fallentine*, but the trial court misunderstood the

footnote. The footnote was simply addressing the question of whether a defendant who had forfeited his right to confrontation by wrongdoing could nevertheless seek refuge from the hearsay rules, not the broader question of whether the proposed hearsay must nevertheless be deemed minimally reliable by meeting one of the exceptions to the hearsay rule.

There were a few statements admitted in this trial that clearly qualified as excited utterances or statements pertaining to present sense impression, but there were also numerous statements which did not meet any exception to the hearsay rule, as the court noted. The most damning evidence against Mr. Dobbs were the statements made to Officer Headley and the information in the written statements (Exhibits 35-37). Those were only admitted on the court's theory that the *Fallentine* footnote allows all statements, whether reliable or not, into evidence to the benefit of the State. The trial court erred in admitting these statements under the State's proffered basis, namely that the Evidence Rules get thrown out at the moment the court finds forfeiture by wrongdoing. If that were so, there would be no need for ER 804 to even address how to classify a declarant whose non-appearance at trial was procured by wrongdoing.

The error in admitting was not harmless. Reversal is required if a trial court error affects a constitutional right or the error was prejudicial. *State v. Ramires*, 109 Wash.App. 749, 760, 37 P.3d 343 (2002). Error is

not prejudicial unless, within reasonable probabilities, the error affected the outcome of the trial. *State v. Dixon*, 37 Wash.App. 867, 875, 684 P.2d 725 (1984). "In assessing whether the error was harmless, [this] court should measure the admissible evidence of guilt against the prejudice caused by the inadmissible testimony." *Ramires* at 760. Here, as noted above in Part I, Ms. Rodriguez's statements represented the entirety of the evidence against Mr. Dobbs on counts I, II, and III. The prejudice of admitting these statements can hardly be overstated. Mr. Dobbs' convictions on these counts should be reversed and his case remanded for a new trial.

**E. CONCLUSION**

Mr. Dobbs' convictions under counts I, II, and III should be reversed and his case remanded for a new trial.

RESPECTFULLY SUBMITTED THIS 30<sup>th</sup> day of December, 2010

  
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Attorney for Mr. Dobbs

**CERTIFICATE OF MAILING**

I, Anne M. Cruser, certify that on 12/30/10 I placed a copy of this document in the mails of the United States addressed to: (1) David C. Ponzoha, 950 Broadway, Suite 300, Tacoma, WA 98402; (2) Susan Baur, 312 S.W. 1<sup>st</sup>, WA 98626; (3) Mr. Dobbs, DOC# 338762, Washington State Penitentiary, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA 99362.