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Court of Appeals  
Division II  
State of Washington  
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No. 53753-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ALPHONSO CURTIS BROWNLEE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR KITSAP COUNTY

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BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Alphonso Brownlee was charged with several domestic violence offenses based largely upon his baby's mother's and his cousin's statements to the police. Neither woman chose to testify at trial. Based upon Mr. Brownlee's jail calls to his mother and another person, the court found the out-of-court statements were admissible and did not violate his right to confrontation based upon the forfeiture by wrongdoing doctrine. Mr. Brownlee's subsequent convictions must be reversed as the State failed in its burden to prove Mr. Brownlee engaged in any wrongful conduct, thus the court's forfeiture by wrongdoing ruling was without support.

## B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Brownlee's right to confrontation when it admitted in their absence Jacqueline White's and Martisha Eckles's testimonial hearsay statements to the police.

2. The trial court erred in finding Mr. Brownlee forfeited his right to confrontation under the forfeiture by wrongdoing doctrine.

3. In the absence of substantial evidence, the trial court erred in entering Finding of Fact VI.

4. In the absence of substantial evidence, the trial court erred in entering Finding of Fact VII.

5. In the absence of substantial evidence, the trial court erred in entering Finding of Fact VIII.

6. In the absence of substantial evidence, the trial court erred in entering Finding of Fact XI.

7. In the absence of substantial evidence, the trial court erred in entering Finding of Fact XII.

8. In the absence of substantial evidence, the trial court erred in entering Finding of Fact XXIII, that Ms. White was unavailable for trial.

9. In the absence of substantial evidence, the trial court erred in entering Finding of Fact XXIV, that Mr. Brownlee was responsible for procuring the unavailability of Ms. White and Ms. Eckles.

10. In the absence of substantial evidence, the trial court erred in entering Finding of Fact XXV, that Mr. Brownlee's actions were intended to prevent Ms. White and Ms. Eckles from testifying.

11. To the extent it is considered a Finding of Fact, and in the absence of substantial evidence, the trial court erred in entering

Conclusion of Law III, that Mr. Brownlee was responsible for the unavailability of Ms. White and Ms. Eckles.

12. To the extent it is considered a Finding of Fact, and in the absence of substantial evidence, the trial court erred in entering Conclusion of Law IV, that Mr. Brownlee intended to prevent Ms. White and Ms. Eckles from testifying.

#### C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The Confrontation Clauses of the United States and Washington Constitutions bar the admission of testimonial hearsay absent the defendant's ability to confront and cross-examine the witnesses. This right may be forfeited where the State establishes by clear, cogent, and convincing evidence that the defendant's wrongful act(s) were responsible for the witnesses' absence at trial. Where the witnesses' testimonial hearsay statements were admitted at trial but the State failed to demonstrate by clear, cogent, and convincing evidence that Mr. Brownlee engaged in wrongful conduct, should this Court reverse?

#### D. STATEMENT OF THE CASE

1. The May 4, 2019, statements by Ms. White.

On May 4, 2019, Bremerton 911 operators received a call from Jacqueline White reporting that her baby's father had contacted her in

violation of a court order and attacked her. CP 168-81; RP 1938-40. Ms. White identified appellant, Alphonso Brownlee, as the father. CP 172. Ms. White described some facial injuries from this event. CP 175. Bremerton Police Officers and firefighters responded and spoke to Ms. White. RP 1760-64, 1821-23.<sup>1</sup> Ms. White answered the officer's questions about what transpired and gave a short written statement. CP 185; RP 1775-77. Although she was strongly encouraged to go to the hospital, Ms. White refused. RP 1825.

On June 6, 2019, Ms. White provided the police with a statement recanting her claims of assault by Mr. Brownlee. RP 2140-41.

2. Ms. White's and Ms. Eckles's May 12, 2019, statements.

On May 12, 2019, Ms. White was staying with Mr. Brownlee's cousin, Martisha Eckles, when Ms. Eckles called 911 reporting Mr. Brownlee and Ms. White were in an argument outside her home. CP 168-81. When Bremerton Police arrived, Ms. White and Ms. Eckles

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<sup>1</sup> The court admitted Ms. White's statements to the firefighter as excited utterances and for medical diagnosis. RP 1968. The court admitted the statements to the police officer as excited utterances, present sense impression, and under the forfeiture by wrongdoing doctrine. RP 387-88, 1969.

gave statements implicating Mr. Brownlee. RP 1977-81. Ms. White provided a written statement to the officer. CP 245-46; RP 1985-87.

3. Mr. Brownlee decides to represent himself.

Mr. Brownlee was subsequently charged with two counts of residential burglary, two counts of second degree assault, two counts of tampering with a witness, and two counts of a violation of a court order. CP 1011-18.

On May 20, 2019, well before trial, Mr. Brownlee moved to represent himself. 5/20/2019RP RP 3. Mr. Brownlee completed a Waiver of the Right to Counsel and Order Granting Motion to Proceed *Pro Se* and the court engaged in an extensive colloquy. CP 96-100; 5/20/2019RP 3-16. At the conclusion of the colloquy, the court found Mr. Brownlee's waiver knowing, voluntary, and intelligent. CP100; 5/20/2019RP 16.

From this point until the end of the trial, Mr. Brownlee continuously objected to the admission of Ms. White's and Ms. Eckles's hearsay statements, arguing their admission violated his right to confrontation under *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). CP 263-66, 472-73; RP 17-26, 1735-44, 1015, 2105-08, 2538-44, 2837-38.

4. Court's ruling on admission of the hearsay statements.

Neither Ms. White or Ms. Eckles appeared at trial.

The State sought to introduce Ms. White's handwritten statement regarding the May 4, 2019, incident as well as her oral statements to Bremerton Officer Nelson. CP 818-26; RP 416-20. Based upon a series of jail phone calls to his mother and a cousin, the State alleged that Mr. Brownlee actively sought to keep Ms. White from testifying, thereby forfeiting his confrontation clause objections because of his wrongdoing.<sup>2</sup> CP 827-1006; RP 421-44.

On the day the court held argument on the State's motion regarding forfeiture by wrongdoing and made its ruling, Mr. Brownlee stayed in his jail cell and refused to attend the hearing. RP 408-09. The trial court ruled Mr. Brownlee had voluntarily absented himself and proceeded with the hearing. RP 408-10.

Based on the State's argument, the court found the State had proved by clear, cogent, and convincing evidence that Mr. Brownlee had engaged and in wrongdoing and admitted the statements under the forfeiture by wrongdoing doctrine. RP 440-43, 1964-66.

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<sup>2</sup> The State used the jail calls only for the purpose of the motion and did not seek their admission at trial nor did the State play them for the jury. RP 1079.

So I believe there is clear, cogent, and convincing evidence that Mr. Brownlee has engaged in wrongdoing, specifically is involved in -- has directed and is responsible for the unavailability of these witnesses and that his actions were indeed intended to prevent testimony in the case. Not only of Ms. White, but also of Ms. Eckles.

RP 442. The court subsequently entering written findings of fact and conclusions of law regarding the admission of the statements. CP 1041-47.

5. Mr. Brownlee seeks reconsideration of the admission of Ms. Eckles's and Ms. White's hearsay statements.

On August 7, 2019, when Mr. Brownlee again attended trial, he essentially moved for reconsideration of the court's decision to admit the hearsay statements of Ms. Eckles and Ms. White. RP 1032-37, 1078-82. The court denied Mr. Brownlee's motion and entered written findings of fact and conclusions of law denying the motion to reconsider. CP 1124-26.

6. Mr. Brownlee is found guilty and sentenced.

At the conclusion of the trial, the jury found Mr. Brownlee guilty of all charges. CP 1099-1101; RP 2885-88. The court sentenced Mr. Brownlee to 63 months with all sentences concurrent. CP 1129; 8/302019RP 41-43.

## E. ARGUMENT

### **Admission of inadmissible hearsay statements violated Mr. Brownlee's right to confrontation.**

1. *The Confrontation Clause bars admission of nontestifying testimonial hearsay statements absent a right to confront.*

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. This ordinarily means that if the State wishes to present a witness’s prior testimonial statements at trial, the witness must be unavailable and the defendant must have had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (2004). But a defendant’s right to confrontation may be subject to forfeiture. The doctrine of “forfeiture by wrongdoing,” was recognized by the Washington Supreme Court in *State v. Mason*, 160 Wn.2d 910, 926, 162 P.3d 396 (2007), and clarified by the United States Supreme Court in *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L.Ed.2d 488 (2008).

“The doctrine of forfeiture by wrongdoing holds that a criminal defendant waives his Sixth Amendment confrontation rights if the

defendant is responsible for the witness's absence at trial." *State v. Dobbs*, 167 Wn.App. 905, 912, 276 P.3d 324 (2012) (*Dobbs I*), *aff'd*, 180 Wn.2d 1, 320 P.3d 705 (2014) (*Dobbs II*). Application of the doctrine "requires a finding that (1) the defendant engaged in wrongdoing; (2) the wrongdoing was intended to render the absent witness unavailable at trial; and (3) the wrongdoing did, in fact, render the witness unavailable at trial." *State v. Tyler*, 138 Wn.App. 120, 128, 155 P.3d 1002 (2007). "Once the State shows that the defendant's conduct is the reason for the witness's absence, the State may introduce the witness's out-of-court statements." *Dobbs I*, 167 Wn.App. 912. But the forfeiture by wrongdoing exception is applicable only if the defendant's wrongful act was designed to prevent the witness from testifying. *Giles*, 554 U.S. at 359-60.

The State must prove the causal link between the defendant's conduct and the witness's absence by clear, cogent, and convincing evidence. *Dobbs I*, 167 Wn.App. at 912-13. The evidence must also establish that the defendant engaged in the conduct "with the intention to prevent the witness from testifying." *Dobbs II*, 180 Wn.2d at 11.

The history of the doctrine provides a "substantial indication that the Sixth Amendment was meant to require some degree of intent

to thwart the judicial process before thinking it reasonable to hold the confrontation right forfeited; otherwise the right would in practical terms boil down to a measure of reliable hearsay, a view rejected in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).” *Giles*, 554 U.S. at 380 (Souter, J., concurring). To the extent that the decision in *Mason* holds that the exception applies even where the defendant did not commit the wrongful act with the specific intent to prevent testimony, the *Giles* Court overruled it. *State v. Fallentine*, 149 Wn.App. 614, 620 n. 13, 215 P.3d 945, review denied, 166 Wn.2d 1028 (2009).

Whether Mr. Brownlee’s right to confrontation was violated by admission of the statements is reviewed *de novo*. *Dobbs II*, 180 Wn.2d at 10. The trial court’s findings of fact are reviewed for whether there is substantial evidence in the record to support them. *Fallentine*, 149 Wn.App. at 620-21.

2. *Ms. White’s and Ms. Eckles’s statements to the police were testimonial and inadmissible absent Mr. Brownlee’s ability to cross-examine them at trial.*

The Confrontation Clause applies to “witnesses” against the accused, in other words, those who “bear testimony.” *Crawford*, 541

U.S. at 51. Admission of a testimonial statement by an absent witness is generally permissible only where the declarant is unavailable, and only where the defendant had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 59. A statement is testimonial if “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). In addition, a statement is testimonial if made to establish or prove some fact or if a reasonable person in the declarant’s position would anticipate that his or her statement would be used against the accused in investigating or prosecuting a crime. *Crawford*, 541 U.S. at 51-52; *State v. Hart*, 195 Wn.App. 449, 459, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017).

In general, where a statement is functionally trial testimony, it is testimonial; where it is just a casual statement made to a friend, it is not testimonial. *Crawford*, 541 U.S. at 51. An out-of-court statement is testimonial if, in the absence of an ongoing emergency, 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.

Whether a statement is admissible as an exception to the hearsay rule is of no moment to the confrontation clause. *See Crawford*, 541 U.S. at 61 (even hearsay with an applicable exception is inadmissible in violation of the clause if it is *testimonial* hearsay). A Confrontation Clause analysis is separate from analysis under the rules of evidence. *Crawford*, 541 U.S. at 51.

Here, the trial court analyzed the admission of the witnesses's statements under the Confrontation Clause, thus implicitly determining the statements were testimonial. But even assuming the court made no ruling on the testimonial nature of the statements, they were nevertheless testimonial. The statements were made to the police after the alleged incident and were functionally trial testimony.

3. *There was no evidence Mr. Brownlee committed a wrongful act to prevent the witnesses from testifying.*

It is important to note that the State failed to provide any evidence of direct contact with Ms. White by Mr. Brownlee. The jail recordings only involve Mr. Brownlee's mother, Ms. Thomas, a woman named "Sierra," and to a limited extent, Ms. Eckles. Further, the State failed to prove the statements were admissible under the

forfeiture by wrongdoing doctrine because there was no showing that Mr. Brownlee engaged in “wrongdoing.”

“When the standard of proof is clear, cogent, and convincing evidence, the fact at issue must be shown to be ‘highly probable.’” *Dobbs II*, 180 Wn.2d at 11, citing *In re Welfare of Sege*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

Initially, the State makes much of Mr. Brownlee’s use of the terms “you know” and “you know what I’m saying” when he knew he was being recorded as a shorthand to disguise his intent. This is echoed in the trial court findings, specifically Findings of Fact VI, VII, VIII, XI. CP 1042-43. In reality, his use of the term “you know” is nothing more than what is commonly known as a “verbal filler” used innocently by much of the population, similar to the term “like” as a verbal tic. *See So, Um, How Do You, Like, Stop Using Filler Words*, New York Times, February 24, 2017.<sup>3</sup> *See also* “You know what I’m saying.” *E.g.* CP 846.<sup>4</sup> Findings of Fact VII and VIII are solely based on this mistaken assumption.

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<sup>3</sup> [www.nytimes.com > 2017/02/24 > verbal-ticks-like-um](http://www.nytimes.com/2017/02/24/verbal-ticks-like-um)

<sup>4</sup> Used to ask if someone understands or agrees with you, especially if you have not expressed yourself very clearly  
<https://dictionary.cambridge.org/us/dictionary/english/do-you-know-see-what-i-m-saying>

In none of the recordings does Mr. Brownlee threaten violence against Ms. White or Ms. Eckles. The majority of the jail recordings of Mr. Brownlee show him demonstrating his frustration with the criminal proceedings against him, the conduct of law enforcement and the prosecutors, his attempts to gain custody of the child he shared with Ms. White who had been found dependent, and his boasting about his legal acumen.

Mr. Brownlee frequently expresses frustration over Ms. White's allegations against him, but also expresses that he wishes her no ill will and wants her to seek treatment for her drug addiction:

Q: You know what I'm saying. Like we'll see our family attorneys and what we do as far as, like, as far as treatment and (unintelligible) classes and stuff like that. I don't wish bad on her [Ms. White].

CP 846. Mr. Brownlee also talks about "things could be done," which the State concludes means intimidating Ms. White into not appearing, or could also have meant seeking bail or seeking a private attorney.

Finding of Fact XIII establishes no wrongdoing on Mr. Brownlee's part. While he notes that the "State does not have Ms. White," this statement fails to establish he was responsible for her

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unavailability. Further, the fact Mr. Brownlee talked about having Ms. Thomas and others contact the assigned prosecutor may have been annoying to the prosecutor but was not illegal or wrong, merely an exercise in his First Amendment right of redress and dissent.

The State failed to establish any wrongdoing by Mr. Brownlee. The trial court erred in finding the hearsay statements were admissible based upon the forfeiture by wrongdoing doctrine.

4. *The error in admitting Ms. White's and Ms. Eckles's statements was not harmless.*

Errors in admitting evidence in violation of the confrontation clause are subject to the constitutional harmless error test. *Lilly v. Virginia*, 527 U.S. 116, 139-40, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009). A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error. *Chapman v. California*, 386 U.S. 18, 21-22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

The admission of the hearsay statements substantially prejudiced Mr. Brownlee and were not merely a harmless error. The

State's entire prosecution relied on the out-of-court statements by Ms. White and Ms. Eckles. Ms. White's personally written statements to the police officer about what she claimed happened were powerful statements that undoubtedly swayed the jury, as did the oral statements of the two women admitted through the police officers. Had Mr. Brownlee had the opportunity to cross-examine these women he could have clarified their statements or provided further explanation.

The error in admitting the hearsay statements was not harmless, and Mr. Brownlee's convictions should be reversed and his matter remanded for a new trial.

#### F. CONCLUSION

For the reasons stated, Mr. Brownlee asks this Court to reverse his convictions and remand for a new trial.

DATED this 7<sup>th</sup> day of April 2020.

Respectfully submitted,

*s/Thomas M. Kummerow*

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	)	
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v.	)	
	)	
ALPHONSO BROWNLEE,	)	
	)	
Appellant.	)	

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# WASHINGTON APPELLATE PROJECT

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