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Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

ALPHONSO CURTIS BROWNLEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 19-1-00602-18

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED June 25, 2020, Port Orchard, WA

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in finding that uncontroverted evidence was admissible by the doctrine of forfeiture by wrongdoing?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Alphonso Curtis Brownlee was initially charged by information filed in Kitsap County Superior Court with residential burglary (on or between May 2, 2019 and May 3, 2019), domestic violence (I), second degree assault, domestic violence (II), felony violation of a court order (on or between May 2, 2019 and May 3, 2019), domestic violence (III), residential burglary (on or between May 3, 2019 and May 4, 2019), domestic violence (IV), and second degree assault with sexual motivation, domestic violence (V). CP 1-6.

A first amended information repeated the above charges and added felony violation of a court order (on or between May 11, 2019 and May 12, 2019), domestic violence (VI) and witness tampering (on or between May 8, 2019 and May 12, 2019), domestic violence (VII). CP 13-20. Another count of witness tampering (on or about May 14, 2019), domestic violence (VIII) was added in the third amended information. CP 537. Trial proceeded on these eight counts but under a fourth amended information that removed the sexual motivation allegation from the second

degree assault, domestic violence charge in count V. CP 1011-1018. Where required, the various counts named Jacqueline Elizabeth White as the victim.

The jury returned verdicts of guilty as to all eight counts. CP 1099-1101. Domestic violence special verdicts were answered in the affirmative on each count. CP 1102-1110.

Brownlee was sentenced to 63 months of total confinement. CP 1129. A notice of appeal was timely filed. CP 1139.

1. Pretrial Procedures.

Brownlee waived his right to counsel, engaging a discussion of that with the trial court at arraignment on the first amended information. RP, 5/14/19, 2-9. Several days later, a hearing was had where the trial court engaged Brownlee in colloquy on the waiver of counsel. RP, 5/20/19, 3-16. The trial court entered a comprehensive written waiver and order granting him *pro se* status. CP 96-100.

After the commencement of trial, Brownlee refused to attend. *See* CP 810 (state's memorandum explaining circumstances at time Brownlee refused to come to court). Eventually, the trial court ordered Brownlee, or private counsel, to attend or the trial would move forward without him. CP 817; 3RP 287-88. Brownlee continued to be absent at various stages of the trial. 3RP 266, 298; 4RP 328; 5RP 461; 12RP 1796; 12 RP 1852-

53; 13RP 1914; 14RP 1967.

The trial court heard evidentiary motions in Brownlee's absence. 4RP 326. Brownlee's court-appointed standby counsel was present. *Id.*

The state submitted notice of intent to submit Evidence Rule 404(b) evidence. CP 32. Sixty-one pages were submitted detailing Brownlee's history of domestic violence, mostly against Ms. White. CP 34-61. The state later submitted a memorandum further detailing the ER 404(b) evidence and arguing for admission of that evidence. CP 398-407. The trial court ruled that most of the offered evidence was admissible. CP 1029; 4RP 369-70; 371-72. The trial court entered findings of fact and conclusions of law on ER 404(b) admissibility. CP 1031-35.

The state proposed to play the 911 calls of victim White and witness Eckles to the jury. CP 279-81; 4RP 374. The state submitted a certified transcription of these calls. CP 292-312. The state argued that the two calls were admissible by hearsay exceptions for excited utterance and present sense impression. CP 281. The state's memorandum advised the trial court of the confrontation clause implications of the offered evidence. CP 286-291. The trial court ruled the calls admissible. 4RP 383.

On their nonappearance, the state moved to admit statements that Ms. White and Ms. Eckles made to investigators, 911 operators, and

medics under the doctrine of forfeiture by wrongdoing. CP 818; 4RP 416. The state relied on transcripts of Brownlee's jail phone calls from a prior matter (CP 827-1006) and a police report that had been filed as probable cause for count VII in the first amended information. CP 26. The trial court granted the state's motion. CP 1039. The trial court entered findings and conclusions regarding forfeiture by wrongdoing. CP 1041-1047.

In ongoing argument about the forfeiture ruling, Brownlee admitted some of the conduct underlying the forfeiture by wrongdoing ruling. The following exchange occurred

THE COURT: You can appeal that decision. All right? That decision was made because of statements you made to your mother directing her to tell people they didn't have to obey any subpoenas by the Court –

MR. BROWNLEE: No. I told them that the people have rights, and they don't have to come to court if they don't want to.

THE COURT: You told them they don't have to come to court and not talk to the police, yes. You told her to deliver that message to other people.

MR. BROWNLEE: No, I did not. I told my mother that, and she delivered that message on her own.

11RP 1749.

B. FACTS

On May 4, 2019, Bremerton Police Department Corporal Michael Nelson, working graveyard shift, responded to a call reporting that Brownlee was attacking a woman—the woman having locked herself in the bathroom. 11RP 1760.¹ Corporal Nelson and another officer knocked and Ms. White answered the door. 11RP 1762. Corporal Nelson identified Ms. White by her picture on her driver’s license (state’s exh. 67). 11RP 1762-63.

Corporal Nelson observed that Ms. White had swollen eyes and nose, was crying, and was very upset. 11RP 1764. She was panicked – very afraid and very confused. 11RP 1776. Ms. White appeared to be afraid and was unsure of Brownlee’s location; officers checked the residence. Id. Ms. White indicated that she was afraid of Alfonso Brownlee. Id.

Corporal Nelson recounted Ms. White’s report of the incident. 11RP 1765-66. He repeated her narrative as follows:

She told me that she's had a relationship with Mr. Brownlee for some time. That night she was out drinking with him at Sirens and the Fuzzy Naval in Bremerton, and they had gone home prior to the call. And when they arrived at the house there was a female named Vanessa standing outside of the residence. Vanessa was invited inside by Mr. Brownlee, and Ms. Jacqueline White did not like this. She said that inside the residence Mr. Brownlee tried to

¹ corporal referred to as prospective juror

get her to close the door to Linda Gains Bush's bedroom door to make it -- to shield what was about to happen. They wanted to have sex and smoke dope is what she said. And then he started pulling off Ms. Jacqueline White's clothes in front of Ms. Vanessa, and she put up a struggle. He threw her on the bed -- Ms. Jacqueline onto the bed face up --

11RP 1765-66.

Had her facedown -- face up on the bed and using both hands began to strangle, as she was afraid for her safety --

11RP 1766.

And she said that she couldn't breathe. And she -- he grabbed her by the hair and yanked her hair to the right. She heard her neck pop. He got off of her. She ran to the bathroom and she locked herself in the bathroom and called 911.

11RP 1766-67.

Corporal Nelson also testified that at that time Ms. White also told him about an incident the previous day. 11RP 1768. She said that Brownlee had punched her in the face, alleging an undiagnosed broken nose. Id. She added that Brownlee had also strangled her during that earlier incident. Id.

Ms. White provided Corporal Nelson with a handwritten statement.

11RP 1777. Corporal Nelson read the statement to the jury:

"I, Jacqueline E. White, have my baby's father, Alphonso Curtis Brownlee, try to take my clothes off once again in front of his long-term friend since grade school, Vanessa, that I believe to be one of his co- ho's and tried to have a threesome while making me smoke dope with him. If I don't, I get my ass beat. I have no family nor friends to go to, so I am, slash, was stuck." And then she says, "Choke marks on neck, had me on my side pulling my hair, and cracked my neck in three different places." A date of May 2nd, 2019. "Punched me in the nose and both of my eyes. When he pulled my hair from the side, I could hear -- I could not breathe,

and his friend Vanessa was standing right there. Strangled me with both hands and could not breathe."

11RP 1777-78.

Ms. White went on showing Corporal Nelson threatening text-messages she had received from Brownlee. 11RP 1779 (exhs 22-49); 11RP 1785.

Ms. White was attended by paramedics. 12R1822. Ms. White was described as "very agitated." 12RP 1823. During the contact Ms. White was very much under the stress of the event. 12RP 1828. She had swelling to the face and complained of being hit earlier in the evening. Id. Ms. White reported being grabbed by the hair and pulled along with resulting neck pain. 12RP 1824. Ms. White said she was strangled during the incident. 12RP 1825. She told the paramedic that the injuries were caused by her "significant other." Id.

The next day, Ms. White phoned Corporal Nelson. 14RP 2139-40. Ms. White wanted to recant her statements of the day before. Id. She said that she had lied and that she had been in Seattle and was beaten up there. Id. Ms. White became upset when Corporal Nelson told her he could not make the report go away. 14RP 2140-41.

Corporal Nelson then received a written statement from Ms. White. 14RP 2141 (admitted as exh. 76).

On May 12, 2019, police responded to a domestic dispute call and arriving were contacted by Ms. Smith and Ms. Eckles. 13RP 1975. The officer observed that Ms. White had a mark below her right eye and redness on her forehead. 13RP 1976. Ms. White appeared to be upset and angry. Id. Bremerton Police Sergeant Meade repeated Ms. White's report:

She was upset from the night before [May 11, 13RP 1978] as well because right around nine o'clock the night before she had just gotten home from a bar. And Mr. Brownlee and her had been residing just outside of the 1733 Grove Street address in a Dodge Durango, so when she got home from the bar he was upset with her from her going out there. He was asking for her money. There was some sort of verbal confrontation, and she said that he grabbed her head and head-butted her right on the forehead, which was -- caused the mark. And then he had hauled off and punched her, which caused the mark on the right side right below her eye.

13RP 1977. Ms. White reported continued abuse the next day:

Well, they are yelling and screaming back and forth quite a bit, and I guess they worked out whatever their issue was. She went to sleep, and then he slept until about noon or so on the next day. And when they woke up he demanded money that she had had. And I guess she had about nine dollars leftover. She gave him the money, and then there was more of an argument. He thought she had more money, that she was holding out, so he wanted her assaulted, basically.

So he drug her up to Ms. Eckles's, who was living at the residence, and he wanted Ms. Eckles to beat her up to get the money from her.

Well, they were yelling and screaming on the way up to the house. And when they got there, Ms. Eckles met them at the front door, and he demanded that Eckles assault White. Eckles refused to assault White, and so then Brownlee and Eckles got into an argument on the porch. And then when Eckles picked up the phone to call 911 he left the area, and I believe somehow or another his

mother had been called. She was in the area, picked him up, and they drove off.

13RP 1978-79. Sergeant Meade also related what Ms. Eckles said about this incident:

She said that around nine o'clock on the 11th she heard a whole bunch of yelling and screaming coming down from the Durango and knew that those two had been staying down there. Things kind of quieted down, and then it was good up until around noon when she heard them yelling and screaming as they are walking up to her front porch. She said that she went out and met him on the front porch, and Mr. Brownlee wanted her to assault White. She refused, and those two got into a verbal altercation. She was tired of him, so she picked up the phone to called 911, and he left.

13RP 1980.

Ms. White penned a statement for the May 12, 2019 incident.

Sergeant Meade read it to the jury:

"My baby's father, Alphonso Brownlee, and I were fighting in his cousin's front yard. Last night he head-butted me and punched me in the eye. This morning he came up to talk to Martisha trying to get her to either beat my ass or pick his side where she didn't say what he wanted -- oh, what he wanted to hear. He ended up getting in her face, and that is when she called the cops on him. I made a statement last week, and he told me to make another statement saying everything was false. Their names were parts in the statement that weren't true -- I'm sorry. There were -- everything was false. There were parts in the statement that weren't true, but overall I would not have called the police if I didn't feel safe." And then it was signed Jacqueline White, May 12th of 2019.

13RP 1987.

When Brownlee was arrested two weeks later he spontaneously said "Jackie is going to recant." 13RP 2008.

While Brownlee was being booked, officers looked to see if the

text messages sent to Ms. Smith had come from the phone they had. After this test, the officer who had called the phone in booking received a text authored by Brownlee saying "In jail. Getting booked now. Jackie, recant and get me out. Love you." 13RP 2015,

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH ADMISSIBILITY OF UNCONFRONTED STATEMENTS BY FORFEITURE BY WRONGDOING.

Brownlee argues that the trial court erred by admitting testimony in violation of his right to confront his accuser. This claim is without merit because the trial court's findings of fact on the issue of forfeiture are substantially supported by the record before the court.

In the case, uncross-examined evidence was admitted under ER 404(b) and by hearsay exception for excited utterances; essentially because the evidence is considered to be nontestimonial. *See Crawford v. Washington*, Some of the evidence would be considered to be testimonial and the state concedes as much. But, testimonial or not, any of the unconfuted evidence can be admitted by the trial court's proper finding of forfeiture by wrongdoing.

Brownlee's constitutional confrontation claim is reviewed de novo. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). Criminal

defendants have the right to confront the witnesses against them: “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” *U.S. Const. amend. VI.*² *Dobbs*, 180 Wn.2d at 11; *State v. Hernandez*, 192 Wn. App. 673, 368 P.3d 500 (2016). “However, a criminal defendant forfeits this right when he or she causes the witness to be unavailable.” *Dobbs*, 180 Wn.2d at 10-11.

Forfeiture by wrongdoing is an exception to the requirement of confrontation that was recognized in American case law over a century ago. *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 244 (1878). The doctrine has its roots in equity, and stems from the principle that a defendant who has wrongfully procured the unavailability of a witness cannot profit from that wrongdoing by asserting the right to confront the witness:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

² Brownlee refers to Wash. Const. Article I, section 22 in his issue statement (Brief at 3) but does not further argue that provision.

Reynolds, 98 U.S. at 158; accord *State v. Dobbs*, 180 Wn.2d at 11-12.

The *Dobbs* Court announced the rule:

we conclude that a defendant forfeits the Sixth Amendment right to confront a witness when clear, cogent, and convincing evidence shows that the witness has been made unavailable by the wrongdoing of the defendant, and that the defendant engaged in the wrongful conduct with the intention to prevent the witness from testifying.

Dobbs, 180 Wn.2d at 11.

When the standard of proof is clear, cogent, and convincing evidence, the fact at issue must be shown to be highly probable. *State v. Fallentine*, 149 Wn.App. 614, 620, 215 P.3d 945, review denied, 166 Wn.2d 1028 (2009). The standard of review is whether there is substantial evidence to support the trial court's findings. *Dobbs*, 180 Wn.2d at 10. It is for the trial court, not the reviewing court, to actually weigh the evidence and determine whether it is clear, cogent, and convincing. *Fallentine*, 149 Wn.App. at 620. Accordingly, we will not disturb findings supported by evidence which the court could reasonably have found to be clear, cogent, and convincing. *Fallentine*, 149 Wn.App. at 620–21.

“We cannot and do not require a direct statement from the witness who is intimidated into silence because such a requirement would exclude almost all absent witnesses' testimony, regardless of evidence of witness intimidation.” *Dobbs*, 180 Wn.2d at 15. Moreover, “A court does not

need to rule out all possibilities for a witness's absence; it needs to find only that it is highly probable that the defendant intentionally caused it.” *Dobbs*, 180 Wn.2d at 16. And, “For the same reasoning that underlies the forfeiture by wrongdoing doctrine, we hold that a defendant who procures a witness's absence waives his hearsay objections to that witness's out-of-court statements.” 180 Wn.2d at 16.

First, Brownlee assigns error to eight of the trial court’s findings of fact and two of the trial court’s conclusions of law. He argues that Brownlee’s turn of phrase—“you know what I’m saying”—is only that and thus findings VI, VII, VIII, and XI are in error. Brief at 13. But the inuendo is the thin veil of Brownlee’s attempts to get the witnesses to absent themselves.

Second, Brownlee claims that “the State failed to provide any evidence of direct contact with Ms. White by Mr. Brownlee.” Brief at 12. However, in her statement of May 12, Ms. White wrote “I made a statement last week, and he told me to make another statement saying everything was false.” CP 28 (relevant excerpt in probable cause materials); 13RP 1987, *supra* at 10 (full statement). The trial court was aware of this statement when it ruled on the forfeiture issue. CP 1045 (finding of fact XX).

Third, no case provides that there must be a threat of violence.

Although the *Reynolds* case has limited use because the standards of proof are not there well defined, the doctrine allowed admission of unopposed prior testimony where

The testimony shows that the absent witness was the alleged second wife of the accused; that she had testified on a former trial for the same offence under another indictment; that she had no home, except with the accused; that at some time before the trial a subpoena had been issued for her, but by mistake she was named as Mary Jane Schobold; that an officer who knew the witness personally went to the house of the accused to serve the subpoena, and on his arrival inquired for her, either by the name of Mary Jane Schofield or Mrs. Reynolds; that he was told by the accused she was not at home; that he then said, 'Will you tell me where she is?' that the reply was 'No; that will be for you to find out;' that the officer then remarked she was making him considerable trouble, and that she would get into trouble herself; and the accused replied, 'Oh, no; she won't, till the subpoena is served upon her,' and then, after some further conversation, that 'She does not appear in this case.'

It being discovered after the trial commenced that a wrong name had been inserted in the subpoena, a new subpoena was issued with the right name, at nine o'clock in the evening. With this the officer went again to the house, and there found a person known as the first wife of the accused. He was told by her that the witness was not there, and had not been for three weeks. He went again the next morning, and not finding her, or being able to ascertain where she was by inquiring in the neighborhood, made return of that fact to the court. At ten o'clock that morning the case was again called; and the foregoing facts being made to appear, the court ruled that evidence of what the witness had sworn to at the former trial was admissible.

Reynolds, 98 U.S. at 159-60 (page break omitted). Minimal statements and circumstantial evidence allowed application of the doctrine. There are no threats of violence, direct or otherwise.

Similarly, *State v. Hernandez*, 192 Wn. App. 673, 368 P.3d 500

(2016), the doctrine was applied in the absence of threats of violence. There the doctrine was applied when the mother of an alleged victim of child molestation took the child out of the country. The record included repeated jail phone calls between the mother and the defendant in which the defendant implies in various coded words that she should flee with the child. 192 Wn. App. at 682-686 (quotation of trial court's ruling).

The trial court in the present case provided comprehensive findings of fact, which, taken together, support the conclusion that Brownlee intended to have Ms. White and Ms. Eckles be absent from the proceedings. As noted, there is a direct statement from Ms. White that Brownlee had asked her to recant a previous report. Moreover, the trial court had before it probable cause to believe that Brownlee had engaged in repeated acts of actual violence toward Ms. White.

In addition, the jail phone calls show a thinly veiled agenda to communicate to Ms. White and Ms. Eckles his position that they need not attend. This agenda is made explicit by Brownlee's own admission that "I told them that the people have rights, and they don't have to come to court if they don't want to." 11RP 1749. Brownlee admits that he told his mother that and that she passed the message along. *Id.* At one point in the jail calls, Brownlee asks his mother to "pass everything down the pipeline." CP 1043 (finding of fact VIII).

When Ms. Eckles and another witness were present in court and were being advised of the date they were to return, Brownlee said

So it is their right -- now, I'm going to say it for the record. They do not have to come here to testify if they do not want to. You cannot -- threatening someone to lock somebody up because they do not want to cooperate to testify or -- I mean, testify on your behalf is not -- is their legal right. They don't have to come to court.

1RP 46-47. Again, this time in open court, Brownlee is plainly communicating to the witnesses there present that he does not want them to attend the trial; that they do not have to attend the trial. CP 1046 (finding of fact XXII). At one point in the jail calls, Brownlee understands that Ms. Eckles was under subpoena and must appear but he asks his mother to communicate with Ms. Eckles and tell her she does not have to go to court. CP 1044 (finding of fact XIV).

The evidence clearly and cogently established that Brownlee sought to procure the absence Ms. Smith and Ms. Eckles. The trial court performed its function in carefully weighing the evidence. Each finding was supported by evidence present by the state or observations of the trial court. Brownlee argues with the findings but does not say how they lacked the support of substantial evidence. Brownlee's right to object to hearsay and asserted confrontation rights was forfeited by his wrongdoing. This issue fails.

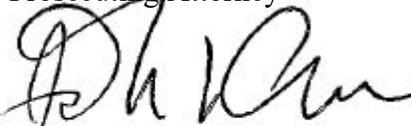
IV. CONCLUSION

For the foregoing reasons, Brownlee's conviction and sentence should be affirmed.

DATED June 25, 2020.

Respectfully submitted,

CHAD M. ENRIGHT
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A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name.

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