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Court of Appeals
Division III
State of Washington

31909-1-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TASHIA STUART,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF
AND CROSS APPEAL

Respectfully submitted:
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TABLE OF CONTENTS

	Page No.
I. <u>IDENTITY OF RESPONDENT/CROSS-APPELLANT</u>	1
II. <u>ISSUES</u>	1
III. <u>ASSIGNMENTS OF ERROR ON CROSS-REVIEW</u>	2
Assignments of Error	2
Issues Pertaining to Assignments of Error	2
IV. <u>RELIEF REQUESTED</u>	2
V. <u>STATEMENT OF THE CASE</u>	3
VI. <u>ARGUMENT</u>	19
A. <u>The Victim’s Attempt To Report a Crime Satisfies The “Testimony” Requirement Of The Doctrine Of Forfeiture By Wrongdoing</u>	19
B. <u>The Court’s Ruling Is Supported By Clear, Cogent, And Convincing Evidence</u>	27
C. <u>Overwhelming Evidence Supports The Convictions</u>	29
D. <u>The Court Erred In Suppressing The Victim’s Property Found In Her Safe</u>	32
E. <u>There is No Record Of Bad Faith To Support the Imposition of Sanctions on the Prosecutor</u>	38
VII. <u>CONCLUSION</u>	40

TABLE OF AUTHORITIES

State Cases

	Page No.
<i>DeHeer v. Seattle Post-Intelligencer</i> , 60 Wn.2d 122, 372 P.2d 193 (1962)	27
<i>Hamilton v. State Farm Mut. Auto. Ins. Co.</i> , 9 Wn. App. 180, 511 P.2d 1020 (1973)	39
<i>King v. Rice</i> , 146 Wn.App. 662, 191 P.3d 946 (2008)	27
<i>LaMon v. Butler</i> , 112 Wn.2d 193, 770 P.2d 1027 (1989)	24
<i>Spokane Research Def. Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005)	38
<i>State v. Boot</i> , 81 Wn. App. 546, 915 P.2d 592 (1996)	33, 34, 37
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997)	29
<i>State v. Brousseau</i> , 172 Wn.2d 331, 259 P.3d 209 (2011)	28
<i>State v. Brown</i> , 159 Wn. App. 1, 248 P.3d 518 (2010)	29
<i>State v. Cantu</i> , 156 Wn.2d 819, 132 P.3d 725 (2006)	34

<i>State v. Carter</i> , 151 Wn.2d 118, 85 P.3d 887 (2004)	34
<i>State v. Evans</i> , 159 Wn.2d 402, 150 P.3d 105 (2007)	37
<i>State v. Fallentine</i> , 149 Wn. App. 614, 215 P.3d 945 (2009)	21
<i>State v. Hinton</i> , 179 Wn.2d 862, 319 P.3d 9 (2014)	38
<i>State v. Ibarra-Cisneros</i> , 172 Wn.2d 880, 263 P.3d 591 (2011)	38
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996)	33
<i>State v. Jones</i> , 68 Wn. App. 843, 845 P.2d 1358 (1993)	35
<i>State v. Kipp</i> , 179 Wn.2d 718, 317 P.3d (2014)	33
<i>State v. Mason</i> , 160 Wn.2d 910, 162 P.2d (2007)	20
<i>State v. Merrill</i> , 183 Wn. App. 749, 335 P.3d 444 (2014)	39
<i>State v. S.H.</i> , 102 Wn. App. 468, 8 P.3d 1058 (2000)	39
<i>State v. Sabala</i> , 44 Wn. App. 444, 723 P.2d 5 (1986)	36
<i>State v. Schelin</i> , 147 Wn.2d 562, 55 P.3d 632 (2002)	36

State v. Simpson,
95 Wn.2d 170, 622 P.2d 1199 (1980)33, 35

State v. Tyler,
138 Wn. App. 120, 155 P.3d 1002 (2007) 19, 20, 21, 24

State v. Zakel,
61 Wn. App. 805, 812 P.2d 512 (1991)35

Wendle v. Farrow,
102 Wn.2d 380, 686 P.2d 480 (1984)24

United States Supreme Cases

Page No.

<i>Alderman v. United States</i> , 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969)	33
<i>Giles v. California</i> , 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)	20, 21, 22, 23
<i>Rakas v. Illinois</i> , 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)	33
<i>Rawlings v. Kentucky</i> , 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980)	33
<i>Reynolds v. United States</i> , 98 U.S. 145, 25 L.Ed. 244 (1878)	20
<i>United State v. Salvucci</i> , 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980)	35

Federal Circuit Court Cases

<i>United States v. Grandberry</i> , 730 F.3d 968 (9th Cir. 2013)	33
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Other State Cases

Page No.

State v. Altrui,
448 A.2d 837 (Conn. 1982)20

State v. Henry,
820 A.2d 1076 (Conn. App. 2003)20

Sutch v. Roxborough Mem'l Hosp.,
2016 PA Super 12639

Statutes and Rules

ER 80424

FRE 80424

RCW 9A.56.02025, 26

I. IDENTITY OF RESPONDENT/CROSS-APPELLANT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent and Cross-Appellant herein.

II. ISSUES

Raised by Appellant:

1. Is the doctrine of forfeiture by wrongdoing satisfied with the court's finding that the Defendant killed Ms. Hebert to prevent her from reporting a crime?
2. Are the court's findings supported by clear, cogent, and convincing evidence on the record, where the record establishes that the Defendant shot her mother while she was on the phone with 911 attempting to report a theft?
3. Separate from the victim's suspicions that she shared with kith and kin, shall the convictions be upheld where the Defendant confessed to both the attempt and killing, and the evidence of premeditation is overwhelming?

Raised by Cross-Appellant:

1. Did the court err in holding the Defendant had standing in the seizure of the crime scene photos taken by the victim and

preserved in the victim's locked safe in which the Defendant had neither access nor any expectation of privacy?

2. Did the court err in sanctioning the prosecutor where there is no record or finding of bad faith?

III. CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

The State assigns error to:

1. The court's finding that the Defendant had standing to challenge the seizure of items from the victim's safe.
2. The court's finding that it was significant that the Defendant's birth certificate had been in the safe at one time.
3. The court's ruling suppressing evidence seized from the victim's safe.
4. The court's ruling sanctioning the prosecutor for testimony which the prosecutor did not elicit and where there was no finding of bad faith.

IV. RELIEF REQUESTED

Respondent asserts the Appellant's conviction and sentence should be affirmed. The Court should reverse the lower court's ruling imposing sanctions and suppressing evidence.

V. STATEMENT OF THE CASE

The Defendant Tashia Stuart has been convicted by jury of both the 2011 attempted and actual first degree murder of her adoptive mother Judy Hebert, along with a firearm enhancement and aggravating factors of deliberate cruelty and domestic violence within sight or sound of minor child. CP 18-20, 200, 202-07, 1691-92.

In early January 2011, Todd and Tashia Stuart were evicted for non-payment and moved with the Defendant's young daughter S.A.A. from Idaho to Pasco to live with Ms. Hebert. CP 14-15, 39-40; RP 463-64, 1498, 1694; PE 375 @ 0:09:50-0:10:35. Before the move, there had been friction between Ms. Hebert and the Stuarts, which had caused Ms. Hebert to feel unsafe and to arrange for regular safety checks. RP 488, 696, 731, 738-39, 931-32, 934; PE 375 @ 0:10:49-0:11:03. Within a week or two of their arrival, Ms. Hebert's anxiety heightened. RP 731. She told her neighbors that she thought the Stuarts were planning something. RP 900. Her neighbors Deborah Severin and Ryan Rhodes shared her concerns, coming up with a code emergency word and offering to call the police. RP 732, 936, 938.

On February 12, the Defendant was googling how to crack a safe. RP 2216; PE 365. On February 14, the Defendant set up her cell phone as a hidden camera in her mother's closet to attempt to capture her mother entering the safe combination. RP 1269; PE 212.

On February 18, Ms. Hebert said if she went missing or turned up dead, the Stuarts were to blame and probably buried her in the backyard. RP 900, 934-35. On February 20, 2011, she suffered a traumatic injury. Mr. Stuart had Ms. Hebert measure for a wall on her garage floor, holding a tape and backing up in small steps until he directed her to stay still in a particular spot. RP 314-15, 469, 477-78, 900-01, 947, 964, 1696, 1711; Munoz RP (6/26/2013) 15. Once Ms. Hebert was in position, an 18-gallon bin of books fell from the rafters onto her head. RP 314-15, 469, 477-78, 657, 668-69, 686, 713, 894, 900-01, 1696; Munoz RP (6/26/2013) 17. Ms. Hebert fell to the concrete, nearly knocked out. RP 479, 1696; Munoz RP (6/26/2013) 18. She suffered acute cervical strain resulting in immense head, neck, and back pain. RP 469-70, 481, 655-59, 661.

Immediately following this injury, the Defendant called Rolfe Hebert demanding the combination to her mother's safe. RP 1695. The Heberts were divorced but remained very close. RP 1687-88.

The Defendant said there had been a horrible accident, and she needed her mother's DNR (do not resuscitate order) and will right away. RP 1695-96; PE 375 @ 2:05:30-2:06:15 (because mother didn't want to be a vegetable on life support). Mr. Hebert told his daughter, "you don't need any of that stuff. You need to hang up and dial 911." *Id.* When the Defendant said her mother would not let her call 911, Mr. Hebert learned that Ms. Hebert was not in need of resuscitation, but was perfectly capable of describing the incident to him on the phone and providing her daughter the combination if she so desired. RP 1695-96, 1699. *Id.* The Defendant called her father two more times in the next couple hours to ask in vain for the safe combination. RP 1698-99. Mr. Hebert wanted to drive from Idaho to check on his ex, but Ms. Hebert, knowing her ex was recovering from serious illness and injury himself and in no shape to travel, persuaded him that she would be fine. RP 1696-97.

The Defendant then called her ex, Charles Adney, and told him her mother was bleeding out of her eyes and nose. RP 1489, 1491, 1500. "[T]hat bitch should be dead in a few days. I dropped something on her head." RP 1489, 1491, 1500. "Take it from me, if you drop something on somebody's head, make sure it's round

instead of flat,” and she laughed. RP 1489, 1500. Before asking her ex for a favor, the Defendant misrepresented that their daughter was in danger from Mr. Stuart and that she needed Mr. Adney’s assistance to prevent Mr. Stuart from inheriting. RP 1490, 1500. She offered Mr. Adney \$1000 to allow her to forge his name as a witness on a forgery of Ms. Hebert’s will, saying Todd Stuart would notarize. RP 1490, 1500-01, 1786. Detective Parramore would later locate a copy of this will hidden between the mattresses in the Defendant’s room. RP 1512, 1514.

In the next 4-5 days, friends and family were unable to reach Ms. Hebert on her home phone. RP 471, 1700. The Stuarts would say Ms. Hebert was busy or sleeping and that she would return the call later. RP 472, 1700. Friend and neighbor Tonya Amende finally sidestepped their interference by calling Ms. Hebert on her cell phone. RP 472. She told Ms. Hebert to go to the hospital. RP 474. Mr. Hebert also begged and pleaded with Ms. Hebert to get medical help. RP 1700. Ms. Hebert had a long history of fibromyalgia, degenerative spine disorder, osteoarthritis, and lupus. RP 663, 712, 723-24, 793, 847, 1691. But the Stuarts refused, telling Ms. Hebert they were capable of taking care of her. RP 469.

When Mr. Stuart “finally” took his mother-in-law to the hospital five days later, she reported that her pain was a 10 out of a possible 10. RP 311, 474, 656-59, 668-69, 688-89, 713, 890. She had soft tissue damage. RP 1702. Her head felt to her to be the size of a watermelon. RP 689. Her entire neck was still in spasm; and she had vertebral tenderness and limited range of motion through her entire back. RP 659, 665, 681-82.

When she returned from the hospital, she continued to use her cell phone for privacy. RP 475. Ms. Hebert discussed the incident with several friends. RP 310-15, 465, 469-70, 790-91, 900-01, 940-44, 964. She did not believe it was an accident. She did not understand why anything should have been in the rafters. The bins belonged to her, and she did not keep them in the rafters. RP 1772. They were too heavy for such a small woman (5’0” and 100 lbs) to carry up a ladder, and there was ample storage on the level in her three car garage. RP 1710, 1772, 1778. It was Ms. Hebert’s nature to be very organized, and she would have been very particular about the bins’ secure placement. RP 482, 1689, 1709, 1771. She also was suspicious about the Defendant’s whereabouts during the incident. The Defendant claimed she had been occupied giving her

daughter a bath, but the little girl's hair was dry. RP 480-81. And Ms. Hebert did not understand why Mr. Stuart would be trying to put up a wall when there was neither money nor space to do so. RP 482.

Ms. Hebert commented to her neighbors and family that the Stuarts were switching her medication to kill her. RP 484, 945, 1702-03. She began to keep her medication in the safe in her closet. RP 485, 859. On separate occasions, Ms. Hebert showed the pills to Mr. Rhodes and then Ms. Amende, observing that, unlike the pills reserved in her safe, the ones kept openly in the kitchen were a different size and the label had been scratched off. RP 484-86, 901, 945-46, 1702. Ms. Hebert preserved the suspect pills in a coat pocket in the back of her closet where police would later recover them. RP 887, 1649-50. When Ms. Hebert discovered the Defendant had stolen her entire pain prescription¹ for the narcotic Tramadol, she told her ex and then called her doctor in Idaho to request a refill. RP 791, 1480, 1703-04.

Mr. Rhodes and Ms. Amende visited her in the day or two before her death. RP 476, 831-32, 902. She looked exhausted, pained, and pitiable. RP 492-93, 902, 952. She said, the Stuarts

were “freaking trying to kill me. ... there’s something going on and they’re trying to kill me.” RP 490-91, 962. She was keeping her bedroom door locked and even put chairs up against it. RP 491. She was considering changing the locks to her house to protect herself from the Stuarts. RP 490-91.

Ms. Hebert took Ms. Amende into the garage, showed her where the tub had dropped on her, and shared her suspicions and concerns for her safety. RP 477-83, 490-91, 830. She had made a diagram of the incident, which she would put in the safe, but Detective Parramore would later locate in the Defendant’s room. RP 483, 1512-13, 1708-09, 1748-49; PE 292. Ms. Amende noticed that there were no construction supplies to build a wall. RP 482. She could see from dust trails in the rafters and on top of the pickup that someone had moved the bin. RP 483, 551-52, 874-75. Ms. Hebert, and later police, took pictures of the dust trails. RP 875, 1650-51.

On March 1, 2011, Mr. Stuart left town unexpectedly without telling his wife or his mother-in-law. RP 487, 490-91, 967, 971, 1704-05; PE 375 @ 0:11:45-0:13:28, 0:54:33-37. He took his military records, personal documents, and Ms. Hebert’s computer battery and

¹ The Defendant abused prescription drugs. CP 1116, Supp RP 540 (18 different

disappeared. RP 970.

The Defendant became concerned that her mother was not going to continue to fund her, would shut off the Stuarts' phones, and that their truck would be repossessed. RP 1320, 1324, 1338. That night the Defendant was caught on the HAPO ATM video making unauthorized withdrawals from her mother's account. PE 315. After some dismissive texts from her husband (RP 1335, 1337-38), the Defendant traveled to Oregon in her mother's truck only to return immediately. RP 1332-33; PE 375 @2:46:57-2:48:00.

Ms. Hebert began to suspect that the Stuarts, who had been using her debit card, were stealing from her. She was delayed a day in closing her account and removing Mr. Stuart from her cell phone account, because someone had switched the cables on her modem to keep her off-line. RP 1322, 1705-06. Once online, Ms. Hebert discovered that there had been unauthorized cash withdrawals on her debit card. RP 1206-11, 1707.

On March 2, 2011, Ms. Hebert called her friend and banker Toni Capaul to report the unauthorized withdrawals, asking her to block the account, but not to mail the new card to her Pasco home.

medications).

RP 305-09, 1707. She told Ms. Capaul about the February incident that left her head so painful and mushy that she did not know if she would ever be able to brush her hair again. RP 310-11, 314-15, 318. She worried someone was trying to kill her. RP 315.

In the early morning of March 3, 2011, the penniless Defendant was googling lodging in Astoria, Oregon and San Francisco and texting her husband that her mother was threatening to have the Defendant arrested and put in jail for theft and for tampering with her computer. RP 1275-82, 1322, 1328, 2217; PE 365; PE 375. She was also texting with Ed Hastie. RP 1296, 1298, 1313-14; Munoz RP (6-26-13) 6, 9-10; PE 366.

At midday, the Defendant called her father asking, “what should I do if mom comes after me.” RP 1714. He found the question bizarre – “mom can barely walk and she can’t raise her arms above her head, how is she going to come after you?” RP 1714-15.² In fact, that day Mr. Hebert had spoken with his ex, and she was feeling run down and sleepy from the medication. RP 901-02, 1714. The Defendant persisted with her hypothetical until her father told her,

² See also RP 493 (too sore to hug Ms. Amende the day before), 495 (too tired to go to Costco a few hours before her death, going to lie down), 665 (limited range of motion).

she should simply “walk away” and leave her mother alone for a while. *Id.* At about 1:30 pm, Ms. Hebert left a phone message on Mr. Hebert’s phone, sounding defeated and saying she had real money problems. RP 1727; PE 371.

At 2:24 PM, Judy Hebert dialed 911; the recording captures a gunshot followed by Ms. Hebert’s weak cries before the call was disconnected. RP 292-95, 297-98, 321-23, 2017; PE 1. The Defendant would later tell police that she had been afraid that her mother was going to have the Stuarts arrested. PE 375 @ 00:28:10, 00:35:25, 00:37:11, 00:39:27; 1:17:00, 1:34:38.

The 911 dispatcher immediately called back and reached the Defendant who claimed that everything was fine. RP 293, 297-98, 2017; PE 1. She explained she needed to change the battery in the smoke detector; the smoke alarm was audible in the background. RP 246, 298. Mr. Rhodes in his driveway heard two gunshots coming from Ms. Hebert’s home and saw the window pulse responsively. RP 903. After a few seconds, he heard a third shot, saw a movement inside the house, and heard a garage door open and close. RP 903-04. He could hear the smoke alarm go off immediately after the shots were fired (due to gunsmoke). RP 960.

Before police arrived, the Defendant took calls from the neighbors and told them something had exploded on the stove. RP 497, 904-06. She told Mr. Rhodes her mother was sleeping, and everything was all right. RP 904-05. She told Ms. Amende her mother was throwing up in the bathroom. RP 497, 905-06.

When Officer Erickson arrived at 2:34, the Defendant told him there was a domestic argument going on having to do with something burning on the stove, and that someone was sick in the back room and everybody was all upset. RP 326, 329-32, 360-61. She delayed the officer's entry for a protracted period of time, claiming she needed to put biting dogs away. CP 163, 1020; RP 333-34. There was nothing burning on the stove, and there were no biting dogs. RP 1016-18; Lang RP 125-26; Supp RP 478. When the Defendant opened the door again, she exclaimed, "she came at me with an ax." RP 333, 335, 359, 906, 967. She admitted she had shot someone and finally granted the officer access to the home where he located Ms. Hebert deceased. RP 259-60, 335-40, 956, 980-81.

The Defendant was interviewed at the police station. PE 375. She admitted she did not have the code to her mother's safe. PE 375 @ 00:52:01. She admitted she hit her mother with the axe. PE 375

@ 00:57:04-00:58:54, 1:02:34-1:03:33 (“I shouldn’t have hit her so bad”). She admitted she sent her daughter to her room and turned the TV all the way up immediately before the shooting commenced. PE 375 @ 1:58:10-16, 3:23:25-3:25:15.

The interview exposed multiple pretenses. PE 375. The Defendant wanted police to believe that:

- she sent S.A.A. to her room immediately before the shooting to keep her from overhearing an argument – and yet she claimed this argument had been going on all day;
- she only wanted to access her mother’s safe to view her birth certificate – for the second time in two days – and in the middle of a heated argument over money;
- her mother asked her to withdraw cash from her account – and yet the Defendant remained in possession of the cash and her mother denied giving her permission to withdraw the money;
- she offered to sell tools to pay back the money – thinking that her mother wanted different cash than what was in the Defendant’s pocket;
- her feeble mother was the aggressor, and was capable of lifting a solid steel axe over her head;
- her mother attacked her with an axe at the same time as her mother was making a 911 call;
- her mother would attack her with an axe, just because Todd Stuart had failed to make agreed payments;
- she ran to the safe in the closet to hide from her mother, although this would be the furthest location from any exit and although she was claustrophobic;
- rather than lock the bathroom door and call 911 with the cell phone in her pocket, she exited the room with an unknown bagged object to shoot her mother;
- she found the gun she used to shoot her mother inside

- the safe, although it was kept in the car;
- she picked this bagged gun out of the safe despite not knowing what it was and despite three other guns being in plain view;
 - she was holding the manila folder – and yet she would have needed two hands to remove the gun from its case and used both hands to shoot;
 - her mother was not holding the folder and yet it was found within her mother’s robes, pierced by a bullet;
 - her mother was holding the axe when shot – and yet she would have had to have been doing this while simultaneously holding a manila folder and making a 911 call;
 - she did not know the “black thing” she hit her mother with was an axe (when she mistakenly said “axe,” she insisted this information came from police, although it had not); and
 - she hit her mother with the axe before she shot her mother, although the blood evidence indicates the axe injury occurred after death.

The contact transfer on the Defendant’s hands indicated she held the revolver with both hands. RP 1963. One bullet (trajectory A) exited the bedroom at a low angle into the hallway, traveled for two feet underneath the carpet, ricocheted upward and impacting the wall behind the sofa, and then bounced onto the sofa. Lang RP 47-49, 56.

A second bullet pierced the folder Ms. Hebert was holding, shredded her thumb, and then pierced her aorta and spine. Lang RP 51, 151-55, 157-58. The spinal damage would have instantly dropped her. Lang RP 91 (no drip trail indicating any purposeful movement

after this injury), 158 (paralyzing legs). And the punctured aorta would have resulted in her death within 0.5 - 2 minutes. Lang RP 157-59. The thumb spatter on the door jamb and in other rooms indicates that the shooter was inside the bedroom and Ms. Hebert was standing just outside her bedroom. Lang RP 50-53.

After Ms. Hebert fell, a third bullet (trajectory B) travelling in a different direction than the other two passed superficially through Ms. Hebert's right side, then the green laundry basket on the ground beside her, and finally ended in the bedroom floor. Lang RP 40-43, 54-55, 155, 159.

The hatchet chop to Ms. Hebert's head cut deeply into her skull but bled only slightly and in an upward direction indicating that the blow occurred after she had fallen and her heart has stopped pumping. Lang RP 156-57, 161-66.

The State's intention to offer the decedent's statements under the forfeiture by wrongdoing doctrine was well litigated before trial. CP 567, 593-609, 867-71, 958-66, 1027-39, 1059-67, 1170-93, 1199. The Court granted the State's motion, finding by clear and convincing evidence that the Defendant shot Ms. Hebert to prevent her from completing the 911 call, thereby forfeiting her right to confront Ms.

Hebert. CP 567; Supp RP 209. The ruling admitted Ms. Hebert's statements to others that the Stuarts were stealing from her; that she feared for her life; and that she believed the Stuarts had or were trying to kill her. Supp RP 210.

CROSS-REVIEW: The State is appealing from (1) the order suppressing the victim's property held in her own safe and (2) the sanction imposed on the prosecutor. CP 896; RP 1724.

Standing: The court suppressed various items seized from the decedent's home, finding the affidavit in support of the warrant did not describe sufficient nexus for this item. CP 654-55. The court found that the Defendant had standing to challenge admission of the victim's property which was located in her safe, including data storage devices and a digital camera which Ms. Hebert was using to store evidence against the Stuarts. CP 612-15; Supp RP 79, 293-98.

Sanction. In pretrial motions, defense requested the prosecutor not elicit from Ms. Crowe that S.A.A. was not attending school. RP 443-44. Defense also expressed concern that Mr. Hebert should not opine on his daughter's guilt. RP 110-11, 189-90. The prosecutor indicated no intention of eliciting this information, and the court made no ruling. RP 114, 191, 443-44.

In cross-examination, defense informed the jury that the Defendant intended to home school S.A.A.. RP 1334-35. During the direct examination of Mr. Hebert, the witness volunteered more than the prosecutor elicited:

Q And do you recall the nature of the conversation?

A Yes, I do.

Q What was that?

A She started off the conversation asking me what should I do if mom comes after me. I said, Tashia, what are you talking about? And she said, well, you know, if mom comes at me what do I do? I said, well, Tashia, if you and mom are having problems, leave the house. You know, and I said, the other thing, mom can barely walk and she can't raise her arms above her head, how is she going to come after you? And she says, well, you know, if she does, what do I do? I said, get out of the house. Just walk away. Take [S.A.A.] if you need to, go to the neighbor's house, you know, just get out of there for a while.

Q Did she go into describing her coming after her, or anything like that –

A No, she didn't.

Q -- at this time? And this is about noon?

A Yeah, it was around lunch time. And I told her, I said, as a matter of fact, ***why don't you get the paperwork you need to get [S.A.A.] enrolled in school***, and just –

RP 1714-15 (emphasis added).

Q When were you informed that Judy had been shot?

A Well, Ryan had left the message and he didn't give me any specifics. He said, Bogie, you need to call me right away and left his number.

And so when I found the message, I called him. And he said, dude, you need to get down here right now. And I said, what's going on? He says, I can't tell you. You just need to get here. And I said, Ryan, it's a three hour drive, don't do that to me. Tell me what's happened, please. And he said, she killed her. Tashia **murdered** Judy. She shot her three times with a .357.

RP 1716-17 (emphasis added).

The defense accused the prosecutor of "eliciting" information about S.A.A.'s schooling as well as Mr. Rhodes' opinion of the Defendant's guilt. RP 1718, 1723. The prosecutor noted that the testimony was not responsive to the prosecutor's question. RP 1718. The trial court agreed that the prosecutor had not elicited the statements. RP 1720. However, the court imposed sanctions of \$200 on the prosecutor, finding that the State should have advised the witness more specifically regarding the court's ruling. RP 1724.

VI. ARGUMENT

A. THE VICTIM'S ATTEMPT TO REPORT A CRIME SATISFIES THE "TESTIMONY" REQUIREMENT OF THE DOCTRINE OF FORFEITURE BY WRONGDOING.

The forfeiture by wrongdoing doctrine extinguishes confrontation claims on equitable grounds. *State v. Tyler*, 138 Wn. App. 120, 128, 155 P.3d 1002 (2007). Under this doctrine, a

defendant may not procure the absence of a witness and then complain that the witness is not available to testify. CP 959-64; *Giles v. California*, 554 U.S. 353, 358-59, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008); *State v. Mason*, 160 Wn.2d 910, 162 P.2d 396 (2007). See also *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878) (a criminal defendant is “in no condition to assert his constitutional right has been violated” when he is the cause of the witness’ absence).

The Washington Supreme Court adopted the equitable doctrine in *State v. Mason*, when the killer claimed the admission of his victim’s statements against him violated his confrontation rights.

[W]e will not allow Mason to complain that he was unable to confront Santoso when Mason bears responsibility for Santoso’s unavailability. Mason made his right impossible to implement; he has only himself to blame for its loss.

State v. Mason, 160 Wn.2d at 925.

An appellate court defended the doctrine with the quip, “‘Though justice may be blind it is not stupid.’” *State v. Henry*, 820 A.2d 1076 (Conn. App. 2003). (quoting *State v. Altrui*, 448 A.2d 837 (Conn. 1982).

State v. Mason, 160 Wn.2d at 925. Basic principles of equity require that a person should not be allowed to profit from one’s wrongdoing.

State v. Tyler, 138 Wn. App. at 129. The forfeiture doctrine protects

the overall integrity of the justice system by deterring litigants from wrongfully preventing the testimony of adverse witnesses. *Id.*

The court must be satisfied by clear, cogent, and convincing evidence that the defendant made the witness unavailable with specific intent to prevent the victim from testifying as a witness at trial. *Giles v. California*, 554 U.S. at 377; *State v. Fallentine*, 149 Wn. App. 614, 619-20, 215 P.3d 945 (2009) (the court must be satisfied that the fact in issue is shown to be “highly probable”).

The Defendant requests this Court narrow the forfeiture doctrine such that it only applies to:

1. cases with a history of domestic abuse intended to dissuade the victim from seeking outside help,
2. witness statements made after the commencement of a criminal prosecution, or
3. witness statements alleging *criminal* wrongdoing.

AOB at 17-19. Such a limitation of the doctrine is contrary to legal authority. The Defendant does not offer any rationale for limiting the doctrine, but only attempts to interpret a limitation from the *Giles* opinion, which the majority in fact explicitly rejects.

As to the first proffered limitation, the *Giles* case explicitly denounced differential treatment for domestic violence cases. When the dissent in the *Giles* opinion floated a “thinly veiled invitation” to

overrule *Crawford v. Washington* in order to craft a forfeiture doctrine which would specifically assist women in abusive relationships, the majority responded:

[W]e are puzzled by the dissent's decision to devote its peroration to domestic-abuse 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 v. California, 554 U.S. at 376.

In any case, such a narrowing of the doctrine would not assist the Defendant. There was prior domestic violence: the prior murder attempt. And there was interference with seeking help: blocking the victim's access to the house phone and internet and killing her as she was on the phone with 911.

The second question, whether a criminal case must have commenced prior to the witness making statements, has already been addressed. In *State v. Dobbs*, the victim told police that the

defendant was carrying a weapon, had been following her for several days, had sent harassing texts and made harassing phone calls, and had slashed her tires. *State v. Dobbs*, 167 Wn. App. 905, 908, 276 P.3d 324, 328 (2012), *aff'd*, 180 Wn.2d 1, 320 P.3d 705 (2014). She said he had threatened to kill her and to shoot up the house and everyone in it. *Id.* She pleaded with police that if they did not find the defendant, they would find her dead. *Id.* When the victim disappeared shortly before trial, the court agreed that the defendant had procured her absence, and admitted her statements under the forfeiture doctrine. *State v. Dobbs*, 167 Wn. App. at 911. This ruling was upheld. “There is no rule that the trial court may consider only acts occurring after the defendant is charged in deciding whether the forfeiture doctrine applies.” *State v. Dobbs*, 167 Wn. App. at 913–14, *citing Giles*, 554 U.S. at 377.

As to the third proposal to narrow the scope of the doctrine, the Defendant does not explain what rationale there would be for distinguishing between procuring the absence of a witness whose testimony was anticipated in a criminal versus civil proceeding. The doctrine is premised on equities. The forfeiture doctrine protects the overall integrity of the justice system, not just the criminal justice

system, by deterring litigants from wrongfully preventing the testimony of adverse witnesses. *State v. Tyler*, 138 Wn. App. at 129. The doctrine is written into evidence rules which apply in both civil and criminal contexts. ER 804(b)(6); FRE 804(b)(6).

Again, the creation of such a new rule would be of no avail to the Defendant. Here, the State's allegation was that the Defendant shot her mother while she was in the act of calling 911 to report a *crime*. CP 965.

It is undisputed that the Defendant shot her mother while her mother was on the phone with 911. The Defendant misrepresents that the lower court found that at the time of her death Ms. Hebert was only attempting to report that the Defendant was trying to learn the contents of her mother's will. AOB at 20, 23-24. This is not a reasonable or fair reading of the record.

A reviewing court can affirm on any theory within the pleadings and proof, even if the lower tribunal did not consider such grounds. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). The Honorable Judge Mitchell summarily ruled there was clear and convincing evidence that "the shooting of Ms. Hebert was done to

prevent her from reporting the wrongdoing that Ms. Hebert had discovered that the defendant had been involved in.” CP 567; Supp RP 209. The superior court’s ruling granted the State’s motion. That motion did not allege Ms. Hebert was calling to report the Defendant had viewed her mother’s will. The State’s allegation in the pleadings and proof before the court was that Ms. Hebert was shot while attempting to report a **theft**.³ CP 964-65. Trial counsel understood this allegation. CP 594.

The Defendant grew impatient when Ms. Hebert did not die after the first attempt on her life. She used her mother’s debit card to withdraw funds to visit her husband in Oregon. She is easily identified in the ATM video. PE 315. Mr. Stuart took Ms. Hebert’s computer battery and left the state making no effort to pay Ms. Hebert per their arrangement. RCW 9A.56.020(1)(b)(obtaining property by deception with the intent of depriving is theft). The Defendant tried to prevent her mother from learning about the thefts by preventing her from accessing her account online. However, Ms. Hebert reconnected her

³ Prior to trial, the State expected that S.A.A. would testify. Eventually, the State felt it had enough evidence without putting the child through the trauma of trial. RP (9/14/13) 56-56, 58-61; Supp RP 770-74; CP 41-42, 995. However, if she had testified, it was anticipated that she would say her grandmother was calling 911 to report that the Defendant had stolen from Ms. Hebert. CP 965.

computer and discovered the unauthorized withdrawals and suspected the Defendant. RP 1206-11, 1707.

The Defendant told police and texted her husband that her mother was going to get her arrested for theft. That appears to be exactly what Ms. Hebert was doing when she was killed. She cancelled her card the day before her death. An hour before her death, she left a voicemail on Mr. Hebert's phone, sounding defeated and saying she had real money problems. RP 1727; PE 371. Then she dialed 911.

The Defendant's claim that Ms. Hebert would not have been a witness in a *criminal* prosecution is false. Ms. Hebert was reporting a theft at the moment she was killed. Theft is a criminal offense which is prosecuted in the State of Washington. RCW 9A.56.020-.050. Because the Defendant's premise is false, this is not the case to be addressing the Defendant's invitation to limit the forfeiture doctrine to those cases where absence was procured to prevent testimony only *in a criminal prosecution*.

The facts in this case satisfy the requirements of the doctrine.

B. THE COURT'S RULING IS SUPPORTED BY CLEAR, COGENT, AND CONVINCING EVIDENCE.

The Defendant appears to argue that, like a *Knapstad* motion to dismiss, a motion to admit evidence must be supported by sworn testimony or affidavits at the time of the ruling. AOB at 24. *Cf.* CrR 8.3(c). No authority is offered for this assertion. Where no authority is cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel after diligent search has found none. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). Nor is it appropriate to raise authority for an unsupported argument for the first time in reply. *King v. Rice*, 146 Wn.App. 662, 673, 191 P.3d 946 (2008).

At the trial level, there was no dispute between the parties over the evidence for forfeiture. The Defendant had readily confessed to police that her mother accused her of theft and that she was afraid her mother was going to have her arrested for it. PE 375. And the defense did not encourage the State to preview testimony in what was already a high profile case. CP 722-28.

Rather, the Defendant challenged whether the forfeiture doctrine applied if, at the time of the killing, there was no pending or

then-existing case. Supp RP 166; CP 601, 1187 (arguing that preventing the reporting of a crime was not equivalent to preventing testimony at a trial). This argument failed, because the doctrine does not require that a prosecution be underway at the time the witness is made unavailable. *State v. Dobbs*, 167 Wn. App. at 913–14 (discussed *supra*).

As in many pre-trial motions, the evidence that would be presented later at trial was summarized in the brief. Preliminary admissibility rulings can be reviewed based on the entire trial record which follows. *State v. Brousseau*, 172 Wn.2d 331, 340, 259 P.3d 209 (2011).

The trial record described *supra* provides the testimony regarding Ms. Hebert's suspicions of a theft and her attempt to report it. The record further establishes the Defendant made Ms. Hebert unavailable (i.e. killed her) with specific intent to prevent her from reporting the theft which would necessarily require Ms. Hebert's testimony at trial. She shot her mother while Ms. Hebert was in the process of connecting with 911. The ruling is supported by the clear, cogent, and convincing evidence summarized in the State's arguments and presented at trial.

C. OVERWHELMING EVIDENCE SUPPORTS THE CONVICTIONS.

Because the lower court did not err in admitting the hearsay statements, this Court need not reach this claim. The Defendant asks the Court to review whether it is reasonably probable that the outcome of trial would have been materially affected had the forfeited statements not been admitted. AOB at 25. “The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *State v. Brown*, 159 Wn. App. 1, 16, 248 P.3d 518, 524 (2010), citing *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The challenged testimony is Ms. Hebert’s statements to others that the Stuarts were stealing from her; that she feared for her life; and that she believed the Stuarts had or were trying to kill her. Supp RP 210. There is overwhelming evidence of the Defendant’s guilt regardless of the statements admitted under the forfeiture doctrine.

THE ATTEMPT: After the Defendant had been googling safe cracking and had tried and failed to gain access to the safe by surveillance, Mr. Stuart made Ms. Hebert stand still until a box of

books fell on her head. The dust trails demonstrate that someone had recently accessed the rafters. Ms. Hebert was small; she would not have placed a heavy box high over her head, especially when there was ample storage below. Ms. Hebert was a fastidious housekeeper, who would not have kept a heavy box in a precarious position. The bin was one of several matching bins belonging to Ms. Hebert, and yet it was weighted with unfamiliar items not belonging to her. RP 2055-58. Mr. Hebert had moved the Stuarts' property into a bedroom, so there was no legitimate reason for them to place the bin in the rafters. RP 1759-60.

Immediately after the incident, the Defendant's first act was to attempt to get the combination to her mother's safe – repeatedly. She had no reasonable explanation for needing access, immediate or otherwise, to the safe. The same day, the Defendant confessed to Charles Adney that she pushed the bin onto her mother's head deliberately. Expecting the "bitch" to die in a few days, she needed Mr. Adney's assistance in preparing a forged will benefitting herself. This will was found under the Defendant's mattress.

Despite the serious injury and the recommendations of friends and family, the Stuarts did not get Ms. Hebert medical care for many

days, instead waiting for her to die. They intercepted calls to the home phone preventing Ms. Hebert's friends and family from contacting her in the days immediately following. The Defendant claimed her mother did not want treatment; a highly unlikely claim considering her mother suffered from fibromyalgia, a chronic pain condition and was reporting 10/10 pain level many days later. And the Defendant killed her mother ten days later.

The failure to provide medical care as the fibromyalgia patient endured 10/10 pain for the ten days between her injury and her death was deliberate cruelty.

THE MURDER: It is undisputed that the Defendant killed her mother with a firearm within sight or sound of S.A.A.. Her premeditated intent is demonstrated by her previous attempt and admission of the attempt to Mr. Adney; the forged will under her mattress; her statements to her father (setting up a thoroughly implausible self-defense story hours earlier); sending her daughter to her room and turning the television volume all the way up immediately before the shooting; her multiple exposed pretenses in the police interview; her text messages to her husband; the post mortem injuries (hatchet chop and gunshot – trajectory B) intended to buttress her

pre-planned self-defense claim; her lies in the immediate aftermath to 911, neighbors, and police (something burning on the stove, mother sleeping) which bought her time to control the scene; the timing of the shooting (after Ms. Hebert had discovered theft and while she was in process of reporting it); her internet and texting activity that morning, and her motives (greed and a desire to avoid arrest).

As the prosecutor explained, the admission of the forfeiture statements was a matter of equity. CP 958-66; Supp RP 157-64. It would be unconscionable to reward the killer by silencing her victim's voice. Ms. Hebert was doing her best to protect herself while still being present for her granddaughter. CP 41-42. She did this by gathering evidence in the form of a calendar, a diagram, and photographs of the crime scene and by sharing information with her loved ones. However, there is sufficient evidence for the convictions without her statements.

D. THE COURT ERRED IN SUPPRESSING THE VICTIM'S PROPERTY FOUND IN HER SAFE.

The State challenges the suppression of Ms. Hebert's property (crime scene photos) which police located inside Ms. Hebert's safe. The legal conclusions in a suppression ruling are reviewed *de novo*.

State v. Kipp, 179 Wn.2d 718, 726, 317 P.3d 718 (2014); *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

... it's now settled that a criminal defendant may seek suppression of evidence discovered during an illegal search only if the defendant's *own* Fourth Amendment rights were violated. *Rawlings v. Kentucky*, 448 U.S. 98, 104–06, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *Rakas v. Illinois*, 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). A defendant may not vicariously assert the Fourth Amendment rights of others. *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). Thus, the Supreme Court has held, ***a defendant generally cannot seek suppression of evidence discovered during an illegal search of an acquaintance's purse, or of a friend's car*** in which the defendant is merely a passenger. *Rawlings*, 448 U.S. at 106, 100 S.Ct. 2556; *Rakas*, 439 U.S. at 148–49, 99 S.Ct. 421.

United States v. Grandberry, 730 F.3d 968, 983 (9th Cir. 2013) (Watford, C.J., concurring) (emphasis added).

As a general rule, rights assured by the Fourth Amendment are personal rights which may be enforced only at the instance of one whose protection was infringed by the search and seizure. *State v. Simpson*, 95 Wn.2d 170, 174, 622 P.2d 1199 (1980). A defendant must prove a legitimate expectation of privacy in the place searched or the thing seized. *State v. Boot*, 81 Wn. App. 546, 550-51, 915 P.2d 592 (1996) (burden is on the defendant). Mere presence or

temporary access is not sufficient to show a legitimate expectation of privacy. *State v. Boot*, 81 Wn. App. at 551. “A subjective expectation of privacy is unlikely to be found where the person asserting the right does not solely control the area or thing being searched.” *State v. Carter*, 151 Wn.2d 118, 127, 85 P.3d 887 (2004).

The Defendant’s temporary residence in her mother’s home did not give her an expectation of privacy in areas where she had no license to enter. In *State v. Cantu*, 156 Wn.2d 819, 822-23, 132 P.3d 725 (2006), a juvenile was charged with burglary for stealing items from his mother’s locked bedroom. The Washington Supreme Court held that although a juvenile is presumed to have a license to enter the parent’s home, that license was limited by clear implication when the mother locked her door. *State v. Cantu*, 156 Wn.2d at 824-25. And here, the adult Defendant did not have a license or privilege to enter her mother’s locked safe. She has no reasonable or legitimate expectation of privacy therein and no standing to challenge the search and seizure.

The legitimate safe owner Ms. Hebert was actively hiding things from the Defendant there and actively denying the Defendant access to the safe. CP 613. The Defendant not only lacked sole

control of her mother's house, she also lacked any control over the safe in her mother's bedroom. PE 375 @ 00:52:01 (the combination is "like top secret or whatever"). Regardless of her temporary residency, the Defendant had no expectation of privacy in her mother's locked safe, which she herself had no legitimate access to.

The Defendant had no possessory interest in the safe. She was also not on the premises at the time of the search. The warrant was executed the day after her arrest, when the Defendant was in jail.

A minority opinion found a special "automatic standing" exception under Article 1, section 7 **in regards to possessory offenses**. *State v. Simpson*, 95 Wn.2d at 175. The exception cannot be justified under the federal constitution. *United State v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), *overruling Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). And the Washington courts are not satisfied that it is justified under the Washington constitution. *State v. Jones*, 68 Wn. App. 843, 853-54, 845 P.2d 1358 (1993)("Given this history, we conclude there is no authority in Washington binding this court to apply automatic standing as a matter of constitutional law"); *State v. Zakei*, 61 Wn. App. 805, 812 P.2d 512 (1991), *aff'd* 119 Wn.2d 563, 834 P.2d 1046 (1992)

(declining to apply automatic standing, finding the rationale of the *Simpson* plurality is not binding precedent).

In any case, there was no possessory offense charged. The Honorable Judge Mitchell correctly did not endorse the Defendant's argument that possession was an "essential" element of the firearm enhancement. CP 589, 881; Supp RP 296-98. Being "armed" is not the same thing as being in possession. CP 262 (armed is when a "firearm is easily accessible and readily available for offensive or defensive use."); See also *State v. Schelin*, 147 Wn.2d 562, 566-67, 55 P.3d 632 (2002); *State v. Sabala*, 44 Wn. App. 444, 723 P.2d 5 (1986). The automatic standing rule would require that the defendant be charged with possession of the very item illegally seized. The automatic standing rule has no application here.

Ms. Hebert kept a variety of things in her safe that she did not want the Defendant to have. Some of these items were evidence of the Defendant's crimes against her mother, e.g. personal notes, prescription medication, and electronic/photographic evidence. The safe also held guns, her will and power of attorney notebook.

In ruling on the motion for reconsideration, the court found it significant that the Defendant's birth certificate had been in the safe at

one time. Supp RP 297. See also Supp RP 295; CP 653 (FF 5). It is not significant. *State v. Boot*, 81 Wn. App. at 551 (temporary access is insufficient to show a legitimate expectation of privacy). The Defendant claimed that she had asked her mother to retrieve a folder of the Stuarts' documents from her safe. PE 375. That folder was recovered by Ms. Hebert's body. PE 7. Neither the folder nor any other property belonging to the Defendant was in her mother's safe at the time of the search. Nor does any authority establish that a person gains a privacy interest in all the contents of someone else's locked compartment, because in the past she had asked another to hold something for her. This cannot be the basis for suppressing the evidence collected by Ms. Hebert and preserved in her safe.

The question is: did the Defendant have a reasonable expectation of privacy in the contents of her mother's safe by (1) exhibiting an actual expectation of privacy by seeking to preserve something within as private and (2) does society recognize that expectation as reasonable? *State v. Evans*, 159 Wn.2d 402, 408-10, 150 P.3d 105 (2007). The answers to both are: no. She has made no claim to ownership of the items in the safe. She exhibited no expectation of privacy as to the items which she could not access and

did not even know existed. Society does not recognize that a killer has a reasonable privacy interest in the evidence the victim gathers and preserves against the killer and locks away from her. This ruling should be reversed.

Even if the Court affirms the convictions, the Court should address this suppression ruling. *Spokane Research Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005) (providing that review is appropriate even of moot issues for future guidance and to prevent recurring error). The ruling contradicts the principles behind the equitable doctrine of forfeiture by wrongdoing. It is also another recent instance of the weakening or discounting of the concept of standing in Washington courts. *State v. Hinton*, 179 Wn.2d 862, 319 P.3d 9 (2014); *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 263 P.3d 591 (2011).

E. THERE IS NO RECORD OF BAD FAITH TO SUPPORT THE IMPOSITION OF SANCTIONS ON THE PROSECUTOR.

A trial court has inherent authority to sanction lawyers for improper conduct during the course of litigation which affects the integrity of the court and, if left unchecked, would encourage future

abuses. *State v. Merrill*, 183 Wn. App. 749, 755, 335 P.3d 444 (2014). However, such sanction generally requires an explicit finding of bad faith. *State v. Merrill*, 183 Wn. App. at 755; *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000). See also *Sutch v. Roxborough Mem'l Hosp.*, 2016 PA Super 126, -- A.3d --, 2016 WL 3269703 (Pa. Super. Ct. June 15, 2016) (reversing sanctions where witness could not recollect whether counsel had advised of pretrial ruling, where court found counsel had not elicited testimony, and record did not support a finding of bad intent). At the least, the record should include a finding that is equivalent to a finding of bad faith. *State v. S.H.*, 102 Wn. App. at 475-76.

Bad faith “embraces more than bad judgment or negligence and imports dishonest purpose, moral obliquity, conscious wrongdoing, breach of known duty through some ulterior motive or ill will partaking of the nature of the fraud, and embraces actual intent to mislead or deceive another.” *Hamilton v. State Farm Mut. Auto. Ins. Co.*, 9 Wn. App. 180, 189, 511 P.2d 1020, 1025 (1973) (Horowitz, C.J., dissenting).

In this case, the court made no such finding of bad faith before imposing sanctions on the prosecutor. In fact, the court explicitly

stated that the prosecutor did not elicit the challenged testimony. The witness' testimony was not responsive to the prosecutor's question. On this record, the sanction cannot be sustained.

VII. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction, reverse the ruling suppressing the victim's property, and reverse the sanction against the prosecutor.

DATED: August 11, 2016.

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 11, 2016, Pasco, WA

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