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COURT OF APPEALS

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Court of Appeals  
Division III  
State of Washington

DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TASHIA STUART, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF FRANKLIN COUNTY

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APPELLANT'S REPLY BRIEF AND  
CROSS-RESPONDENT'S ANSWER

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## A. ARGUMENT

Ms. Stuart does not ask this court to narrow the forfeiture doctrine. She urges this court to limit its application to the circumstances carefully analyzed by the *Giles* opinion. See *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). Evidence the victim may have been attempting to prevent a crime does not satisfy the requirement that the court find clear convincing evidence that the defendant intended to prevent a witness from testifying.

The first four sections of the majority opinion in *Giles* repeatedly refer to the circumstances carefully circumscribed by the *Giles* opinion.

The Court's opinion emphasizes at length that the doctrine can only apply when the defendant's alleged wrongdoing not only procured the witness's absence but was designed to do so:

The manner in which the rule was applied makes plain that unfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declarations exception. Prosecutors do not appear to have even *argued* that the judge could admit the unfronted statements because the defendant committed the murder for which he was on trial.

*Id.* at 361-62.

The majority opinion describes at length the historical cases in which the defendant had caused the death of the victim and before dying the victim had made persuasive statements accusing the defendant and the statements were nevertheless excluded because they did not fall within the dying declaration exception to the hearsay rule. *Id.* at 362-65. Against this background the courts recognized the doctrine of forfeiture by wrongdoing not merely because the accused had caused the death of the unavailable witness but because the death had been procured for the very purpose of preventing that person from testifying. *Id.* at 365.

There is nothing mysterious about courts' refusal to carry the rationale further. The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to "dispensing with jury trial because a defendant is obviously guilty." *Crawford*, 541 U.S. at 62, 124 S. Ct. 1354.

*Id.*

The Court cited with approval that analysis of commentators: "[T]he requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'" *Id.* at 377 (quoting 5 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 8:134, p. 235 (3d ed. 2007)).

Sections II(A)-(D) emphasize that the doctrine applies when the defendant's actions are designed to "prevent [the] witness from testifying." *Id.* at 359, 361, 365, 367, 368, 373. In the final section of the majority opinion, the Court recognizes that "[e]arlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify." *Id.* at 377.<sup>1</sup> The Court does not retreat from the requirement that there must be clear evidence that the defendant intended to prevent the victim from testifying, only that under certain circumstances, such as those that arise in an abusive domestic relationship, evidence may show that the abuse is designed to preclude the victim from initiating a criminal prosecution by reporting the abuse.

The State did not claim that there was evidence of earlier abuse or threats intended to dissuade Ms. Hebert from seeking outside help or initiating a criminal prosecution.

In support of the motion to admit Ms. Hebert's statements under the doctrine of forfeiture by wrongdoing, the state alleged Ms. Stuart had asked her father to help her access her mother's safe, and asked her former

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<sup>1</sup> Part II-D-2, *Giles* at 374-76, is not part of the majority opinion since Justices Souter and Ginsburg declined to join in that portion of Justice Scalia's opinion for reasons unrelated to the analysis here. *Giles* at 379-380.

husband to witness a will that would benefit herself. (CP 958) The State alleged that her daughter S.S. would testify that she had heard her parents discussing how they had taken Ms. Hebert's money, that she had shown her mother how to get into the safe, and "that when Ms. Hebert found out that Ms. Stuart had accessed the safe and that money was taken, she called the police." (CP 958) The State also noted that when dispatch returned the 911 call from Ms. Hebert's home Ms. Stuart denied any need for police attention. (CP 958)

S.S. did not testify. Apart from allegations as to S.S.'s proposed testimony, the motion does not cite any evidentiary basis for numerous factual assertions included in the argument section of the motion. (CP 965-66)

Without evidence of earlier abuse intended to dissuade Ms. Hebert from resorting to outside help, evidence Ms. Stuart had taken, or attempted to take, money from Ms. Hebert, and evidence that Ms. Stuart had shot her mother as her mother was calling 911, the court cannot conclude Ms. Stuart's actions were designed to prevent her mother from initiating a criminal prosecution.

1. THE COURT'S RULING IS NOT SUPPORTED BY CLEAR, COGENT AND CONVINCING EVIDENCE.

Testimonial statements under the forfeiture doctrine are thus admissible only when the evidence shows the wrongdoing was intended to prevent the testimony, and the evidence is clear, cogent and convincing.

*State v. Fallentine*, 149 Wn. App. 614, 620, 215 P.3d 945 (2009).

Statements were held admissible in the *Fallantine* case based on testimony presented at two pretrial hearings.

The court's ruling states:

[T]here is evidence that the defendant had taken steps to obtain documents, particularly a will, I think was the one that was in particular that was addressed. There's information in the record that the defendant attempted to get someone else to assist her in obtaining the will, or at least signing off on a will providing that certain property would go to her. Also there was evidence of the defendant asking or repeatedly asking her, I guess, father, Mr. Hebert, for the combination to a safe to obtain documents. This occurred shortly after the first incident where Ms. Hebert was injured.

There is evidence in the record that files from the safe were in the possession of Ms. Hebert at the time her body was located; that there had been a 911 hang-up call from that location; that when the police responded, the defendant initially told them that there was nothing wrong, but then later came back and indicated that she had shot Ms. Hebert because Ms. Hebert had come at her with an ax or a hatchet.

From that evidence, it appears clear and convincing to this court 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.

(Supp CP 208-09) Despite the court's references to evidence in the record, nothing in the record for this appeal suggests the existence of any evidence before the court at the time of this ruling, apart from the assertions in the State's motion, to support the court's findings.

The State contends this court may review the trial court's findings based on the entire record, including evidence presented at trial, citing *State v. Brousseau*, 172 Wn.2d 331, 259 P.3d 209 (2011). *Brousseau* is based on considerations not present for determining evidence will be admissible under the forfeiture doctrine. Specifically, *Brousseau* states that in reviewing the trial judge's competency determination of an infant witness, the appellate court "may examine the entire record." *Id.* at 340. This is so because "[t]he presumption of competence persists throughout the proceedings but may be challenged at any time." *Id.* at 341. Since competency can fluctuate, "[a] child found competent at one point in time may become incompetent at trial." *Id.* at 348.

When a pre-trial ruling permits numerous witnesses to testify to numerous hearsay statements at trial, this rationale cannot apply. A ruling admitting hearsay at trial under the doctrine of forfeiture cannot "be challenged at any time."

The forfeiture doctrine does not protect the overall integrity of the justice system if the State may obtain a ruling admitting the victim's hearsay statements on the basis of unsubstantiated assertions of fact, permitting the court state its findings are based on clear, cogent and convincing evidence, and permitting the State on appeal to rely solely on evidence subsequently produced at trial to show the factual basis for the findings. When the trial court states its findings are based on clear and convincing evidence in the record, this court should require that the statement be supported by the record.

2. THE COURT PROPERLY DENIED THE STATE'S MOTION TO RECONSIDER THE ADMISSIBILITY OF EVIDENCE SEIZED WITHOUT A WARRANT.

Respondent/Cross-Appellant contends the court erred in denying the State's motion to reconsider a ruling excluding evidence found in the safe in Ms. Hebert's bedroom. Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion. A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

Respondent argues Ms. Stuart did not have a legitimate expectation of privacy, or that it was an expectation society recognizes as reasonable. The relevant rules were stated in *State v. Link*, 136 Wn. App. 685, 692–94, 150 P.3d 610 (2007):

Standing is a “party’s right to make a legal claim or seek judicial enforcement of a duty or right.” When a defendant seeks to suppress evidence on privacy grounds and the State contests the defendant’s standing, the defendant has the burden to establish that the search violated his *own* privacy rights. A claimant who has a legitimate expectation of privacy in the invaded place has standing to claim a privacy violation. A two-part inquiry resolves a question of standing: (1) did the claimant manifest a subjective expectation of privacy in the object of the challenged search; and (2) does society recognize the expectation as reasonable?

An overnight guest has standing to challenge a warrantless search. But a defendant who merely establishes that he was casually and legitimately on the premises does not satisfy his burden to show a legitimate expectation of privacy. The middle ground, where the defendant was more than a casual guest but less than an overnight guest, requires a more fact-specific standing analysis.

No published Washington case has analyzed whether a defendant who was a social guest but was not an overnight guest has standing to contest the warrantless search of a home. But the Supreme Court . . . answered this question in the affirmative under a certain set of circumstances. And, in dicta, our court interpreted the Supreme Court as holding that “ ‘almost all social guests’ have a reasonable expectation of privacy.”

136 Wn. App. at 692–93 (citations omitted).

Ms. Stuart was more than a casual guest, and certainly more than an overnight guest, in her mother's home. It is undisputed she and her husband and daughter had been living there for several months.

Respondent suggests that even if Ms. Stuart had a legitimate expectation of privacy in the residence, she had no such expectation with respect to the safe in her mother's bedroom, citing *State v. Cantu*, 156 Wn.2d 819, 132 P.3d 725 (2006). That case, however, does not address the Fourth Amendment rights of a defendant; the issue there was whether a juvenile who was not living at his mother's home, and who broke into her locked bedroom, did so unlawfully for purposes of establishing the unlawful entry element of burglary: "[E]ven though Cantu may have had a license to be in the home, an unprivileged entry into a locked room may still constitute unlawful entry for purposes of burglary." *Id.* at 824. The State does not contend that in entering her mother's safe Tashia had, or could have, committed burglary.

Respondent nevertheless contends Ms. Stuart did not have a subjective expectation of privacy because she did not solely control the area to be searched, citing *State v. Carter*, 151 Wn.2d 118, 85 P.3d 887 (2004). The court held Carter could not claim his private affairs were disturbed when he voluntarily placed a gun on a table in open view and invited class members to handle and explore the gun.

*Carter* cited *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, *cert. denied*, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986), for the proposition that “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.” *Jeffries* held that a search of the defendant’s boxes was lawful because the boxes were kept on property not owned by defendant and he could not expect to keep people from looking inside them.

In denying the motion for reconsideration, the trial court noted that there was evidence Ms. Stuart may have had belongings in the safe and the court could not reasonably admit items in the safe on an item-by-item basis. (RP 297-98) The court did not abuse its discretion in denying the motion.

3. THE RECORD AS A WHOLE SUPPORTS THE IMPOSITION OF SANCTIONS.

Respondent contends the court erred in imposing sanctions merely because a prosecution witness volunteered more than the prosecutor’s questions asked because, although the court agreed the prosecutor had not elicited the answer, the witness should have been more specifically advised. Resp. Br. At 18-19, 39-40. The court provided a more complete explanation of its ruling:

[T]he court is going to impose sanctions in the amount of \$200 against the prosecutor because this is not, in this court's opinion, the first time that we've had situations where I believe that the State should have advised their witnesses more specifically regarding the court's ruling.

(RP 1724) The record supports the court's opinion. (RP 866, 1289)

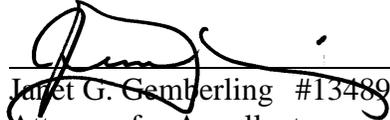
A trial court's decision to impose sanctions is reviewed for abuse of discretion. *State v. Gassman*, 175 Wn.2d 208, 210, 283 P.3d 1113 (2012). A careful reading of the record in this case suggests the trial court did not abuse its discretion.

#### B. CONCLUSION

Affirming the conviction in this case would effectively expand the application of the forfeiture doctrine beyond the limits set by the United States Supreme Court in *Giles v. California*.

Dated this 23rd day of September, 2016.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )       No.   31909-1-III  
  )  
                          vs.                    )       CERTIFICATE  
  )       OF MAILING  
TASHIA STUART,                    )  
  )  
                                  Appellant.    )  
\_\_\_\_\_

I certify under penalty of perjury under the laws of the State of Washington that on September 23, 2016, I served a copy of the Appellant's Reply Brief and Cross-Respondent's Answer in this matter by email on the following parties, receipt confirmed, pursuant to the parties' agreement:

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