NO. 100206-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALPHONSO CURTIS BROWNLEE,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 53753-2-II
Kitsap County Superior Court No. 19-1-00602-18

ANSWER TO PETITION FOR REVIEW

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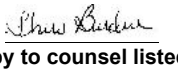
SERVICE		
	Suzanne Lee Elliott 705 2nd Avenue, Suite 1300 Seattle, Wa 98104-1797 Email: suzanne-elliott@msn.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 1, 2021, Port Orchard, WA  **Original e-filed at the Supreme Court; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney JOHN L. CROSS.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals published decision in *State v. Brownlee*, No. 53753-2-II filed as unpublished on April 20, 2021 and ordered published August 10, 2021 a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles held that Brownlee's confrontation rights were not violated where uncross-examined testimony from a crime victim and from a witness was admitted under the doctrine of forfeiture by wrongdoing. The question presented is thus whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and

2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United

States; and

3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

IV. 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 an 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 ab out 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 if any, 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 responded to a call reporting that Brownlee was attacking a woman—the woman having locked herself in the bathroom. 11RP 1760. Corporal Nelson and another officer knocked and Ms. White answered the door. 11RP 1762. Corporeal 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 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 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 (exh.s 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 again responded to a domestic dispute call and were again 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,

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE THAT CORRECT DECISION IS NOT IN CONFLICT WITH OTHER CASELAW AND LEAVES NO SIGNIFICANT CONSTITUTIONAL ISSUE TO BE RESOLVED.

1. The considerations governing acceptance of review set forth in RAP 13.4(b) do not support acceptance of review.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Brownlee argues 13.4(b)(1) and (3), claiming that the decision below conflicts with United State Supreme Court authority and raises a significant question of constitutional law. Review should be denied because the Court of Appeals correctly determined that Brownlee's constitutional confrontation right was forfeit by his own wrongdoing.

2. The Court of Appeals decision on de novo review correctly applied precedent and left no significant question of constitutional law unanswered.

Brownlee first claims that the Court of Appeals is in error in its assessment of the quantum of evidence necessary to establish the wrongful conduct necessary to overcome the confrontation right and that this issue raises a significant issue of constitutional law. Next, Brownlee claims that the Court below suggested that a history of domestic violence could be broadly used as evidence of wrongdoing in conflict with United States Supreme Court authority that constrains such evidence to use as proof of intent to absent the witness only.

Brownlee's constitutional confrontation claim is reviewed de novo. *State v. Dobbs,* 180 Wn.2d 1, 10, 320 P.3d 705 (2014). "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." *U.S. Const. amend. VI*.; *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) (husband hides wife from subpoena). 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. Under the clear, cogent, and convincing evidence standard, 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). On review, deference is accorded the trial court's findings if supported by evidence trial court could reasonably have found to be clear, cogent, and convincing. *Fallentine*, 149 Wn.App. at 620–21.

Brownlee incorrectly alleges that none of Brownlee's statements that subpoenaed witnesses need not appear were made in the presence of absent witnesses. The record is clear that 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 -- threating 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. In open court, Brownlee plainly communicated to the witnesses there present that he does not want them to attend the trial; that

they do not have to attend the trial. See CP 1046 (finding of fact XXII). Ms. Eckles was a witness, heard Brownlee's remarks in person, and was then absent. It is not the case that Brownlee only made his remarks to "persons other than the absent witness." Petition at 3.

The record also shows that Ms. White had direct contact with Brownlee. 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). Moreover, the Court of Appeals recognized this exchange: "He [Brownlee] expressly asked White to recant statements in a prior case." Opinion at 9.

Finally, *State v. Hernandez*, 192 Wn. App. 673, 682, 368 P.3d 500 (2016), makes clear direct communication is not required; use of an intermediary, like Brownlee's mother herein, to procure unavailability is sufficient. *See also* Fed. Rule Evid. 804(b)(6) (the doctrine applies where the defendant "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.") (emphasis added).

Similarly, it is not the case that the Court of Appeals is "suggesting

that prior acts of domestic violence establish the requisite "wrongdoing."" Petition at 5. As Brownlee next notes, the United States Supreme Court has found such behavior "highly relevant" in ascertaining intent. Id. In the present case, the Court of Appeals correctly stated that the use of the doctrine required clear, convincing, and cogent evidence of, *inter alia* "(2) the wrongdoing was intended to render the absent witness unavailable at trial." The trial court concluded that "[t]he defendant's actions were intended to prevent Ms. White and Ms. Eckles from testifying." Opinion at 5.

The Court of Appeals properly considered whether this conclusion was supported by the findings and in turn whether the findings were supported by substantial evidence that is clear, cogent, and convincing. The Court below on de novo review found that

> the record shows that Brownlee's communications were intended to procure White's unavailability. He appeared to believe that absent the forfeiture by wrongdoing doctrine, White's unavailability would result in his freedom.

Opinion at 9. The Court of Appeals did not expressly rely on the history of domestic violence in finding the requisite intent to absent the witness in this case—the Court's focus is on the nature and content of the "communications." Brownlee repeatedly evinced his motivation in expressing his desire that witnesses either recant or disregard their

subpoenas. Moreover, insofar as history of domestic violence informs the inquiry, this record shows contemporaneous continuing domestic assaultive behavior that is immediately followed by repeated efforts by Brownlee to have the Ms. White recant.

Nothing the Court of Appeals said conflicts with *Giles v. California*, 554 U.S. 353, 365, 128 S. Ct. 2678, 2686, 171 L. Ed. 2d 488 (2008). There, the California Supreme Court had allowed, under forfeiture by wrongdoing, a murder victim's statements about a previous domestic violence incident. The Supreme Court found that the doctrine has common-law roots and thus allows the admission of unconfronted testimonial evidence without violation of the Court's confrontation clause holdings in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In sum, the *Giles* Court rejected that the murder itself could provide the wrongful conduct necessary for application of the doctrine. The common-law and thus the constitution require that there be a showing that the defendant intended to absent the witness.

The *Giles* majority rejected what it took to be the dissent's invitation to carve out a confrontation exception for domestic violence. 554 U.S. at 376. The court addressed evidence of past or ongoing domestic violence, up to the commission of murder in that context:

> The domestic-violence context is, however, relevant for a separate

> reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier 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.

Giles, 554 U.S. at 377.

In the present case, the Court of Appeals did no more than observe that the repeated, ongoing reports of domestic violence are relevant to consideration of the forfeiture doctrine. The reason for the decision was expressly stated as "communications" but the Court of Appeals clearly recognized that those communications occurred within a domestic violence context. This is consistent with the observations of the *Giles* Court.

Brownlee repeatedly, both directly and through a messenger, sought to have the alleged victim and a material witness defy lawful process and absent themselves from the trial. He succeeded and both were absent. The forfeiture by wrongdoing doctrine was properly applied in the trial court. The de novo review of that ruling is without error and conflicts with neither caselaw nor constitutional provision.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Brownlee's petition for review.

VII. CERTIFICATION

This document contains 4197 words, excluding those parts of the document exempted from word count by RAP 18.17.

DATED December 1, 2021.

Respectfully submitted,

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December 01, 2021 - 8:14 AM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Alphonso Curtis Brownlee
Superior Court Case Number:	19-1-00602-0

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