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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

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APPEAL FROM THE SUPERIOR COURT

OF FRANKLIN COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court erred in admitting into evidence hearsay testimony of multiple witnesses relating alleged statements of the deceased.

B. ISSUES

1. Hearsay statements of an absent witness may be admissible under the doctrine of forfeiture by wrongdoing if the defendant procured the absence by a wrongful act intended to prevent the witness from testifying. The wrongful act prevents the witness from calling 911 and the court finds the defendant has been attempting to obtain a copy of the witness's will or change the will. Would these facts be sufficient to show the wrongful act was committed with the intent to prevent the witness from testifying?
2. The court found the evidence of intent to prevent the witness from testifying was clear and convincing. The record before the court did not include any testimony or sworn affidavits relating to the court's findings of

attempted interference with the witness's will. Is the evidence sufficient to support the finding?

3. Five witnesses testified to numerous statements of the deceased witness alleging she feared the defendant, the defendant was trying to harm her, and she believed the defendant might kill her. The defendant claimed she shot the deceased witness in self-defense. There were no witnesses to the shooting. The defendant was charged with murdering the deceased. Was the erroneous admission of the hearsay testimony harmless error?

### C. SUMMARY

Tashia Stuart shot her mother Judy Hebert three times. When police arrived she told them "she came at me with an ax." The State charged her with murder. Her six-year-old daughter S.S. was the only other person in the house at the time of the shooting. S.S. did not testify at Tashia's trial.

Tashia later admitted she lied to neighbors who called when they heard shots and she told them everything was all right. In her statements to police in the hours after the shooting, she said she found a gun in her mother's closet and as she was leaving the closet she encountered her

mother who was coming at her with an ax and she shot in self-defense. Forensic evidence was consistent with those statements.

At Tashia's trial Ms. Hebert's ex-husband and neighbors were permitted to relate numerous statements Ms. Hebert allegedly made to them in which she said she was afraid of her daughter and believed Tashia was trying to kill her. The statements were admitted under the doctrine of forfeiture by wrongdoing. The court's theory was that Tashia killed her mother to prevent Ms. Hebert from telling police her daughter was trying to find and change her will.

The circumstances do not support the ruling admitting the hearsay statements, without which Tashia could not have been convicted.

#### D. STATEMENT OF FACTS

Tashia woke up on Tuesday morning and couldn't find her husband Todd. (Exh. 375) She asked her daughter S.S. where daddy was, and S.S. said he was out in the garage smoking. (Exh. 375) But he wasn't there and after a while she looked outside and realized his truck was gone. (Exh. 375) She began sending him text messages, and gradually realized he had left her. (Exh. 367, pp. 1-10)

That afternoon she texted him, "She's screaming @ ME ABOUT ALL THE MONEY WE OWE HER & HOW AM I GONNA PAY HER 4

EVERYTHING please what is going on? Are you leaving me” (Exh. 367, p. 5) For the next two days she begged him to come home, asking him why he was leaving and if he was ever coming back. (Exh. 367) She also began asking him where were the keys to her truck and her WalMart card and worrying about how to pay for her medication. (Exh. 375)

Tashia sent her husband over a hundred text messages between Tuesday and Thursday morning. He responded occasionally, insisting he did not have the keys or the WalMart card and eventually told her it was time for her to grow up. (Exh. 367)

At four o’clock in the morning on Thursday, Tashia told her husband “there is major trouble here . . . threatening to put me in jail because of stuff you did to her computer & laptop & missing file from the ofc. . . .Please I don’t know what to do & I’m tired of getting hit cuz of you.” (Exh. 367, p. 14) Around noon she called her father and asked him “what should I do if mom comes after me.” (RP 1714<sup>1</sup>) Mr. Hebert told his daughter “if you and mom are having problems leave the house. . . . Take S.S. if you need to, go to the neighbor’s house, you know, just get out of there for a while.” (RP 1714)

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<sup>1</sup> Cheryl Pelletier was the court reporter for nearly all of the trial. Her trial transcripts are referenced as “(RP nn).” She prepared a supplemental report of pre-trial proceedings; those transcripts are referenced as “(Supp RP nn).” She prepared a second supplemental report of pre-trial proceedings; that transcript is referenced as “(2 Supp RP nn).” Portions of the trial were reported by Lisa Lang. Those transcripts are referenced as “(RP LL nn).”

Shortly after two o'clock, Franklin County Sheriff's dispatch received a 911 hang-up call. (RP 294-95) The operator called the number back and Tashia answered. (RP 298) She didn't know who it was so she just told her the smoke detectors were going off and she needed to get off the phone so she could shut them off. (RP 298; Exh. 375) Officer Erickson was dispatched to the call. (RP 303) He arrived about ten minutes later, knocked, and Tashia opened the door. (RP 329-30) She seemed upset. (RP 331) When asked what was going on, she told him something had been burning, someone was sick and everybody was all upset. (RP 332) She said she needed to put the dogs away and closed the door.

While waiting for her to return, Officer Erickson spoke with a neighbor, and then contacted Officer Perry and asked him to respond immediately. (RP 333-34) As he was returning to the front door, Tashia opened it and said "She came at me with an ax." (RP 334-35) She appeared to be distraught. (RP 336) He told her the neighbor had said gunshots had been fired. (RP 335) She told him she had fired the shots, she had actually hit the person she was shooting at and that person was lying in the hallway. (RP 335-37)

When Officer Perry arrived, Officer Erickson went down the hallway, saw a revolver and found a woman lying on the floor and a utility

hatchet nearby. (RP 338, 347) He quickly determined that she was probably dead. (RP 339) He told Officer Perry this was a homicide. (RP 340) They requested backup, then took Tashia outside and put her in Officer Perry's police car. (RP 340-41)

For the next 20 minutes Tashia alternated between sobbing and trying to explain to the officer what had happened. (Exh. 20) At one point the officer described her as hysterical. (Exh. 20) She told him that she and her husband had been living with her mother, but that that her husband had left her a few days earlier. (Exh. 20) She said her mother had hit her the day before and started yelling at her and chasing her with a black thing, which apparently was the hatchet; that she had gotten it away from her mother and hit her, but that her mother was trying to hit her and she shot her. (Exh. 20)

Tashia was taken to the station where she was interview for about four hours. (Exh. 375) She told Detective Gregory her mother had accused Todd of stealing from her, and claimed Tashia had taken money out of her checking account. (Exh. 375) She explained that her mother had provided her with a debit card and pin number, and instructed her to withdraw the money but still accused her of taking it. (Exh. 375) At some point her mother had opened a safe in the closet next to the bathroom in the master bedroom. (Exh. 375)

When her mother's anger escalated, Tashia tried to hide in the closet and came upon the gun in a bag in the safe. (Exh. 375) She left the safe and was in the bedroom when she saw her mother coming toward her with the hatchet, so she began shooting until her mother stopped coming at her. (Exh. 375) She told Detective Gregory: "When everything was done and over with I had a phone and a gun." (Exh. 375)

#### 1. PRE-TRIAL PROCEDURAL MATTERS.

The State charged Tashia with the first degree murder of her mother, Judy Hebert. (CP 1146-47)

Defense moved to exclude statements attributed to Ms. Hebert by others. (CP 1059) The alleged statements related Ms. Hebert's assertions her daughter was a terrible, nasty person and that she was afraid of her, and , claims her daughter and son-in-law were trying to kill her and were tampering with her medication, (CP 1060-61) The State moved to admit the statements, arguing they were admissible as dying declarations, excited utterances, or present sense impressions. (CP 1027-39) The court heard argument and ruled the statements were neither dying declarations nor present sense impressions, that Ms. Hebert's statement to one witness, that she believed Tashia and Todd might hurt her, was the only statement admissible under the state of mind exception. (RP 51-53, 65)

The State filed a motion a few weeks later asking the court to rule the hearsay statements admissible under the doctrine of forfeiture by wrongdoing. (CP 958) The State alleged that Tashia asked her father, and her six-year-old daughter to help her to get into Ms. Hebert's safe, asked her ex-husband to witness her mother's will, which she believed would benefit her, and that according to the child, Ms. Hebert called the police when she found out Tashia had gotten into the safe and that money was missing. (CP 958-59) The State argued Tashia wrongfully killed Ms. Hebert to prevent her from telling police her daughter had stolen from her. (CP 964)

Defense argued no evidence supported the inference Tashia shot Ms. Hebert to keep her from testifying. (CP 870) The court heard argument on the State's motion, though no evidence was presented at that hearing. (Pelletier Supp RP 157-70)

The State amended the Information, adding a charge of attempted murder based on an incident that occurred about ten days before the shooting incident. (CP 828-29) The State alleged Tashia had dropped a box of books on her mother. (CP 829)

The court subsequently ruled the statements were admissible under the forfeiture doctrine. (Supp RP 207-14)

2. TRIAL.

a. Forensic Evidence.

The State presented to the jury copious photographs, reports, and other items of forensic evidence. (CP 220)

The pathologist who conducted the autopsy determined that a gunshot wound to the chest caused Ms. Hebert's death. (RP LL 179) During the autopsy, the pathologist found bullet fragments on the surface of the body and in her clothing. (RP LL 152-55) He determined a bullet had struck Ms. Hebert's left hand, penetrated the chest, and lodged in the fifth thoracic vertebrae. (RP LL 155-58) He explained that when the bullet struck the spinal cord, Ms. Hebert would have lost control of her legs and immediately fallen. (RP 158) He also found a second, superficial bullet wound in the lower right chest below the ribs. (RP 155) Finally, he found a chop wound, possibly caused by a hatchet, on the top right back of the scalp. (RP 156)

The coroner's office obtained a report on the drugs found in Ms. Hebert's bloodstream and urine. (RP 999; Exh. 328) These included Tramadol, Diazepam (Valium), Citalopram (Celexa), Trazadone, Cannabinoids, Benzodiazepine (Ativan) and ethanol. (RP 999-1000, 1479-84; RP LL 173-74) The pathologist explained that Ms. Hebert's blood alcohol level was just above the legal driving limit. (RP LL 173)

Tramadol is an opiate pain medication. (RP LL 173) Trazedone and Citalopram are both antidepressants. (RP LL 174) Cannabinoids are an indication of marijuana use. (RP 174) The pathologist testified that he was unable to determine what the levels of these drugs may have been at the time of death, but that they would have enhanced the effect of the alcohol. (RP LL 177-78)

An expert pharmacologist, testifying for the defense, told the jury that the combined use of Trazedone, Tramadol and Citalopram may cause serotonin syndrome. (RP LL 204) This condition involves an overstimulation of serotonin receptors, which may result in delusions, hallucinations, agitation, anxiety, “basically everything you can see if you saw somebody that would overdose on or would take LSD.” (RP LL 205) When taken in combination with Valium, which inhibits the breakdown of the other substances, this condition may develop gradually over a period of several days. (RP 207)

Tashia’s toxicology report showed a very low level of Citalopram, as well as acetone, which may indicate diabetes or fasting. (RP 1484)

Mitchell Nessen presented a detailed analysis of evidence relating to the trajectory of the bullets fired, blood and tissue spatter patterns and locations, gunshot residue found on Tashia’s hand and her mother’s body and clothing. (RP LL 5-56) He concluded that three shots had been fired.

(RP LL 51-52) Bullet A was probably fired into the hallway wall from inside the master bedroom. (RP LL 52) Bullet B was likewise fired from inside the bedroom and went through the clothes basket. (RP LL 52) Ms. Hebert's body was likely next to the basket at the time that shot was fired. (RP 54-55) A third bullet struck Ms. Hebert's hand when she was just outside the bedroom door. (RP LL 50, 52) Mr. Nesson did not have an opinion as to which bullet was fired first. (RP LL 52)

Defense expert Kay Sweeney testified he had reviewed the forensic evidence gathered by the investigating officers. (RP 1877-78) Based on his analysis of that evidence, Mr. Sweeney reached several conclusions. First, he concluded that the fatal shot was a contact shot with Ms. Hebert's hand, through a file folder and several layers of clothing, into her chest, and ultimately lodged in her spinal column. (RP 1920-21) That shot would have rendered her hips and legs useless and she would have fallen immediately. (RP 1920) At the moment the shot was fired she would have been holding the hatchet over her head, it would have been in motion, and as she lost physical control it would have fallen on her head. (RP 1921-24) This theory is consistent with the position in which Ms. Hebert's body was found, the minimal blood flow from the chop wound on her head, and the presence of tissue spatter on multiple surfaces of the hatchet. (RP 1924-25)

b. Other Testimony.

Dr. Fermin Godinez is an emergency room physician at Kadlec Hospital (RP 653-54) He saw Ms. Hebert on February 25, about a week before the fatal shooting. (RP 655) She was complaining of headache and neck pain. (RP 655) She told him a bucket of books had fallen on her head about five days earlier. (RP 657) He noted muscle spasm and tenderness on the back of her neck and top of her shoulders. (RP 659) He did not see any external injuries. (RP 659-60) A CT scan revealed no fractures or internal bleeding. (RP 661) He prescribed Toradol and Valium. (RP 661)

The State introduced into evidence a copy of Ms. Hebert's will. (RP 1742) The will had been executed in August 2010. (RP 1791) Ms. Hebert's former husband, Tashia's father Rolfe Hebert, identified the signatures of the witnesses on the will certification as Ms. Hebert's neighbors Tonya and Allen Amende. (RP 1742) The certification bears the statement: "At the time the decedent signed the will, she expressed to us that the will was the expression of her wishes regarding her estate. Decedent made a point of telling us that she intended to leave nothing to her adopted daughter, Tashia Lee Stuart." (RP 1752; Exh. 377) The will contains a provision leaving \$10,000 and an automobile to Tashia. (RP 1754)

Mr. Hebert testified that Tashia called him on February 20 asking him for the combination to her mother's safe. (RP 1695) She said there had been an accident. (RP 1696) He told the jury she said she needed her mother's "do not resuscitate" order and her last will and testament. (RP 1695) He asked her to put her mother on the phone. (RP 1696) Ms. Hebert assured him that if she needed him she would definitely call him. (RP 1698)

Tashia called back about 20 minutes later, again asking for the combination to the safe because she needed to get the will. (RP 1697) According to Mr. Hebert, Tashia told him her mother had said everything in the safe was hers, and Mr. Hebert told his daughter to get the combination from her mother. (RP 1699) He testified that Tashia called a third time, about an hour later, still asking for the combination for the safe and he told her there was nothing in the safe that she needed to help her mother. (RP 1699)

A few days later Ms. Hebert called and said she thought Todd was leaving. (RP 1704-05) Mr. Hebert knew she had given Todd and Tashia her debit card and access code. (RP 1705) He advised Ms. Hebert to get rid of the debit card and shut off Todd's phone. (RP 1705)

Mr. Hebert testified he had purchased the Smith and Wesson .357 revolver for Ms. Hebert in 1978 and it was her gun of choice. (RP 1712-

13) He said she would put a gun in her car whenever she traveled. (RP 1713)

Charles Adney is the father of Tashia's daughter S.S.. (RP 1487) According to Mr. Adney, Tashia texted him about two weeks before her mother's death and said Ms. Hebert was bleeding out of her eyes and nose and "that bitch should be dead in a few days." (RP 1488, 1491) She allegedly told him she had dropped something on her mother's head, and joked: "Take it from me if you drop something on somebody's head, make sure it's round instead of flat." (RP 1489) She then said that Todd was gone and she thought Todd might have hurt her too. (RP 1490)

According to Mr. Adney, Tashia told him that she needed to change the will because she, Todd and S.S. were in the will and if anything did happen her mother didn't want Todd to get any of the money. (RP 1490) She then offered him a thousand dollars if she could use his name as a witness. (RP 1490) Mr. Adney assured the jury that he refused this offer. (RP 1490)

The jury found Tashia guilty of murder and attempted murder. (CP 18)

## E. ARGUMENT

### 1. ATTEMPTING TO REPORT NON-CRIMINAL “WRONGDOING” IS INSUFFICIENT TO SATISFY THE “TESTIMONY” REQUIREMENT OF THE DOCTRINE OF FORFEITURE BY WRONGDOING.

The Supreme Court long ago recognized “that it is this literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause . . . .” *California v. Green*, 399 U.S. 149, 157, 90 S. Ct. 1930, 1934-35, 26 L. Ed. 2d 489 (1970). Confrontation “. . . forces the witness to submit to cross-examination, the ‘greatest legal engine ever invented for the discovery of truth . . . .’ ” *Id.* quoting 5 John Henry Wigmore, *Evidence in Trials at Common Law* § 1367 (3d ed.1940).

Under the Confrontation Clause, out-of-court testimonial statements of an absent witness may be admitted at trial under the doctrine of forfeiture by wrongdoing as an exception to the right of confrontation, but only where the defendant’s wrongful act was designed to prevent the witness from testifying. *Giles v. California*, 554 U.S. 353, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). “[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.” *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705 (2014).

When a defendant forfeits his confrontation rights by wrongdoing, he also waives his hearsay objections. *Id.* at 16. “For the same reasoning that underlies the forfeiture by wrongdoing doctrine, we hold that a defendant who procures a witness’s absence waives his hearsay objections to that witness’s out-of-court statements.” *Id.* at 16.

The reasoning that underlies the forfeiture doctrine articulated in *Giles* does not support the trial court’s ruling admitting Ms. Hebert’s hearsay statements.

The evidence in *Giles* showed that about three weeks before her death the victim had reported to a police officer that Giles had accused her of having an affair, attempted to choke her, punched her, displayed a knife and threatened to kill her. Three weeks later she was dead. Giles, accused of her murder, claimed self-defense. The trial court admitted the officer’s testimony relating the victim’s prior statements.

The lower court had relied on a California evidentiary rule of forfeiture by wrongdoing applicable when the defendant’s intentional criminal act caused the witness to be unavailable at trial. *Giles*, 554 U.S. at 357.

The issue before the Supreme Court was whether evidence that

showed the defendant's intentional criminal conduct had caused the victim's absence was sufficient to invoke the forfeiture doctrine absent a determination the defendant had acted with the intention of preventing the declarant's testimony. The *Giles* opinion clarified that such a purposeful intention is an essential component of the rule of forfeiture by wrongdoing: "the forfeiture by wrongdoing doctrine is limited to those situations where the defendant engaged in the conduct with the intention to prevent the witness from testifying." *Dobbs*, 180 Wn.2d at 11, citing *Giles*, 554 U.S. at 361.

The analysis in both the majority and the dissent in *Giles* focused on the whether proof of the defendant's intent to prevent testimony should be an essential component of the forfeiture doctrine. The *Giles* court did not undertake to resolve the issue of what would constitute testimony for purposes of this rule. The entire analysis was predicated on the assumption that the statements the defendant's wrongdoing was intended to prevent would have been made in anticipation of a criminal prosecution. Thus the *Giles* decision itself addresses the admissibility of statements made in contemplation of a criminal prosecution.

The issue in the present case is whether the *Giles* court intended to require an intention to prevent the declarant from giving testimony at a judicial trial or hearing, from giving testimonial statements in

contemplation of criminal prosecution, from merely making statements reporting criminal activity, or from making statements regarding non-criminal wrongdoing.

A short statement near the conclusion of the majority opinion in *Giles* addresses the application of the forfeiture doctrine in the domestic-violence context:

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.

554 US at 377.

This language can be construed as requiring an intent to prevent the missing witness from giving testimonial statements in contemplation of criminal prosecution or, at a minimum, reporting criminal activity. In effect, the court's analysis of the hypothetical case suggests that, at least in cases of domestic violence, if there were to be evidence of repeated criminal conduct designed to prevent a victim from reporting such conduct to the police or cooperating in a criminal prosecution, evidence supporting the inference the defendant had attempted to prevent the victim from

reporting such conduct and perhaps even evidence of a prior actual report to the police, then the evidence might be enough to support the inference the defendant killed the witness to prevent her from calling the police and thus from testifying in such a prosecution.

This court should determine that, absent evidence of a history of abuse intended to dissuade the victim from seeking outside help, or evidence of ongoing criminal proceedings, the doctrine of forfeiture by wrongdoing requires evidence the defendant intended to prevent the missing witness from giving testimonial evidence in contemplation of criminal prosecution.

In the present case, the court appears to have read the Supreme Court's language as holding that whenever a defendant acts with an intention to prevent a person from reporting mere wrongdoing, not necessarily criminal in nature, then the person's statements may be admitted under the forfeiture exception to the hearsay rule. The court did not identify any criminal conduct Ms. Hebert might have been attempting to report. (Supp RP 208-09, RP 287-88)

The trial court's reading of *Giles* is not supported by the text of the opinion or the underlying reasoning.

The facts in the present case are clearly distinguishable from those incorporated in the hypothetical situation posed by the court. First, there

is no history of domestic violence involving Tashia and her mother, and the trial court made no finding as to such a history. Second, the court did not find Tashia had attempted to isolate her mother. Whatever may be the facts surrounding the aborted call to 911, the court did not find that Ms. Hebert was attempting to report domestic abuse, or indeed any criminal activity.

The court found Tashia had repeatedly asked her father for the combination to a safe to obtain documents, tried to obtain her mother's will, tried to get someone else to help obtain the will, and tried to get someone to sign off on a will "providing that certain property would go to her," and that when Ms. Hebert's body was found, files from the safe were in her possession.

The court's findings do not establish that Ms. Hebert might have been attempting to report criminal activity. Trying to learn about the contents of someone's will, seeking to be named in a will, or trying to persuade a person to change her will, are not criminal acts.

The *Giles* opinion as a whole, and the language relating to domestic abuse in particular, make it very clear that while a defendant's act that is intended to prevent future testimony may be merely wrongdoing, the defendant's intent must be to prevent testimony about, or at a minimum the reporting of, criminal conduct. The court did not find

Ms. Hebert was attempting to report criminal conduct. The court did not find that Tashia believed her mother was going to report criminal conduct. The trial court merely found Ms. Hebert may have been attempting to report perceived wrongdoing and Tashia was trying to stop her.

2. NO EVIDENCE SUPPORTS THE “FACTS”  
RELIED ON BY THE COURT TO FIND  
DEFENDANT ACTED WITH INTENT TO  
PREVENT THE WITNESS FROM TESTIFYING.

“[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* at 11; see *State v. Hernandez*, 192 Wn. App. 673, 2016 WL 661837 (Feb. 16, 2016); *State v. Fallentine*, 149 Wn. App. 614, 620, 215 P.3d 945 (2009). “When the standard of proof is clear, cogent, and convincing evidence, the fact at issue must be shown to be ‘highly probable.’ ” *Dobbs*, 180 Wn.2d at 11-12, quoting *In re Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973). Thus, “evidence that may be sufficiently ‘substantial’ to support an ultimate fact in issue based upon a ‘preponderance of the evidence’ may not be sufficient to support an ultimate fact in issue, proof of which

must be established by clear, cogent and convincing evidence.” *Sego*, 82 Wn.2d at 739 (footnote omitted).

Our Supreme Court applied the *Giles* domestic violence analysis in *Dobbs*. Evidence had shown the defendant’s “pattern of abuse and intimidation” of the missing witness and his violent threats, which he explicitly “connected to her decisions to call the police and press charges” had caused her absence. 180 Wn.2d at 12. Citing frequently to the trial court record, the Court then reviewed the evidence, which included a history of the defendant’s stalking the witness, threatening to shoot her, and actually firing shots at her home, and evidence the witness had reported the defendant to the police, whereupon he “began harassing her about that decision and warned her that she was going to “ ‘get it.’ ” *Dobbs*, 180 Wn. 2d at 1. The Court concluded that the trial judge’s finding of clear, cogent and convincing evidence was supported by substantial evidence, stating “all of the evidence points to that conclusion.” 180 Wn.2d at 16.

In the present case the trial court found: “[I]t 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 RP 209) In support of

this finding, the court outlined evidentiary facts purportedly contained in the record before it:

Now in this case, there 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.

(Supp RP 208-09)

But acting to prevent someone from reporting “wrongdoing” is not the same thing as preventing the reporting of criminal activity. A report of mere wrongdoing is insufficient to support the inference a criminal investigation or criminal prosecution will likely ensue.

The wrongdoing found by the court does not support an inference that any reporting Ms. Hebert might have contemplated, or that her daughter might have believed she contemplated, would have given rise to a criminal investigation; no law prohibits trying to learn the contents of

another person's will, or encouraging someone to witness another person's will, or asking a relative for the combination to a safe that contains documents. Ms. Hebert's possession of some documents at the time of her death does not support any inference whatsoever. When police responded to the 911 hang-up call, Tashia's failure to be promptly forthcoming about having just shot her mother may support numerous inferences, none of which would be that she intended to prevent her mother from reporting some unidentified criminal activity.

But most significantly, the record that was before the trial court is devoid of evidence to support the trial court's belief that Ms. Hebert was shot to prevent her from reporting her daughter's wrongdoing.

Only two evidentiary hearings had been held prior to the court's rulings admitting the hearsay evidence: hearings as to the admissibility of Tashia's statements to law enforcement following her arrest and the admissibility of certain evidence obtained in the execution of search warrants shortly after the arrest. (2 Supp RP 4-70; Supp RP 5-148) Affidavits were not attached to the State's pleadings in support of admitting the hearsay statements. (CP 958-66, 1027-39)

The unsupported factual assertions contained in the State's briefing are not evidence. The evidence is not clear, cogent and convincing; it is non-existent.

3. WHOLESALE ADMISSION OF HEARSAY TESTIMONY WAS NOT HARMLESS.

Improper admission of evidence constitutes harmless error if the evidence is of only minor significance in reference to the evidence as a whole. *State v. Rodriguez*, 163 Wn. App. 215, 233, 259 P.3d 1145 (2011). An erroneous admission of evidence does not amount to reversible error unless the court determines within reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. *State v. Goggin*, 185 Wn. App. 59, 69, 339 P.3d 983 (2014), *review denied*, 182 Wn.2d 1027 (2015).

Apart from the testimony admitted under the doctrine of forfeiture by wrong doing, the only evidence as to whether or how Ms. Hebert was injured in February was provided by the medical staff at Kadlec Hospital and statements Tashia allegedly made. None of that testimony suggests the incident was anything other than an accident or that Tashia was in any way involved.

The only evidence as to the events immediately preceding Ms. Hebert's death consists of Tashia's statements to Officer Perry and Detective Gregory, and the forensic evidence collected at the scene. Officer Nesson's analysis of the evidence is consistent with Tashia's claim that she was in the master bedroom when her mother was coming towards

her from the hallway, she fired shots and her mother fell. The jury's verdict can only be explained by Ms. Hebert's alleged statements to Mr. Hebert and several neighbors, none of which were properly admitted at trial.

Neighbor Deborah Severin testified that she met Ms. Hebert when they became neighbors in 2007. (RP 729) She told the jury that at that time Ms. Hebert had asked her to "check on her on Mondays" if Todd and Tashia Stuart "had been there over the weekend." (RP 731) She testified that shortly after Todd and Tashia moved in with her, Ms. Hebert "stated that if something ever happened to her, they did it." (RP 732) According to Ms. Severin, Ms. Hebert "had some concerns for her safety." (RP 732) At Ms. Severin's suggestion, they chose a code word to be used to signal that Ms. Severin should call the police. (RP 732)

Ryan Rhodes, testified that Ms. Hebert told him Todd led her out into the garage "and kind of positioned under a spot in the rafters where a bin full of books, a heavy bin full of books, was pushed on her by Tashia." (RP 899) He told the jury Ms. Hebert had earlier told him "she felt that they were planning something and that if she wasn't at the house for any period of time that they probably buried her out in the backyard." (RP 900) Mr. Rhodes testified that after the garage incident she told him "that the painkillers that she was suppose to have been taking had been replaced

with other larger pills that had to be -- the pill name scratched off of them.” (RP 901)

Neighbor Tonya Amende had been friends with Ms. Hebert since they moved into the neighborhood back in 2006. (RP 456, 462) She told the jury that Ms. Hebert had showed her where the tub incident occurred and said she had been told to stand as close as she could to the mirror of the pickup, and stay right there, and then the tub hit her in the head. (RP 478-79) Ms. Hebert told Ms. Amende that at the time Tashia was supposed to be giving S.S. a bath, but when S.S. came to see her afterwards her hair wasn't wet. (RP 478-81) According to Ms. Amende, Ms. Hebert didn't understand how the bin could have fallen on her head, “or why they would even be out there in March trying to put up a wall when didn't have the money” for that, and besides “there was too much stuff in the garage.” (RP 482)

According to Ms. Amende, Ms. Hebert said she hadn't gone to the doctor after the tub incident because “Todd and Tashia had said that they were capable of taking care of her.” (RP 469)

Ms. Amende testified Ms. Hebert was concerned that Todd and Tashia were “messing with her medication.” (RP 484) She told the jury that the night before the shooting Ms. Hebert told her she was “scared that Todd and Tashia was going to try to hurt her [so] she had locked her

master bedroom door and that she had put chairs up against it because she didn't feel safe. And she didn't know if she was going to get locks changed on her house because she was afraid that Tashia and Todd had something planned to hurt her.” (RP 490-91)

Ms. Amende stated that Ms. Hebert told her she had made “a diagram of the garage of exactly where she was standing, exactly where Todd was standing” and she took pictures showing the top of the hood of the pickup “looked like somebody had been on it” and “she saw the same thing” up in the rafters. (RP 483)

Similarly, Rolfe Hebert testified that his ex-wife told him “that she had basically drawn out a diagram in the garage of where everything was and where the accident took place.” (RP 1708) According to Mr. Hebert, “[s]he just found the circumstances to the accident so unusual. The fact that there was, there was never anything up in the rafters that she knew about.” (RP 1709)

Mr. Hebert testified that Ms. Hebert had told him “she didn't recognize the medication she was being given and that she noticed that some of the pills had the name and number scratched off of them. . . . At that time she also told me, she says, Hon, if I didn't know better, I'd think they're trying to kill me.” (RP 1702-03) According to Mr. Hebert “she had called me and she was very upset because she told me that Tashia had

taken her entire prescription of Tramadol. And she really needed it and she wasn't sure what she was going to do.” (RP 1703)

Mr. Hebert told the jury that the day before the shooting Ms. Hebert called and told him she couldn't access her online banking because there was no internet at the house. (RP 1706) He had her describe the modem to him and, based on what she said, he determined the wires had been reversed. (RP 1706)

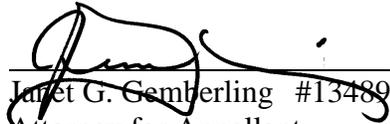
This admission of hours of hearsay testimony pursuant to an erroneous application of the doctrine of forfeiture by wrongdoing severely undermines the core of the values furthered by the Confrontation Clause. If this hearsay testimony had been excluded it is reasonably probable that the outcome of the trial would have been materially affected.

#### F. CONCLUSION

The hearsay testimony was improperly admitted; the other evidence is insufficient to support the verdict. The convictions should be reversed.

Dated this 23rd day of May, 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.	)	

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

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I certify under penalty of perjury under the laws of the State of Washington that on May 23, 2016, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on May 23, 2016.

  
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