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No. 56935-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY E. PUGH,

Appellant.

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. MR. PUGH DID NOT INVITE THE ERROR IN THE JURY INSTRUCTIONS

The State concedes the “to-convict” jury instruction for witness tampering contained a statutory alternative means that was not charged in the information. SRB at 7. The State further concedes this was constitutional error. SRB at 9. Nonetheless, the State argues Mr. Pugh invited the error by “adopting” the instruction proposed by the State. The State’s argument must be rejected, as it is clearly contrary to Washington Supreme Court case law. The Washington Supreme Court has consistently maintained a party invites an error in a jury instruction only if the party *requests* the instruction. Here, because defense counsel did not request the erroneous instruction but merely failed to object to it, the invited error doctrine does not apply.

The doctrine of invited error is intended to prohibit a party from setting up an error at trial and then complaining about it on appeal. State v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

The policy behind the doctrine is as follows:

The law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant’s

request. To hold otherwise would put a premium on defendants misleading trial courts; this we decline to encourage.

State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

In the context of an erroneous jury instruction, the Supreme Court has applied the invited error doctrine only where the appellant *requested* the instruction at issue. In fact, that was the situation in the cases the State relies upon. See SRB at 9 (citing State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (defendants invited error in jury instructions where they *proposed* erroneous instructions); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (applying invited error doctrine where defense counsel *proposed* instructions identical to instructions given to jury that defendant later challenged on appeal); Henderson, 114 Wn.2d at 868 (defense counsel *requested* instructions later challenged on appeal); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defense counsel *participated in drafting* instructions later challenged on appeal)).

The rule applying the invited error doctrine only where the erroneous instruction at issue was proposed by the defense has been consistent over time. See, e.g., Patu, 147 Wn.2d at 719, 721 (applying invited error doctrine where defense counsel proposed

instruction he later challenged); State v. Boyer, 91 Wn.2d 342, 244-45, 588 P.2d 1151 (1979) (instruction at issue was one defendant himself proposed). The rule as stated in Boyer is well settled and has been regularly followed by courts in this state. Henderson, 114 Wn.2d at 870-71 (and cases cited therein).

The State fails to cite a single case applying the invited error doctrine where defense counsel did not request the erroneous instruction. Absent such authority, this Court may not extend the invited error doctrine and apply it to the facts here. The *State* proposed the to-convict instruction for the witness tampering charge. See CP 115. The instruction the court gave to the jury was identical to the instruction the State proposed. Compare CP 115 with CP 54, AOB Appendix B. Defense counsel *did not* propose a to-convict instruction for the witness tampering charge. See Sub #42, #44.

Defense counsel merely failed to object to the State's proposed instruction. But failure to except to a jury instruction proposed by the other party does not constitute "invited error." State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999).

This Court has unambiguously held that where a jury is instructed on an uncharged alternative means of committing a

crime, a manifest error affecting a constitutional right has occurred and the defendant may raise the issue for the first time on appeal. State v. Chino, 117 Wn. App. 531, 538-40, 72 P.3d 256 (2003); RAP 2.5(a)(3). In Chino, defense counsel did not object to the erroneous to-convict instruction, but the Court nonetheless reached the constitutional error for the first time on review. 117 Wn. App. at 538-40. This Court must do the same in Mr. Pugh's case.

2. MS. PUGH'S STATEMENTS TO THE 911 OPERATOR WERE TESTIMONIAL

The State contends the contents of the 911 call are non-“testimonial” and hence admissible despite the lack of opportunity to confront the witness. SRB at 24-32. The State contends the statements are non-testimonial, even though the alleged assault had ended by the time of the 911 call, because a reasonable 911 operator in this operator's position would have believed the situation remained dangerous. Further, the State contends that because the primary purpose of the operator's questions was to facilitate a police response, Ms. Pugh's statements in response to the questioning were non-testimonial. The State erroneously focuses solely on the operator's perceptions and the purpose of the questioning from a reasonable operator's point of view. But as the Supreme Court set forth in Davis v. Washington, \_\_\_ U.S. \_\_\_, 126

S.Ct. 2266, 2273-74, 165 L.Ed.2d 224 (2006), the question instead is whether an actual ongoing emergency existed and the declarant's statements were primarily directed at resolving that emergency. Unlike in Davis, the circumstances of this case indicate there was no actual ongoing emergency at the time of the 911 call. Thus, despite the reasonableness of the operator's questioning, Ms. Pugh's statements to the operator reporting a past crime must be deemed testimonial.

In Hammon, the Court recognized that when police (or their agents) respond to the report of a crime, they often reasonably direct their initial inquiries at determining whether a threatening situation exists and how they should respond to it. Id. at 2279. Nonetheless, the Court made clear that, if in fact there is no ongoing emergency, any responses to the officer's questions are testimonial. Id. at 2279 & n.6. Where the declarant's statements "are neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, the fact that they were given at an alleged crime scene [in response] to 'initial inquiries' is immaterial." Id. at 2279. Regardless of the reasonableness of police questions, "[t]heir saying that an emergency exists cannot make it be so." Id. at 2279 n.6.

Thus, the Davis decision is more strongly pro-confrontational than the State suggests. It provides a more expansive definition of “testimonial” than the State indicates, by holding that reports of criminal activity made to law enforcement officers or their agents are non-testimonial only where there is (1) an actual ongoing emergency, and (2) the statements are primarily directed at resolving that emergency situation. A 911 operator’s reasonable belief that a caller might still be under threat is immaterial, if in fact there is no such on-going emergency.

The Court’s disposition of 14 cases in the wake of Davis appears to conform to this interpretation. For purposes of this argument, the decisions are divided into two categories: The cases in which grant, vacate and remand orders were issued (“GVR” cases) and the cases in which the Court denied certiorari. A “GVR” order is one in which the Court grants certiorari, vacates the judgment below, and remands the case. Lawrence v. Chater, 516 U.S. 163, 165, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996). The Court utilizes the “GVR” procedure where recent developments in the law “reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.” Id. at 167. The Court’s GVR decisions

following Davis reflect an unwillingness to assume that a fresh accusation was probably made during an "ongoing emergency."

At the end of the term, the Court issued GVR orders in eight cases in which the lower courts had allowed the admission of unfronted statements made to law enforcement officers:

Anderson v. State, 111 P.3d 350 (Alaska App. 2005), cert. granted, vacated, and remanded, 126 S.Ct. 2983 (2006); People v. Castellanos, 2006 Cal. App. Unpub. LEXIS 10071 (Cal. App. 2005), cert. granted, vacated, and remanded, 126 S.Ct. 2965 (2006); People v. Thomas, 2005 Cal. App. Unpub. LEXIS 7927 (Cal. App. 2005), cert. granted, vacated, and remanded, 126 S.Ct. 2983 (2006); State v. Warsame, 701 N.W.2d 305 (Minn. App. 2005), cert. granted, vacated, and remanded, 126 S.Ct. 2983 (2006); State v. Wright, 701 N.W. 2d 801 (Minn. 2005), cert. granted, vacated, and remanded, 126 S.Ct. 2979 (2006); State v. Forrest, 596 S.E.2d 22 (N.C. App. 2004), cert. granted, vacated, and remanded, 126 S.Ct. 2977 (2006); State v. Lewis, 619 S.E.2d 830 (N.C. 2005), cert. granted, vacated, and remanded, 126 S.Ct. 2983 (2006); United States v. Billingslea, 144 Fed. Appx. 98 (11th Cir. 2005), cert. granted, vacated, and remanded, 126 S.Ct. 2980 (2006).

The Supreme Court's decision to remand these cases for further consideration in light of Davis indicates that the Court intends to place strict limitations on what constitutes an emergency-resolving, nontestimonial statement to law enforcement officers. First, it appears that any statement falling within this category must relate, as the nontestimonial statements did in Davis, to an emergency that is ongoing and actual, not past, future, or theoretical. Anderson, Thomas, and Lewis all involved police interviews of the complainant more than a few minutes after the criminal incident. Anderson, 11 P.3d at 351; Thomas, 2005 Cal. App. Unpub. LEXIS 7927 at \*4; Lewis, 619 S.E.2d at 832. But the Court also remanded Forrest, where the complainant made a statement *seconds after* she was rescued by police -- a statement the lower court had been willing to construe as "part of the criminal incident itself." Forrest, 594 S.E.2d at 280. Similarly, the Court remanded Wright -- where the lower court tried to exempt from confrontation a call to 911 by the complainant made after the defendant allegedly pulled a gun on her, while defendant, who had keys to the apartment, was still lurking in the neighborhood. Wright, 701 N.W.2d at 804-05. The Court also remanded Warsame, where the lower court tried to exempt from confrontation

a statement by a complainant made to police while the defendant was still at large and she was en route to the police station purportedly to seek police protection. Warsame, 701 N.W.2d at 307. These are two cases in which the witnesses possibly faced a potential threat of *future* danger, but were not in actual danger at the time they made their statements.

Second, it appears that this category of nontestimonial, emergency-resolving statements will be limited to statements, as in Davis, that provide information critical to resolving the particular emergency presented. Thus, the Court remanded Anderson where the complainant, who was severely injured and required medical attention, told the responding police officers that “Joe [Anderson] had hit him with a pipe,” Anderson, 111 P.3d at 351. Likewise, the Court remanded in Lewis where the complainant, who had been badly bruised and was purportedly in shock, recounted for police how she had been beaten and gave police a description of her attacker, Lewis, 619 S.E.2d at 832-33. As noted above, Anderson and Lewis can both be read as cases where the unconforted statements were clearly testimonial because the defendant had left the scene, the crime was over, and there was no ongoing emergency situation. Or, if the emergency is redefined as the

complainants' need for medical attention, these cases can be read as decisions in which the complainants' statements to police discussing the crime and identifying their assailants -- unlike in Davis where the ongoing emergency was the assailant's continued presence at the scene -- had no bearing on the resolution of that particular emergency. In Davis, the Court specifically noted that establishing the identity of Ms. McCottry's assailant was necessary to resolve the ongoing emergency -- the ongoing attack -- so that the police officers who were being dispatched to rescue her "might know whether they would be encountering a violent felon." 126 S.Ct. at 2276. Under the latter reading, these cases indicate that the Court will not permit the definition of the ongoing emergency to be manipulated so as to allow broader admission of unfronted accusatory statements and statements of identity.

Finally, if there is any doubt after Davis, the GVR orders demonstrate that whether or not a statement is testimonial is an objective inquiry and does not turn on the subjective emotional state of the witness or the application of a state hearsay exception for excited utterances. Indeed, in all but one of the case in which the Court remanded, the lower courts had improperly relied upon, to some extent, the "excited" emotional state of the witness when

making the statement in order to find that the right to confrontation was not triggered. Anderson, 111 P.3d at 354; Castellanos, 2006 Cal. App. Unpub. LEXIS 10071 at \*8; Thomas, 2005 Cal. App. Unpub. 7927, at \*17-18; Warsame, 701 N.W.2d at 309; Wright, 701 N.W.2d at 812-13; Forrest, 596 S.E.2d at 180-81; Lewis, 619 S.E.2d at 844.

In addition to the GVR orders, the Court has denied review in at least six confrontation cases since Davis: United States v. Brito, 427 F.3d 53 (1st Cir. 2005), cert. denied, 126 S.Ct. 2983 (2006); State v. Greene, 874 A.2d 750 (Conn. 2005), cert. denied, 126 S.Ct. 2981 (2006); Commonwealth v. Foley, 833 N.Ed.2d 130 (Mass. 2005), cert. denied, 126 S.Ct. 2980 (2006); Commonwealth v. Gonsalves, 833 N.Ed.2d 549 (Mass. 2005), cert. denied, 126 S.Ct. 2982 (2006); State v. Hembertt, 696 N.W.2d 473 (Neb. 2005), cert. denied, 126 S.Ct. 2977 (2006); State v. Quintero, 2005 Tenn. Crim. App. LEXIS 383 (Tenn. Crim. App. 2005), cert. denied, 126 S.Ct. 2979 (2006).

The Supreme Court may deny certiorari for any number of reasons, and it is important not to read too much into these denials. See Teague v. Lane, 489 U.S. 288, 296, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Even so, the denials suggest that the Court

did not believe reversible error had occurred in these cases, and, if that is the case, they appear to be consistent with the pattern of rulings emerging from Davis and the GVRs.

In two cases, the Court denied state petitions for review where lower courts appear to have properly anticipated the rule of Davis and categorized statements to police as nontestimonial and testimonial based on the existence of an ongoing emergency. Thus in Foley, a case where the police responded to a report of ongoing domestic violence, the lower court properly held that initial statements in response to the police question “where is he?” (which prompted a child to point to another room) and an inquiry whether anyone needed medical assistance (no one did) were nontestimonial, but statements made after the defendant was apprehended and medical care was declined were testimonial and admitted in violation of the Confrontation Clause. Foley, 833 N.E.2d at 132-33. Likewise, in Gonsalves, the lower court properly held that statements to police may be nontestimonial only if there is a “concrete concern of impending harm” and that the statements complainant made to police accusing her boyfriend of attacking her were the product of investigatory interrogation and testimonial

because the defendant was no longer present and the “situation had diffused.” Gonsalves, 833 N.E.2d at 551, 555-56, 561.

In four additional cases, the Court denied review where the results -- if not the rationales -- were in accord with the rule of Davis. In Brito, Hembertt, Quintero, and Greene, the lower courts deemed nontestimonial statements made during an ongoing emergency where the statements directly related to the resolution of that emergency. In Brito and Hembertt, the lower courts properly deemed nontestimonial statements made to police officers during ongoing emergencies: a 911 call made seconds after a shooting where the caller indicated she had "just" heard gunshots, the shooter had pointed the gun at her, and the man was still in her line of sight, thus suggesting that she was in imminent personal peril when the call was made, Brito, 427 F.3d at 56, 62, and a statement to police officers responding to a call of ongoing domestic abuse where the defendant was still on the scene and armed, Hembertt, 696 N.W.2d at 477, 483. In Quintero, the statements -- “Jose, stop, you’re going to kill me” and “Jose, stop, you’re killing me” -- were made by the complainant while she was on the phone with a friend seeking help and the crime was ongoing. Quintero, 2005 Tenn. Crim. App. LEXIS 383 at \*4, 29-30. Thus they conform to the

distinction the Court drew in Davis between nontestimonial emergency-resolving statements and testimonial statements the primary purpose of which is to report a past crime.

Greene appears to be the flip side of the situation presented in Anderson and Lewis. In Greene, the victim contacted police immediately following a criminal incident to report a possible injury and the officer asked questions to ensure the victim received proper medical attention and the scene was properly secured. Greene, 874 A.2d at 772, 775. The lower court held the victim's statements in response to the officer's questions were nontestimonial because they were part of the criminal incident itself. Id. The Court's denial of certiorari in the case is consistent with the above analysis. In Greene, the statements to police were limited to information related to the complainant's injury. Indeed, when the police tried to elicit information relevant to their investigation, the complainant was unable to assist them. Had the complainant been able to identify the shooter for the police, however, such a statement would have been testimonial under Davis, because the statement, like the statements in Anderson and Lewis, would only have been relevant to the criminal investigation and not to resolving any need for medical attention.

Thus, the GVR orders and certiorari denials in the wake of Davis appear to follow a pattern that further clarifies and reinforces the rule of Davis where statements made to police are (1) testimonial if they concern a completed crime, however recently completed; (2) testimonial if they are made while there is an ongoing emergency but, objectively analyzed, the statements are not directed primarily at resolving that particular ongoing emergency; and (3) nontestimonial if there is an ongoing emergency and the statements are primarily directed at resolving that particular emergency.

In light of this analysis, and for the reasons outlined in the opening brief, Ms. Pugh's statements to the 911 operator must be deemed testimonial. The circumstances existing at the time of the call indicate there was no ongoing emergency, as Mr. Pugh had left the scene and the alleged criminal incident was over. Moreover, even if the operator reasonably believed Ms. Pugh might still be in danger and the questioning was designed to determine whether Ms. Pugh needed help, Ms. Pugh's responses to the questions were nonetheless testimonial. The statements were not directed primarily at resolving an ongoing emergency but rather at reporting a completed assault and violation of a no-contact order to police.

Mr. Pugh therefore had a constitutional right to confront the witness which was denied in this case.

3. THE RECORD DOES NOT DEMONSTRATE MR. PUGH FORFEITED HIS CONSTITUTIONAL RIGHT TO CONFRONTATION

The State contends Mr. Pugh forfeited his right to confront Ms. Pugh by trying to persuade her to absent herself from the proceedings. SRB at 12-24. The State urges this Court to hold the record is adequate to conclude Mr. Pugh forfeited his rights in this case, even though the issue was never presented to the trial court and the trial court made no findings of fact necessary to demonstrate forfeiture. Due to the importance and breadth of the constitutional right to confrontation, which the Supreme Court unambiguously reaffirmed in Crawford and Davis, any finding that the defendant forfeited his rights must be based on strong evidence that the defendant's wrongful conduct was actually responsible for the denial of the opportunity for cross-examination. Here, the record does not demonstrate that Ms. Pugh was actually unavailable to testify or that Mr. Pugh's actions caused her unavailability. Thus, the forfeiture doctrine cannot apply.

Under some circumstances, when a person's deliberate actions cause a witness to be unavailable to testify, courts have

ruled that the accused has waived the right of confrontation. Reynolds v. United States, 98 U.S. 145, 158-59, 25 L.Ed. 2d 244 (1878). Until recently, this doctrine received very little attention from the Supreme Court and it has not been used in Washington cases. State v. Mason, 127 Wn. App. 554, 570, 126 P.3d 34 (2005), rev. granted, 157 Wn.2d 1007 (2006) (noting doctrine not expressly adopted in Washington).<sup>1</sup>

In Davis, the Court acknowledged the principle of forfeiture by misconduct, which it described as grounded in notions of equity. 126 S.Ct. at 2280 (citing Crawford, 541 U.S. at 62, which cited Reynolds for same proposition). The court took “no position” on the standards necessary to demonstrate forfeiture. Id. The Court noted, however, that forfeiture could not apply unless the claim were properly raised and the record was sufficient to support a finding of forfeiture. Id.

Although the Davis Court did not address the standards necessary to demonstrate forfeiture, the Court previously ruled that the Confrontation Clause may be waived only upon the voluntary relinquishment of a known right, after indulging in all presumptions against waiver. Brookhart v. Janis, 384 U.S. 1, 4, 8, 86 S.Ct. 1245,

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<sup>1</sup> See Note, Expanding Forfeiture Without Sacrificing Confrontation After Crawford, 104 Mich. L.Rev. 599, 605 (2005) (noting sparse history of

16 L.ED.2d 314 (1966); Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.ED. 1461 (1938). In keeping with this precedent, the Washington Supreme Court has acknowledged the high standards of proof required before it will find a person waived a Sixth Amendment right. State v. Crawford, 147 Wn.2d 424, 431 & n.2, 54 P.3d 656 (2004), rev'd on other grounds, 541 U.S. at 68. In addition, commentators have noted the potential to "eviscerate" the Confrontation Clause if forfeiture is "applied extravagantly." C. Hutton, Sir Walter Raleigh Revived: The Supreme Court Re-Vamps Two Decades of Confrontation Clause Precedent in Crawford v. Washington, 50 S.D. L.Rev. 41, 71 (2005); T. Lininger, Yes Virginia, There is a Confrontation Clause, 71 Brook. L.Rev. 401, 407 (2005) (former prosecutor warns against broad doctrine where "the forfeiture exception would swallow the rule").

A defendant's loss of the valued Sixth Amendment right to confrontation constitutes a substantial deprivation. People v. Geraci, 85 N.Y.2d 359, 367, 649 N.E.2d 817 (1995). In addition, and even more significantly, society has a weighty interest in limiting any exceptions to confrontation due to the intimate association between the right to confrontation and the accuracy of

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jurisprudence on confrontation clause forfeiture in Supreme Court precedent).

the fact-finding process. Id. The forfeiture exception endangers these fundamental values because it is justified not by the inherent reliability of the evidence but rather by the public policy of reducing the incentive to tamper with witnesses. Id. Indeed, as the Supreme Court stated in Crawford, the only method of ensuring the reliability of testimonial evidence which satisfies the Confrontation Clause is testing “in the crucible of cross-examination.” 541 U.S. at 61. Where the evidence is not tested through cross-examination, greater doubt therefore lingers over the outcome of the trial.

The importance of the right to confrontation and the potential of the forfeiture exception to swallow the rule mandate that the exception not be applied liberally. A defendant’s wrongful actions do not relieve the State of all responsibility to attempt to ensure that evidence still be tested “in the crucible of cross-examination.” Crawford, 541 U.S. at 61. Where forfeiture is at issue, the State bears the burden to prove not only that the defendant acted wrongfully, but also that the witness is actually unavailable to testify as a result of the defendant’s wrongful actions. Only then may the defendant be held responsible for the loss of the right to confront the witness.

Other jurisdictions that have adopted the forfeiture doctrine recognize this burden on the State. Federal Rule of Evidence 804(b)(6) requires the government show “the declarant is unavailable as a witness” and that the defendant’s actions “procure[d] the unavailability of the declarant as a witness,” before the forfeiture doctrine may apply.

State courts that have adopted the forfeiture doctrine similarly require the State prove both that the witness is legally unavailable and that the defendant’s wrongful actions caused that unavailability. In State v. Alvarez-Lopez, for instance, the New Mexico Supreme Court held the State must prove by a preponderance of the evidence that: (1) the declarant was expected to be a witness; (2) the declarant became unavailable; (3) the defendant’s misconduct caused the unavailability of the declarant; and (4) the defendant intended by his misconduct to prevent the declarant from testifying. 136 N.M. 309, 98 P.3d 699, 704 (N.M. 2004). The court concluded that even if the defendant acted with an intent to procure the witness’s absence in that case, the facts did not demonstrate the defendant’s actions directly caused the witness’s unavailability, and therefore the forfeiture doctrine did not apply. Id. Other state courts similarly require the State prove both

that the witness is legally unavailable and that the witness's unavailability was directly caused by the defendant's actions. See, e.g., State v. Valencia, 186 Ariz. 493, 924 P.2d 497, 498 (Ct. App. 1996); People v. Moore, 117 P.3d 1, 5 (Colo. Ct. App. 2004); State v. Henry, 76 Conn. App. 515, 535, 820 A.2d 1076 (2003); Devonshire v. United States, 691 A.2d 165, 168-69 (D.C. 1997); State v. Hallum, 606 N.W.2d 351, 356 (Iowa 2000); State v. Meeks, 277 Kan. 609, 88 P.3d 789, 794 (2004); Commonwealth v. Edwards, 444 Mass. 526, 830 N.E.2d 158, 170 (2005); State v. Fields, 679 N.W.2d 341, 347 (Minn. 2004); Geraci, 85 N.Y.2d at 368; State v. Boyes, 2004 Ohio 3528 (Ohio Ct. App. 2004); Commonwealth v. Paddy, 569 Pa. 47, 73, 800 A.2d 294, 311 (2002); Gonzalez v. State, 155 S.W.3d 603, 610-11 (Tex. Crim. App. 2004); Commonwealth v. Salaam, 65 Va. Cir. 405, 413 (Va. Cir. Ct. 2004).

Demonstrating a witness is legally unavailable to testify requires more than merely showing the witness did not show up for trial. The Sixth Amendment right to confrontation demands that the government make stringent efforts to procure the attendance of the prosecution witness before the witness can be considered "unavailable." Barber v. Page, 390 U.S. 719, 723-25, 88 S.Ct.

1318, 20 L.Ed.2d 255 (1968). A witness may not be considered unavailable unless the State has made a "good faith" effort to obtain the witness's presence at trial. State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002). The issuance of a subpoena, alone, does not satisfy the requirement. Additional efforts must be made to secure the witness's presence. State v. Rivera, 51 Wn. App. 556, 560, 754 P.2d 701 (1988).

In this case, the record is not sufficient to conclude Ms. Pugh was legally unavailable to testify. Police served a subpoena on her, but there is no evidence the State made additional efforts to secure her presence. 7/28/05RP 66; 7/29/05RP 35. Had the State made further efforts to locate Ms. Pugh, she might have been available to testify. Because the State did not demonstrate Ms. Pugh was actually unavailable to testify, Mr. Pugh's right to confront her was paramount to the State's need for the hearsay testimony. State v. Dictado, 102 Wn.2d 277, 287, 687 P.2d 172 (1984).

In addition to bearing the burden to show the witness is unavailable, the State must also show the witness's unavailability was *caused* by the defendant's misconduct. Again, the record is insufficient in this case. Even if the State presented evidence of witness tampering, that evidence was not sufficient to sustain the

State's burden of proof, as the crime of witness tampering does not require proof the defendant's conduct actually caused the witness to become unavailable to testify. See RCW 9A.72.120.

Moreover, there was conflicting evidence about the reasons for Ms. Pugh's absence from the trial. Ms. Pugh's aunt, Tracy Dixon, testified that Ms. Pugh had been out of contact with the family for several weeks before the trial began. 7/20/05RP 88-95. Ms. Dixon saw Ms. Pugh once during that time, when she came by to pick up her mail, and Ms. Pugh looked disheveled and as though she had been using drugs. 7/20/05RP 89-91. According to Ms. Dixon, Ms. Pugh had a long history of drug abuse, and would often disappear for extended periods while she was using drugs. 7/20/05RP 91. The prosecutor herself even acknowledged to the court that she did not know why Ms. Pugh was absent and that her absence could be for any number of reasons. 7/20/05RP 77-78.

Based on this record, in the absence of sufficient evidence and a finding that the elements of forfeiture were established, this Court cannot conclude the State sustained its burden to show Mr. Pugh forfeited his right to confront the witness.

4. ADMISSION OF THE HEARSAY STATEMENTS  
VIOLATED THE CONFRONTATION CLAUSE OF  
THE WASHINGTON CONSTITUTION

The State contends the Confrontation Clause in the Washington Constitution does not grant broader protection to provide a right to confront the witness in this case. The State overstates Mr. Pugh's argument and claims that accepting the argument would mean excluding all hearsay under the Washington Constitution. SRB at 39. That is not Mr. Pugh's position.

As Mr. Pugh demonstrated in his opening brief, the language of the Confrontation Clause of the Washington Constitution is different from the federal clause, and, as the Washington Supreme Court recognizes, demonstrates an intent by the Framers to grant a different and broader right. At the time of the founding of the Washington Constitution, courts would not have allowed the admission of an accusatory hearsay statement uttered *after* an event had ended, merely because the declarant was in an excited state at the time. The psychological theory underlying the excited utterance exception is questionable and insufficient to justify departing from traditional notions about the right to confrontation.

The State is correct that Washington courts have generally followed the lead of the United States Supreme Court in

determining the scope of the right to confrontation. In State v. Palomo, the Washington Supreme Court adopted the United States Supreme Court's interpretation of the Sixth Amendment to hold excited utterance hearsay statements were admissible regardless of the witness's availability. 113 Wn.2d 789, 797, 783 P.2d 575 (1989). The Palomo court recognized, however, that the language of the Washington Constitution Confrontation Clause was "different from that of the Sixth Amendment and arguably gives broader protection." Id. at 794. Nonetheless, the court declined to analyze the state provision separately, as it had not been briefed. Id.

Although the Palomo court followed the lead of the United States Supreme Court, that Court has now retreated from its earlier position regarding excited utterances. In Crawford, the Court recognized that testimonial statements would not have been admissible on that ground in 1791 unless they were made "immediat[ely] upon the hurt received." Crawford, 541 U.S. at 58 n.8. The Court recognized that its earlier holding that hearsay statements admitted under the excited utterance exception without an opportunity for cross-examination did not offend the Sixth Amendment was probably inconsistent with the rule it was setting forth in Crawford. Id. In Davis, of course, the Court conclusively

departed from its earlier position by holding that testimonial statements are inadmissible without a prior opportunity for cross-examination, regardless of whether they fall under the excited utterance exception to the hearsay rule. 126 S.Ct. 2266. If indeed the Confrontation Clause of the Washington Constitution grants broader protection than the Sixth Amendment, it must be more protective of confrontation rights than the rule provided by Davis.

The Washington Supreme Court again recognized the uniqueness of the Washington clause in Foster, where five justices of the court concluded that differences between the federal and state provisions required an independent analysis of the state provision. State v. Foster, 135 Wn.2d 441, 473-74, 482, 957 P.2d 712 (1998). The court recently reaffirmed this position, reiterating that “article I, section 22 can offer higher protection than the Sixth Amendment with regard to a defendant’s right of confrontation.” State v. Price, No. 77152, at \*8 n.4 (Nov. 16, 2006) (citing State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006) (citing Foster, 135 Wn.2d 441)). Again, however, the court declined to consider the Washington Constitution separately, as it had not been briefed. Id. In this case, however, Mr. Pugh has provided a Gunwall analysis of the state clause, as required by the Washington Supreme Court.

As Mr. Pugh argued in his opening brief, the precise scope of the unique right granted by the Washington Constitution, and its application to this particular context, should be understood in light of the law and practice that existed in Washington at the time of our constitution's adoption in 1889. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986); see State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (citing City of Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982)). The State relies heavily on its contention that excited utterances like those made on 911 tapes have long been admissible in Washington under the res gestae exception. SRB at 35-39. But that is not correct. Although the modern exception for excited utterances grew out of the older res gestae exception, the boundaries of the modern exception are now far broader than the traditional rule.

Like the State in this case, courts occasionally cite Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939) as defining the exception for excited utterances. But this reliance is misplaced because the court in Beck never mentioned the need for an element of excitement, stress, or a startling event. Id. Beck is the common law forerunner of the exception for present sense impressions, not

excited utterances. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.5, at 418 n.1 (1999).

The exception for present sense impressions provides: “A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter” is not excluded by the hearsay rule even though the declarant is available as a witness. ER 803(a)(1). The time limit is considerably shorter than the time limit associated with the exception for excited utterances. Tegland, §803.4, at 417.

As stated in Beck, statements of present sense impression or res gestae must grow out of the event reported and in some way characterize that event. 200 Wash. at 9-10. The statement must be made “while” the declarant was perceiving the event or condition, or “immediately thereafter.” ER 803(a)(1). It must be a “spontaneous or instinctive utterance of thought,” evoked by the occurrence itself, unembellished by premeditation, reflection, or design. Beck, 200 Wash. at 9-10. Thus, a statement in response to a question cannot qualify as a present sense impression. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001), overruled on other grounds, 119 Wn. App. 494, 81 P.3d 157 (2003). In other words, statements made in response to a 911 operator’s

questioning cannot qualify as present sense impressions and would not fall under the traditional exception for *res gestae*.

In contrast, to be admissible as an excited utterance, the statement need not be contemporaneous with the startling event. To the contrary, Washington cases have held admissible excited utterances made even *several hours* after the startling event. See, e.g., State v. Strauss, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992) (rape victim's description of incident to police up to 3 1/2 hours after startling event held admissible as excited utterance); State v. Hieb, 39 Wn. App. 273, 278-79, 693 P.2d 145 (1984), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986) (description of alleged event by witness made several hours after incident and in response to questions not admissible as present sense impression but admissible as excited utterance); State v. Fleming, 27 Wn. App. 952, 956, 958, 621 P.2d 779 (1980) (rape victim's statements to friend three hours after incident and statements to police three to six hours after incident admissible as excited utterances).

The asserted justification for the excited utterance exception is that statements made while under the stress of excitement caused by a startling event are believed to be more reliable than ordinary hearsay. State v. Dixon, 37 Wn. App. 857, 872, 684 P.2d

725 (1984). But as Mr. Pugh pointed out in his opening brief, the psychological theory underlying the excited utterance exception is questionable. Moreover, the Confrontation Clause demands that reliability of testimonial statements be determined “in the crucible of cross-examination.” Crawford, 541 U.S. at 61.

The “excited utterance” exception was isolated and promoted by John Henry Wigmore. Aviva Orenstein, “My God!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 Calif. L. Rev. 159, 169 (1997). According to Wigmore, the key to the exception was the declarant’s state of nervous tension, which was an “immediate and uncontrolled domination of the senses,” during which neither thoughts of “self-interest” nor other “reasoned reflection” arise. Id. Wigmore postulated that precise contemporaneousness was not required to meet the excited utterance exception and believed the doctrine did not have a fixed time limit between startling event and excited utterance. Id. at 171 (citing 6 Wigmore, supra, 1750, at 221).

The early cases the State relies on are consistent with this historical analysis. In each case, the hearsay statements were held admissible as part of the *res gestae*, because they were spontaneous and not made in response to any question, and

because they were made while the criminal transaction was in progress or immediately thereafter. State v. Hazzard, 75 Wash. 5, 123, 34 P. 514 (1913); State v. Ripley, 32 Wash. 182, 190-91, 72 P. 1036 (1903); State v. Smith, 26 Wash. 354, 356-57, 67 P. 70 (1901). The justification for admitting the evidence in these cases is that the statements were considered an integral part of the criminal incident itself and were not statements of memory or belief. Further, admission of the statements did not turn on any notion of reliability due to the declarant's emotional state at the time.

Finally, the State faults Mr. Pugh for relying on early Washington cases concerning hearsay statements of sexual assault victims. But those cases are relevant because they illustrate the exception that proves the rule. They involve application of the common law "fact of complaint" hearsay exception. That exception was applied narrowly and allowed into evidence only the fact of the complaint and that it was made immediately or soon after the alleged injury. State v. Hunter, 18 Wash. 670, 672, 52 P. 247 (1898). Excluded were details of the complaint, including the identity of the offender and the nature of the act. Id.; State v. Osborne, 59 Wn. App. 1, 7, 795 P.2d 1174 (1990). The evidence was admissible for the sole purpose of

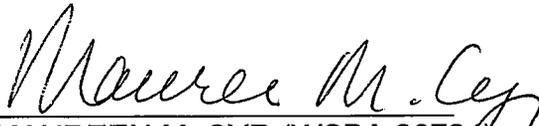
rebutting the inference that the complaining witness was silent following the attack. Osborne, 59 Wn. App. at 7. In other words, statements describing a past sexual assault would not have been admissible even under the fact of complaint exception.

Thus, admission of the accusatory hearsay statements at issue here, which were uttered after the alleged criminal event was over, which described the details of the event from memory, and which were made in response to police questions, offends traditional notions about the right to confrontation. This Court should hold admission of the statements, without an opportunity for cross-examination, violated the unique contours of the Washington Constitution's Confrontation Clause.

**B. CONCLUSION**

For the reasons stated herein and in his opening brief, Mr. Pugh respectfully requests this Court reverse his convictions for witness tampering and felony violation of a no-contact order.

Respectfully submitted this 16th day of November 2006.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	NO. 56935-0-1
Respondent,	)	
	)	
v.	)	
	)	
TIMOTHY PUGH,	)	
	)	
Appellant.	)	

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**CERTIFICATE OF SERVICE**

I, MARIA RILEY, CERTIFY THAT ON THE 16<sup>TH</sup> DAY OF NOVEMBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104\	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2006.

X \_\_\_\_\_ 

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STATE OF WASHINGTON  
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