

56935-0

56935-0

80850-3

NO. 56935-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY E. PUGH,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 OCT 13 PM 4:08

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL HISTORY	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	6
1. PUGH INVITED ERROR WHEN HE ADOPTED THE TRIAL COURT'S JURY INSTRUCTIONS	6
2. PUGH FORFEITED HIS CONFRONTATION RIGHTS BY INTIMIDATING THE WITNESS	12
a. General Principles And Overview	13
b. Procedures And Application	18
c. Pugh Forfeited His Sixth Amendment Rights	23
3. BRIDGITT'S 911 CALL WAS ADMISSIBLE UNDER <u>DAVIS</u> BECAUSE IT WAS MADE IMMEDIATELY FOLLOWING PUGH'S ASSAULT -- OBJECTIVELY VIEWED, THE PRIMARY PURPOSE OF THE OPERATOR'S QUESTIONING WAS RESOLVE AN ONGOING EMERGENCY AND OBTAIN PROTECTION AND MEDICAL AID FOR THE CALLER	24
4. THE CONFRONTATION CLAUSE OF THE WASHINGTON STATE CONSTITUTION IS NO BROADER THAN THE CLAUSE IN THE SIXTH AMENDMENT	32

a.	Washington Supreme Court Precedent Has Long Permitted Hearsay Like the Statements Made By Bridgette Pugh In This Case.....	33
b.	Neither <u>State v. Foster</u> Nor Pre-existing Law Support Pugh's Position	40
D.	<u>CONCLUSION</u>	46

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bourjaily v. United States, 483 U.S. 171,
107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)..... 21

Crawford v. Washington, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....passim

Davis v. Washington, 547 U.S. ____,
126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).....passim

Delaware v. Van Arsdall, 475 U.S. 673,
106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)..... 30

Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.,
542 U.S. 177, 186, 124 S. Ct. 2451,
159 L. Ed. 2d 292 (2004)..... 26

Mattox v. United States, 156 U. S. 237,
15 S. Ct. 337, 39 L. Ed. 409 (1895)..... 39

Reynolds v. United States, 98 U.S. 145,
25 L. Ed. 244 (1878)..... 12, 13

Steele v. Taylor, 684 F.2d 1193
(6th Cir. 1982) 21

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 11

United States v. Dhinsa, 243 F.3d 635
(2nd Cir. 2001) 18

United States v. Emery, 186 F.3d 921
(8th Cir. 1999) 19

United States v. Houlihan, 92 F.3d 1271
(1st Cir. 1996)..... 14, 15, 20

<u>United States v. Inadi</u> , 475 U.S. 387, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986).....	39
<u>United States v. Johnson</u> , 219 F.3d 349 (4th Cir. 2000)	19
<u>United States v. Mastrangelo</u> , 693 F.2d 269 (2nd Cir. 1982)	22
<u>United States v. Thevis</u> , 665 F.2d 616 (5th Cir. Unit B 1982).....	14, 15, 20
<u>United States v. White</u> , 116 F.3d 903 (D.C. Cir. 1997)	15, 22
<u>United States v. Zlatogur</u> , 271 F.3d 1025 (11th Cir. 2001)	14, 16, 20, 22
 <u>Washington State:</u>	
<u>Beck v. Dye</u> , 200 Wash. 1, 92 P.2d 1113 (1939).....	37, 38
<u>Britton v. Washington Water Power Co.</u> , 59 Wash. 440, 110 P. 20 (1910).....	38
<u>Lamon v. Butler</u> , 112 Wn.2d 193, 770 P.2d 1027 (1989).....	18
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	9, 11
<u>State v. Baldwin</u> , 15 Wash. 15, 45 P.650 (1896).....	34
<u>State v. Beaudin</u> , 76 Wash. 306, 136 P. 137 (1913).....	37
<u>State v. Bolen</u> , 142 Wash. 653, 254 P. 445 (1927).....	34

<u>State v. Chapin</u> , 118 Wn.2d 681, 829 P.2d 194 (1992).....	38
<u>State v. Cushing</u> , 17 Wash. 544, 50 P. 512 (1897).....	34
<u>State v. Eddon</u> , 8 Wash. 292, 36 P. 139 (1894).....	34
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	40-43, 45
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	22
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	41, 42
<u>State v. Hazzard</u> , 75 Wash. 5, 134 P. 514 (1913).....	35, 37
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	9
<u>State v. Hunter</u> , 18 Wash. 670, 52 P. 247 (1898).....	45
<u>State v. Johnson</u> , 194 Wash. 438, 78 P.2d 561 (1938).....	34
<u>State v. Kelley</u> , 64 Wn. App. 755, 828 P.2d 1106 (1992).....	12
<u>State v. Kilgore</u> , 147 Wn.2d 188, 53 P.3d 974 (2002).....	19
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996).....	9
<u>State v. Long</u> , 163 Wash. 607, 1 P.2d 844 (1931).....	34

<u>State v. Lough</u> , 125 Wn.2d 847, 889 P.2d 487 (1995).....	23
<u>State v. Mann</u> , 39 Wash. 144, 81 P. 561 (1905).....	34
<u>State v. McGonigle</u> , 144 Wash. 252, 258 P. 16 (1927).....	34
<u>State v. Medlock</u> , 86 Wn. App. 89, 935 P.2d 693 (1997).....	43
<u>State v. Mohamed</u> , 132 Wn. App. 58, 130 P.3d 401 (2006).....	32
<u>State v. Ortego</u> , 22 Wn.2d 552, 157 P.2d 320 (1945).....	34
<u>State v. Palomo</u> , 113 Wn.2d 789, 783 P.2d 575 (1989).....	39
<u>State v. Payne</u> , 10 Wash. 545, 39 P. 157 (1895).....	34
<u>State v. Perez</u> , 130 Wn. App. 505, 123 P.3d 135 (2005).....	8
<u>State v. Powell</u> , 34 Wn. App. 791, 664 P.2d 1 (1983).....	11
<u>State v. Ripley</u> , 32 Wash. 182, 72 P. 1036 (1903).....	37
<u>State v. Saunders</u> , 132 Wn. App. 592, 132 P.3d 743 (2006).....	32
<u>State v. Smith</u> , 122 Wn. App. 294, 93 P.3d 206 (2004).....	9
<u>State v. Smith</u> , 26 Wash. 354, 67 P. 70 (1901).....	35

<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	9
<u>State v. Waite</u> , 141 Wash. 429, 251 P. 855 (1926).....	39
<u>State v. Webster</u> , 21 Wash. 63, 57 P. 361 (1899).....	34
<u>State v. Williams</u> , 62 Wash. 286, 113 P. 780 (1911).....	34
<u>Walters v. Spokane International Ry. Co.</u> , 58 Wash. 293, 108 P. 593 (1910).....	38
 <u>Other Jurisdictions:</u>	
<u>Commonwealth v. Edwards</u> , 444 Mass. 526, 830 N.E.2d 158 (2005).....	14, 15, 17, 19-23
<u>Devonshire v. United States</u> , 691 A.2d 165 (D.C. 1997).....	17, 19, 21
<u>Gonzalez v. State</u> , 195 S.W.3d 114 (Tex. Crim. App.2006).....	17
<u>Miller v. State</u> , 517 N.E.2d 64 (Ind. 1987).....	43
<u>People v. Cotto</u> , 92 N.Y.2d 68, 677 N.Y.S.2d 35, 699 N.E.2d 394 (1998).....	17
<u>People v. Giles</u> , 123 Cal. App. 4th 475, 19 Cal. Rptr. 3d 843, <u>rev. granted</u> , 22 Cal. Rptr. 3d 548, 102 P.3d 930 (2004).....	16
<u>People v. Jiles</u> , 122 Cal. App. 4th 504, 18 Cal. Rptr. 3d 790, <u>rev. granted</u> , 22 Cal. Rptr. 3d 869, 103 P.3d 270 (2004).....	16
<u>People v. Jones</u> , 270 Mich. App. 208, 714 N.W.2d 362 (2006).....	21

<u>People v. Melchor</u> , 362 Ill. App. 355, 299 Ill. Dec. 8, 841 N.E.2d 436 (2005)	17
<u>People v. Moore</u> , 117 P.3d 1 (Colo. App. 2004)	17
<u>Rex v. Wink</u> , 6 Car. & P (1834)	35
<u>State v. Ah Loi</u> , 5 Nev. 99 (1869)	35
<u>State v. Altrui</u> , 188 Conn. 161, 448 A.2d 837 (1982).....	14
<u>State v. Alvarez-Lopez</u> , 136 N.M. 309, 98 P.3d 699 (2004).....	17
<u>State v. Burns</u> , 332 N.W.2d 757 (Wis. 1983).....	44
<u>State v. Campbell</u> , 705 P.2d 694 (Or. 1985).....	43
<u>State v. Fields</u> , 679 N.W.2d 341 (Minn. 2004)	17
<u>State v. Frambs</u> , 157 Wis.2d 700, 460 N.W.2d 811 (1990)	17
<u>State v. Hallum</u> , 606 N.W.2d 351 (Iowa 2000)	17
<u>State v. Henry</u> , 76 Conn. App. 515, 820 A.2d 1076 (2003).....	14, 17, 18
<u>State v. Hester</u> , 801 S.W.2d 695 (Mo. 1991)	44
<u>State v. Ivy</u> , 188 S.W.3d 132 (Tenn. 2006).....	18
<u>State v. Jacob</u> , 494 N.W.2d 109 (Neb. 1993)	44

<u>State v. Magourik</u> , 561 So.2d 801 (La. 1990).....	17
<u>State v. Mechling</u> , 633 S.E.2d 311 (W.Va. 2006).....	17
<u>State v. Meeks</u> , 277 Kan. 609, 88 P.3d 789 (2004).....	17
<u>State v. Sheppard</u> , 197 N.J. Super. 411, 484 A.2d 1330 (1994).....	17
<u>State v. Valencia</u> , 186 Ariz. 493, 924 P.2d 497 (1996).....	17

Constitutional Provisions

Federal:

U.S. Const., amend. VI	14, 23, 32, 39, 41, 42, 44
------------------------------	----------------------------

Washington State:

Const. art. 1, § 22.....	23, 32, 34, 40-43, 45
--------------------------	-----------------------

Other Jurisdictions:

Ariz. Const. art. 2, § 24	23
Colo. Const. art. 2, § 16	23
Del. Const. art. 1, § 7	23
Kan. Const. Bill of Rights, § 10.....	23
Mass. Const. pt. 1, art. 12	23
Ohio Const. art. I, § 10	23
Or. Const. art. I, § 11.....	43

Tenn. Const. art. 1, § 9	23
Wis. Const. art. 1, § 7.....	23

Statutes

Washington State:

RCW 9A.44.150	40, 41
RCW 9A.72.120	6

Rules and Regulations

Federal:

Fed. R. Evid. 104	16, 19, 21
Fed. R. Evid. 804	15, 20

Washington State:

CrR.2.1.....	11
CrR 6.15.....	10
ER 104	19, 21, 22
ER 404	19, 23
ER 803	33, 38, 39, 42
RAP 2.5.....	9, 10

Other:

Del. R. Evid. 804	16
Haw. R. Evid. 804	16
Mich. R. Evid. 104	21
Mich. R. Evid. 804	16
Ohio R. Evid. 804	16
Pa. R. Evid. 804	16
Tenn. R. Evid. 804	16

Other Authorities

2 Bish. New Cr. Proc. § 1007a1	35
Friedman, R. D., <u>Confrontation and the Definition of Chutzpah</u> , 31 Israel L. Rev. 506 (1997)	21

A. ISSUES

1. Should this court refuse to review Pugh's attack on a "to convict" instruction for witness tampering where he invited error by assenting to the use of that instruction?

2. Did Pugh forfeit by wrongdoing his right to confront his accuser when he attempted to persuade her to recant her earlier witness statements, to end her cooperation with investigators, and to fail to appear in court?

3. Was it the primary purpose of the 911 operator in this case to obtain information relevant to resolving an emergency where the caller said she had just been assaulted by her husband, she was injured, and it appeared that her husband may be lurking outside?

4. Is the state constitutional right to confront witnesses the same, for purposes of admitting 911 calls, as the federal right?

5. Was any error in admitting portions of the 911 tape harmless beyond a reasonable doubt where, in addition to the 911 tape, the jury also heard recorded telephone conversations between Pugh and his wife wherein he admitted to assaulting her?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Pugh was originally charged with felony violation of a no-contact order. CP 94. After the State learned he had attempted to prevent the victim from testifying, an amended information was filed charging him with three additional counts, as follows: Count I -- felony violation of a no-contact order; Count II -- witness tampering; Count III -- violation of a no-contact order; Count IV -- violation of a no-contact order. CP 73-74; RP 7/11 at 4-5.

During pretrial hearings, the trial court granted a motion to sever Count I from the other counts so two jury trials were held. RP 7/13 68, 96-98. The witness tampering events, Counts II through IV, were tried first and Pugh was convicted as charged. CP 38-40. Count I, the felony violation of a no-contact order, was tried second, and Pugh was convicted. CP 33-34. He was sentenced on all four counts. CP 8-16 (felonies); CP 5-7 (misdemeanors).

Pugh filed a timely appeal from both jury verdicts and his appellate arguments are presented in a single brief. The first assignment of error pertains to the witness tampering charge, whereas the second assignment of error attacks the felony violation

of the no-contact charge, in particular the use of the 911 tape to support that charge. Pugh does not attack his convictions on counts III and IV.

2. SUBSTANTIVE FACTS

Timothy Pugh and Bridgette Pugh¹ are married but their relationship was problematic. A no-contact order was issued preventing Timothy from contacting Bridgette. Ex. 10, 11; RP 7/20 at 53-54. On March 31, 2005, the two were together at the home of a friend in the city of Des Moines, King County. At 3:13 a.m. police received a 911 emergency call from Bridgette. Ex. 15.² In that call, Bridgette is breathing heavily and crying. Id. Among other things, she says that she was assaulted, asks for police and an ambulance, and indicates that she is afraid to go outside because she might get assaulted again. See Trans. of 911 call.

The court heard extensive arguments pre-trial regarding the admissibility of the 911 tape. RP 7/11 at 99-131. In the witness tampering trial, the 911 tape was suppressed on relevance and

¹ First names will be used for clarity when discussing the facts of this incident, and when discussing the recorded telephone calls from jail.

² This exhibit has been designated on appeal. A transcript of the recorded call was attached to Pugh's opening brief, and will be cited in this brief as "Trans."

prejudice grounds, as were statements to medics, and the photographs showing her injuries. See RP 7/18 at 35-38. The primary evidence of tampering came in the form of a redacted version of recorded telephone calls that Timothy made to Bridgette, placed while Timothy was incarcerated at the King County Jail following his arrest on March 31st. In those telephone calls, Timothy repeatedly apologizes to Bridgette, asks for forgiveness, and requests that she contact his lawyer or the court so that she can recant her earlier statements to police. Ex. 23 (recorded calls); CP 37 (stipulation regarding recording); RP 7/20 96. Timothy did not testify at the witness tampering trial.

The 911 tape was admitted at the trial for violation of a no-contact order. Ex. 15; RP 7/28 at 15-16. In addition, Officer Meissner testified to his observations at the scene. He said that he was dispatched at 3:15 a.m. to a domestic violence call. He arrived at 3:17 a.m. after quickly checking the area for suspects. RP 7/28 at 23-24. He found Bridgette obviously upset and crying. Id. He noted that she was bruised and had a chipped tooth. Id. at 25. Medics arrived and treated her. Id. at 26-27. Officer Meissner then asked her questions, took a recorded statement, and photographed

her injuries. Id. at 26-27. After a while, Timothy returned and was arrested. He was uninjured. Id. at 33-34.

Officer Young met Bridgette the next day and she still seemed upset, shaken up. RP 7/28 at 55-56. He testified that he photographed the bruises to her arm, an abrasion on her knee, and the chipped tooth. Id. at 58-62. In June, he delivered a subpoena to her at her Auburn address. Id. at 66.

Timothy Pugh then testified. RP 7/28 at 77. He described his relationship with Bridgette, his wife's struggles with cocaine addiction, the fact that she had been missing for days before this event, and that she arrived at the apartment high on crack. Id. at 77-91. They argued, she assaulted him by grabbing his coat, she fell off a ledge on her own, she assaulted him with a 3 foot-long rod, she threw four or five cans at him, chased him with a butcher knife, then threw the knife inches from him, so he ran away. Id. at 100-09. Throughout this alleged melee, however, he "never laid hands on her." Id. at 109. On cross-examination, he admitted willful violation of the no-contact order. RP 7/28 at 118-20.

In addition to the testimony of the officer, and the 911 tape, the jury in the second trial heard portions of the jail telephone calls

in which Timothy asks Bridgette not to testify, and in which he acknowledges assaulting her. Ex. 23; RP 7/28 at 73.

C. ARGUMENT

1. PUGH INVITED ERROR WHEN HE ADOPTED THE TRIAL COURT'S JURY INSTRUCTIONS.

Pugh asserts that his conviction for witness tampering must be reversed because the jury instructions included an uncharged means of committing the crime. Br. of App. at 6-12. His argument on appeal should be rejected. He invited the error by adopting the trial court's instructions.

The crime of witness tampering may be committed in any of three alternative ways. It is committed if the defendant induces a likely witness to (a) testify falsely or withhold testimony; (b) absent herself from legal proceedings; or (c) withhold information from police that is relevant to a criminal investigation or child abuse.

RCW 9A.72.120(1)(a), (b), (c). The amended information charged

Pugh with two alternative means in Count II as follows:

...I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse TIMOTHY EARL PUGH of the crime of Tampering With a Witness, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant, TIMOTHY EARL PUGH, in King County, Washington, on or about April 20, 2005, did induce Bridgett Pugh, a witness or person he has reason to believe is about to be called as a witness in any official proceeding, or a person whom he has reason to believe may have information relevant to a criminal investigation, [a] to testify falsely or, without right or privilege to do so, to withhold any testimony or [b] absent herself from such proceedings...

CP 73-74 (bracketed letters added). Yet, Pugh did not object in pretrial hearings when the state asserted that he had committed all three prongs. RP 7/18 at 21.

A the close of the first trial, the court provided a "to convict" instruction for the crime of witness tampering. CP 54. The "to convict" instruction included an uncharged means -- that the defendant tried to persuade the witness to withhold relevant information from police. Pugh did not propose his own version of the instruction.

When the court discussed jury instructions with counsel, it initiated the discussion as follows:

We're back on the record with State of Washington versus Timothy Pugh. I'd like to take exceptions to jury instructions now with the understanding that there may be a defense case and we may need to revisit some of the instructions or some additional instructions may be imposed.

What I'd like to do is go through my packet, and I think defense has proposed a few instructions.

You need to take exceptions as we go through.
Silence will be interpreted as an adoptive admission.

RP 7/20 at 97 (italics added). Pugh argued at length that to be witness tampering, a defendant's "inducement" must be more overt than his statements in the recorded telephone conversations.

RP 7/20 at 108-111. Yet, as to the "to convict" instruction, counsel voiced no objection, whatsoever, even though it contained the uncharged alternative means. RP 7/20 at 112.

Early in the prosecutor's closing argument, defense counsel requested a sidebar to ask that the prosecutor clarify an exhibit she was apparently referring to. The point of clarification related to the precise wording of the uncharged alternative means. RP 7/21 at 9. Defense counsel did not object, however, to the inclusion of that alternative. In fact, defense counsel personally told the jury that the precise language for the third alternative means was "[i]nformation which is relevant to a criminal investigation," correcting the looser language used by the prosecutor. Id. He never asserted to the judge or jury that the alternative means was inappropriate.

Also, defense counsel never objected to the numerous occasions upon which the prosecutor urged the jury to convict

based on the uncharged means. See RP 7/19 at 257, 7/21 6, 12-13, 44-45, 48.

It is undisputed that a defendant may not be convicted on an uncharged alternative means. State v. Perez, 130 Wn. App. 505, 506, 123 P.3d 135 (2005). Still, a defendant who invites error by adopting an incorrect jury instruction may not claim on appeal that the court erred in submitting the instruction. RAP 2.5(a); State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004). The invited error rule recognizes that "[t]o hold otherwise [i.e. to entertain an error that was invited] would put a premium on defendants misleading trial courts." State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

It has been suggested that, for purposes of applying the doctrine of invited error, there may be a distinction between "whether defense counsel merely failed to object to the giving of the instruction, or whether he *affirmatively assented* to the instruction or proposed one with similar language." State v. LeFaber, 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J. dissenting -- italics added). Although it could be argued that a

failure to object should be treated the same as proposing an erroneous instruction, that broader issue need not be addressed here. In this case, in light of the trial court's warning that silence would be interpreted as adoption of the proposed instruction, Pugh can be said to have "affirmatively assented" to the giving of the instruction.

A ruling applying the invited error doctrine in this case would be consistent with the policy of the rules of appellate procedure and with the trial court rules. CrR 6.15(a) provides that both parties *shall* file proposed jury instructions, and CrR 6.15(c) requires timely and specific objections to instructions proposed by the court. And, as noted, RAP 2.5(a) limits appellate review to issues that were brought to the trial court's attention. Together, these rules foster judicial economy by requiring lawyers to object to faulty jury instructions before they are submitted to the jury, so that any errors can be corrected before deliberations, conviction, and an appeal.

Here, Pugh failed to comply with CrR 6.15(a) in that he did not submit a "to convict" instruction. And, the trial court in this case went beyond CrR 6.15(c) and expressly told counsel that failure to object to an instruction would be interpreted as adoption by counsel of that instruction. RP 7/20 at 97. Moreover, the fact that Pugh's

attorney provided the jury with the precise language of the uncharged means during the prosecutor's closing argument certainly suggests that he assented to the uncharged alternative means. RP 7/21 at 9. Nor did counsel ever object when the prosecutor urged conviction under the uncharged means. Under such circumstances, this Court should hold that Pugh assented to the instruction, that he adopted it, and that he thereby misled the court into believing the instruction was correct. Thus, the doctrine of invited error precludes a challenge to that instruction on appeal.

Finally, it cannot be said that trial counsel was ineffective for failing to object to the to-convict instruction. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Aho, supra. First, an objection would not have advanced Pugh's theory of the case. Counsel's primary theory was that Pugh did not "induce" his wife to be absent, to lie, or to withhold information. The inducement argument would not change if there were three means charged. Second, even if counsel had objected to the jury instructions, the prosecutor could have easily adapted in either of two ways. The alternative means could simply have been stricken from the to-convict instruction. Alternatively, a timely objection to the instruction may have triggered a motion to

amend the information. See CrR 2.1(d); State v. Powell, 34 Wn. App. 791, 664 P.2d 1 (1983) (information may be amended to add alternative means after the state rests its case). If the information were amended to include the third prong, Pugh would be in no different position than if the objection had not been made. Thus, the failure to object cannot be deemed deficient performance or prejudicial.

2. PUGH FORFEITED HIS CONFRONTATION RIGHTS BY INTIMIDATING THE WITNESS.

Timothy Pugh claims that his right to confront witnesses was violated when, at his trial for felony violation of a no-contact order, the State played a 911 tape containing testimonial statements. This argument should be rejected because Timothy Pugh forfeited this claim by causing Bridgette Pugh to be absent from the proceedings.³

³ In pre-trial hearings, the State pointed out that Timothy forfeited his right to confront Bridgette. RP 7/11 109. Although it does not appear the court ruled, the trial court may be affirmed on any basis supported by the record. State v. Kelley, 64 Wn. App. 755, 764, 828 P.2d 1106 (1992).

a. General Principles And Overview

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). The doctrine has its roots in equity, and stems from the principle that a defendant who has wrongfully procured the unavailability of a witness cannot profit from that wrongdoing by asserting the right to confront the witness:

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds, 98 U.S. at 158.

The policy behind this doctrine is as simple as it is just: no one will be rewarded for subverting the justice system by depriving the prosecution, the court, and the jury of evidence through bribery, intimidation, collusion, coercion, or murder:

The law simply cannot countenance a defendant deriving benefits from murdering the chief witness against him. To permit such subversion of a criminal prosecution would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause, and make a mockery of the system of justice that the right was designed to protect.

United States v. Thevis, 665 F.2d 616, 630 (5th Cir. Unit B 1982)

(citations and internal quotations omitted), *superseded by rule on*

other grounds as stated in United States v. Zlatogur, 271 F.3d

1025, 1028 (11th Cir. 2001). Or, as one court has more bluntly

stated, "Though justice may be blind, it is not stupid." State v.

Henry, 76 Conn. App. 515, 533, 820 A.2d 1076 (2003) (quoting

State v. Altrui, 188 Conn. 161, 173, 448 A.2d 837 (1982)). Thus,

forfeiture by wrongdoing serves "to ensure that a wrongdoer does

not profit in a court of law by reason of his miscreancy." United

States v. Houlihan, 92 F.3d 1271, 1282-83 (1st Cir. 1996).

Forfeiture by wrongdoing, distilled to its essence, dictates that a defendant who has wrongfully procured a witness's unavailability has forfeited the right of confrontation and any hearsay objections, and the witness's out-of-court statements are admissible at trial in lieu of testimony. See Houlihan, 92 F.3d at 1282. Courts applying the forfeiture doctrine acknowledge that

confrontation is a bedrock constitutional right; nonetheless, the "Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery." Commonwealth v. Edwards, 444 Mass. 526, 535, 830 N.E.2d 158 (2005) (quoting Houlihan, 92 F.3d at 1282-83). Furthermore, "[t]he same equity and policy considerations apply with even more force to a rule of evidence without constitutional weight," and thus any hearsay objections are forfeited as well. United States v. White, 116 F.3d 903, 913 (D.C. Cir. 1997).

In 1997, forfeiture by wrongdoing was codified in the Federal Rules of Evidence as a hearsay exception. Fed. R. Evid. 804(b)(6). The rule provides that out-of-court statements are admissible if "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Id. The rule also eliminated a prior circuit split as to the preliminary standard of proof,⁴ and all federal

⁴ Before the rule was adopted, the Fifth Circuit applied a clear and convincing standard of proof to the preliminary question of whether forfeiture had occurred, opining that the forfeiture question was similar to the question of whether an in-court identification was admissible in spite of a prior, tainted out-of-court identification. See Thevis, 665 F.2d at 631. All other circuits applied a preponderance standard, concluding that proving forfeiture was "functionally identical" to proving "the conditions precedent to the applicability of the coconspirator exception" for coconspirator statements. Houlihan, 92 F.3d at 1280 (and cases cited therein). As will be discussed further below, the

courts now apply a preponderance of the evidence standard to the question of admissibility under Fed. R. Evid. 104. Zlatogur, 271 F.3d at 1028.

The United States Supreme Court has encouraged courts to apply forfeiture by wrongdoing in the wake of its recent reformulation of the Confrontation Clause. See Crawford v. Washington, 541 U.S. 36, 62, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds"); Davis v. Washington, 547 U.S. ___, 126 S. Ct. 2266, 2280, 165 L. Ed. 2d 224 (2006) (reiterating approval of the forfeiture doctrine). The doctrine is particularly suited to domestic violence cases, where the relationship between the defendant and victim will often permit the defendant to intimidate, or entice the victim into a recantation.

Six states have adopted evidence rules identical or substantially similar to the federal rule.⁵ At least fifteen⁶ more

preponderance standard is now the rule in every jurisdiction but New York. See Edwards, 444 Mass. at 542-44 (and cases cited therein).

⁵ See Del. R. Evid. 804(b)(6); Haw. R. Evid. 804(b)(7); Mich. R. Evid. 804(b)(6); Ohio R. Evid. 804(b)(6); Pa. R. Evid. 804(b)(6); Tenn. R. Evid. 804(b)(6).

⁶ California's lower appellate courts have adopted forfeiture by wrongdoing, but the lower court opinions were unpublished pending review by the California

states and the District of Columbia have adopted forfeiture by wrongdoing through their decisional law.⁷

In sum, every jurisdiction that has had the opportunity to make forfeiture by wrongdoing a part of its jurisprudence has done so. This Court has the opportunity to do so now in Washington. Furthermore, particularly in cases decided post-Crawford, no appellate court has declined to address the issue of forfeiture by wrongdoing in any case with a sufficient trial record, even if the trial court made its evidentiary rulings on different grounds. To the contrary, courts have held that the question of "[w]hether to adopt the 'forfeiture by wrongdoing' doctrine is a question of law, which we review de novo." Edwards, 444 Mass. at 532; *see also* Gonzalez, 195 S.W.3d at 125-26; Hallum, 606 N.W.2d at 354.

Supreme Court. See People v. Giles, 123 Cal. App. 4th 475, 19 Cal. Rptr. 3d 843, *rev. granted*, 22 Cal. Rptr. 3d 548, 102 P.3d 930 (2004); People v. Jiles, 122 Cal. App. 4th 504, 18 Cal. Rptr. 3d 790, *rev. granted*, 22 Cal. Rptr. 3d 869, 103 P.3d 270 (2004).

⁷ See State v. Valencia, 186 Ariz. 493, 924 P.2d 497 (1996); People v. Moore, 117 P.3d 1 (Colo. App. 2004); Henry, 76 Conn. App. 515; Devonshire v. United States, 691 A.2d 165 (D.C. 1997); People v. Melchor, 362 Ill. App. 355, 299 Ill. Dec. 8, 841 N.E.2d 436 (2005); State v. Hallum, 606 N.W.2d 351 (Iowa 2000); State v. Meeks, 277 Kan. 609, 88 P.3d 789 (2004); State v. Magourik, 561 So.2d 801 (La. 1990); Edwards, 444 Mass. 526; State v. Fields, 679 N.W.2d 341 (Minn. 2004); State v. Sheppard, 197 N.J. Super. 411, 484 A.2d 1330 (1994); State v. Alvarez-Lopez, 136 N.M. 309, 98 P.3d 699 (2004); People v. Cotto, 92 N.Y.2d 68, 677 N.Y.S.2d 35, 699 N.E.2d 394 (1998); Gonzalez v. State, 195 S.W.3d 114 (Tex. Crim. App. 2006); State v. Mechling, 633 S.E.2d 311 (W.Va. 2006); State v. Frambs, 157 Wis.2d 700, 460 N.W.2d 811 (1990).

Washington law also holds that the trial court may be affirmed on appeal on any basis supported by the record and the law. Lamon v. Butler, 112 Wn.2d 193, 201, 770 P.2d 1027 (1989).

b. Procedures And Application

Although forfeiture by wrongdoing has been adopted by every jurisdiction that has considered it, some debate has occurred with respect to its procedures and application. As relevant to this case minor conflicts have arisen as to two discrete issues:

1) whether a pretrial hearing is mandatory; and 2) which standard of proof should apply to a trial court's preliminary ruling that forfeiture has occurred.⁸ The State asks this Court to adopt the majority rules.

First, as to whether a pretrial hearing is required, the majority view is that a pretrial hearing outside the presence of the jury, while not necessarily mandatory, is the preferred method for establishing predicate facts for the trial court's ruling that the elements of forfeiture have been satisfied. See, e.g., United States v. Dhinsa, 243 F.3d 635, 653-54 (2nd Cir. 2001); Henry, 76 Conn. App. at

⁸ A third issue concerns whether a murdered witness's statements are admissible to prove the murder itself. That issue is not germane to this case.

534-35; State v. Ivy, 188 S.W.3d 132, 147 (Tenn. 2006). At such a hearing, as with any pretrial hearing regarding the admissibility of evidence, the rules of evidence do not apply and the trial court may consider a wide array of information, including hearsay, in making its determination. See ER 104; Fed. R. Evid. 104; Edwards, 444 Mass. 545 (preliminary ruling may rely on hearsay, and should not be a "mini-trial"); Davis, 126 S. Ct. 2280 (citing Edwards).

On the other hand, courts have held that a pretrial hearing is not necessary if the defense does not request one,⁹ if the prosecution makes a sufficient offer of proof,¹⁰ or if the trial court decides to admit the out-of-court statements "contingent upon proof of the underlying [misconduct] by a preponderance of the evidence."¹¹ Washington case law is in accord with these principles. See State v. Kilgore, 147 Wn.2d 188, 53 P.3d 974 (2002) (holding in the context of ER 404(b) that it should be left to a trial court's discretion whether a full pretrial hearing is required or whether an offer of proof will suffice for the preliminary ruling); see also ER 104(b) (evidence may be conditionally admitted). This

⁹ See United States v. Johnson, 219 F.3d 349, 356 (4th Cir. 2000).

¹⁰ See Devonshire v. United States, 691 A.2d 165, 169 (D.C. 1997).

¹¹ United States v. Emery, 186 F.3d 921, 926 (8th Cir. 1999).

Court should hold that although an evidentiary hearing will be the preferred method for establishing a basis for the trial court's preliminary ruling on forfeiture by wrongdoing, it is within a trial court's discretion not to hold a hearing in appropriate cases.

The second practical issue about which there has been some debate is the appropriate standard of proof for a trial court's pretrial ruling that forfeiture has occurred. As mentioned above, there used to be a minor circuit split as to this burden of proof, with all circuits but the Fifth applying a preponderance of the evidence standard. *Compare Houlihan*, 92 F.3d at 1280 (and cases cited therein), *with Thevis*, 665 F.2d at 631. This conflict was resolved with the adoption of Fed. R. Evid. 804(b)(6), and all federal courts now apply the preponderance standard. *Zlatogur*, 271 F.3d at 1028. In addition, of the states that have expressly adopted a standard of proof for forfeiture by wrongdoing, every state but one (New York) has rejected the clear and convincing standard in favor of the preponderance standard. See *Edwards*, 444 Mass. at 542-44 (noting overwhelming support for the preponderance standard, citing numerous cases). The reasons for applying the preponderance standard are several. First, many courts agree that a trial court's preliminary ruling as to whether a witness's

statements are admissible due to forfeiture by wrongdoing is functionally identical to a ruling that a co-conspirator's statements are admissible because they were made in furtherance of the conspiracy. See, e.g., People v. Jones, 270 Mich. App. 208, 215-16, 714 N.W.2d 362 (2006); Edwards, 444 Mass. at 543; Devonshire, 691 A.2d at 169. Second, many jurisdictions have rules identical to ER 104, and hold consistently that the preponderance standard applies to nearly all preliminary rulings. See, e.g., Steele v. Taylor, 684 F.2d 1193, 1202-03 (6th Cir. 1982) (preponderance standard governs preliminary rulings); Devonshire, 691 A.2d at 169 (preponderance "is the accepted standard" and is "traditionally used in deciding preliminary fact questions"); Jones, 270 Mich. App. at 216 (Mich. R. Evid. 104 is identical to Fed. R. Evid. 104). See also R. D. Friedman, Confrontation and the Definition of Chutzpah, 31 Israel L. Rev. 506, 522-23 (1997); Bourjaily v. United States, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (defendant on trial for conspiracy, yet trial court properly finds existence of same conspiracy by a preponderance of the evidence in determining admissibility of co-conspirator statements). But most importantly, courts recognize that the policies underlying forfeiture by wrongdoing would be

undermined by requiring proof by clear and convincing evidence. See Zlatogur, 271 F.3d at 1028 (preponderance standard adopted "in light of the behavior [forfeiture] seeks to discourage"); Edwards, 444 Mass. at 544 (rejecting clear and convincing standard on policy grounds). As one court has observed, a higher standard of proof would undermine the forfeiture doctrine's equitable purposes without any resulting benefit to the truth-seeking function of the trial:

As a higher standard of proof under the forfeiture doctrine would not actually separate out the more from the less reliable hearsay and admit only the former (it would simply reduce the scope of the doctrine's application), and as the public interest in deterring this sort of mischief is great, we think it correct to use the same standard as is used for coconspirators' statements.

White, 115 F.3d at 912; see also United States v. Mastrangelo, 693 F.2d 269, 273 (2nd Cir. 1982) (a higher burden of proof "might encourage behavior that strikes at the heart of the system of justice itself").

This Court should hold, as has every jurisdiction but one, that the preponderance standard applies to a trial court's preliminary determination as to whether forfeiture by wrongdoing has occurred. This standard is consistent with ER 104 and with this Court's holdings in analogous circumstances. See State v. Guloy,

104 Wn.2d 412, 420, 705 P.2d 1182 (1985) (preponderance standard applies to preliminary finding that defendant participated in conspiracy for purposes of admitting co-conspirator statements); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995) (preponderance standard applies to preliminary finding that other bad acts occurred under ER 404(b)). This standard also serves the compelling public policy underlying the forfeiture doctrine itself, ensuring that a defendant does not profit in a court of law from his or her wrongdoing.¹²

c. Pugh Forfeited His Sixth Amendment Rights.

The recorded jail conversations in this case readily demonstrate that Timothy Pugh was attempting to convince his wife not to testify at trial or to change her testimony. Ex. 23. Accordingly, Timothy should not be permitted to complain that

¹² Pugh may argue for a higher standard of proof based on the premise that confrontation rights are broader under the state constitution. See Wash. Const. art. 1, § 22. Such an argument should be rejected. The scope of the right does not determine whether it can be forfeited by misconduct. And, no other state with constitutional language similar to Washington's (i.e., "face to face") has rejected or restricted forfeiture by wrongdoing on this basis. See Ariz. Const. art. 2, § 24; Colo. Const. art. 2, § 16; Del. Const. art. 1, § 7; Kan. Const. Bill of Rights, § 10; Mass. Const. pt. 1, art. 12; Ohio Const. art. I, § 10; Tenn. Const. art. 1, § 9; Wis. Const. art. 1, § 7. In fact, the one court that has considered an independent state constitutional claim in the context of forfeiture by wrongdoing has soundly rejected that claim. See Edwards, 444 Mass. at 536.

Bridgette followed his instructions and failed to appear as a witness at his trial.

3. BRIDGITT'S 911 CALL WAS ADMISSIBLE UNDER DAVIS BECAUSE IT WAS MADE IMMEDIATELY FOLLOWING PUGH'S ASSAULT -- OBJECTIVELY VIEWED, THE PRIMARY PURPOSE OF THE OPERATOR'S QUESTIONING WAS RESOLVE AN ONGOING EMERGENCY AND OBTAIN PROTECTION AND MEDICAL AID FOR THE CALLER.

The question before the Court in Davis v. Washington, was whether, "objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements." Davis, 126 S. Ct. at 2276. Statements that are "testimonial" cause the declarant to be a "witness" within the meaning of the Confrontation Clause. ... It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause. Davis, 126 S. Ct. at 2273 (citing Crawford, 124 S. Ct. at 1364).

A statement is testimonial if it is " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " Davis, 126 S. Ct. at 2276 (quoting Crawford, 124 S. Ct. at

1354). The Court then adopted the following test for testimonial statements in the context of 911 calls:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis 126 S. Ct. at 2273-74.

The Supreme Court held that the hearsay statements in the Davis 911 call were not testimonial because the circumstances “objectively indicate [the call’s] primary purpose was to enable police assistance to meet an ongoing emergency.” Davis, 126 S. Ct. at 2277. In determining whether the statements were testimonial, the Court focused on differences between the 911 operator’s questions in Davis and the interrogation in Crawford. In Davis, the victim was describing events as they actually happened, the victim was facing an ongoing emergency, the answers were necessary for law enforcement to resolve the emergency, and the questioning during the call was less formal than the structured formal interrogation in Crawford concerning past events. Davis,

126 S. Ct. at 2276-77. "[A] 911 call, ... and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." Davis, 126 S. Ct. at 2276. Questions about surrounding circumstances, including the identity of the alleged assailant, are relevant "...so that the dispatched officers might know whether they would be encountering a violent felon. See, e.g., Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty., 542 U.S. 177, 186, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004)." Id. The Supreme Court also noted that:

the difference in the level of formality between the two interviews [Crawford verses Davis] is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

Id. at 2277.

Bridgette's 911 call is similar to the call approved in Davis; the primary purpose of the questioning was to facilitate a police response rather than to establish or prove some past fact. The call in this case was received in the middle of the night, at 03:13 hours.

Bridgette immediately told the operator that "my husband was beating me up really bad." Trans. at 1. Her heavy breathing and crying are audible in the recording. It was also apparent that there was child present. Trans. at p. 4, line 23 - p. 5 lines 1-7.

Moreover, the nature and circumstances of the call would have suggested to a reasonable operator that the situation remained dangerous. Most importantly, it was not clear whether Timothy had left the premises, or whether he was lingering just outside the door. For instance, at one point during the call, Bridgette says that Timothy has left and is "walking away," Trans. at 2. But, shortly thereafter, the operator asks, "Is he still there or did he leave?" Bridgette replies: "He's just outside." Trans. at 4, line 5. She then says that he is on foot rather than driving a car. The operator asks which way he is walking, and Bridgette replies, "Towards the street...seven-eleven." Trans. at 4, line 15. When the operator asks, "Can you see him from where you are?," Bridgette responds, "I'm not gonna ... you want me to go outside so he can beat me up so [sic] more?" These statements would suggest to a reasonable 911 operator that the defendant could still be lurking outside the apartment, and that there was a continuing danger. And, although from the sounds and the context of the

recording it appears Bridgette was not being assaulted at the moment she was on the telephone, at one point she says, "He's beatin' me up [unintelligible]," suggesting that the event was so recent that Bridgette was struggling to separate the immediate past from the present. Trans. at 5. The use of the present tense also could have caused the operator to question whether the event was truly resolved.

It is also clear that the operator was intent on determining whether Bridgette needed medical attention. Trans. at p. 2, line 8; p. 5, line 12; p. 7, lines 4, 9. Bridgette did not respond to the first inquiry but asked for an ambulance when asked the second and third times. She indicated that she had pain in her face. Trans. at p. 7, line 10.

Other questions asked by the operator were reasonably necessary to ensure a proper response by officers and medics. For instance, the operator asked about the assailant's identity and description, Trans. at 2-3, whether other people were present, Trans. at 4-5, whether the assailant had been drinking, Trans. at 6, line 17, whether he was armed, Trans. at p. 5, line 10, and whether a restraining order existed. Trans. at p. 6, line 15. These questions informed the responding officers of the nature of the potentially

dangerous situation they are entering, and whether an arrest may be appropriate based on violation of a no contact order. Davis, 126 S.Ct. at 2276.

On appeal, Pugh places great weight on the assertion that he had left once the 911 call was made. Br. of App. at 19. As noted above, it would not have been at all clear to a reasonable 911 operator that Pugh had permanently left the residence. In fact, under these circumstances, it is objectively reasonable to assume that he had not left, and that he could return at any moment and renew his assault.

The Supreme Court contrasted this type of case with the situation facing officers who interviewed Amy Hammon.

It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct-as, indeed, the testifying officer expressly acknowledged[.] ... There was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything When the officers first arrived, Amy told them that things were fine, ... and there was no immediate threat to her person. When the officer questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in *Davis*) "what is happening," but rather "what happened." Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime-which is, of course, precisely what the officer *should* have done.

Davis, 126 S. Ct. at 2278.

This Court should hold that this case is more like Davis than Hammon. It was objectively reasonable for the operator to believe that this was a continuing emergency, and to ask questions related to resolving that emergency. The tape in this case, like that in Davis, was made under "circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, at 2273-74. Bridgette Pugh's "frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." Id. at 2277. No officers had arrived on the scene with notepads, a volatile situation had not been demonstrably diffused, and Bridgette appeared to need police and medical assistance. It cannot be said that she was "testifying" to the operator in any sense intended by the drafters of the confrontation clause. Thus, her statements were not testimonial.

Even if some statements were testimonial, however, any error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674

(1986). In addition to the 911 tape, the jury listened to the recordings of Timothy attempting to persuade Bridgette to recant her allegations. Although Timothy quarreled with Bridgette on a number of points, he clearly did not dispute her allegations that he had beaten her badly on the night in question. For example, Bridgette said, "You know you hit me like I was a nail in the ground. ... You fuckin' hit. My head was all fucked up. My face was all fucked up. I mean you did." Timothy replied, "You forgive me, right?" CP 169, lines 1-4. There would be no need to ask forgiveness unless he had, indeed, hit her "like a nail in the ground." When Bridgette said, "You beat me up really bad," Timothy replied, "Yeah." CP 171, lines 1-22. And, when Bridgette said, "...[Y]ou hit me again," Timothy replied, "Right. Because I hit you, right." CP 192, 16-18. These admissions are damning on paper but more damning in the actual recording. Ex. 23. There is no question but that the defendant was agreeing that he had assaulted Bridgette, even though he denied that he pushed her off a ledge.

These adoptive admissions, coupled with the fact of the 911 call, and the testimony from responding officers who discovered her

crying, upset, bruised, and with a chipped tooth, RP 7/28 23-27, clearly established the fact that the defendant assaulted Bridgette.

4. THE CONFRONTATION CLAUSE OF THE WASHINGTON STATE CONSTITUTION IS NO BROADER THAN THE CLAUSE IN THE SIXTH AMENDMENT.

Pugh claims that he was deprived of his right to confrontation under article I, § 22, of the state constitution, which provides that, in criminal prosecutions, “the accused shall have the right...to meet the witnesses against him face to face.” He argues that the state’s corollary to the Sixth Amendment’s Confrontation Clause provides greater protection than the federal right, even after the Crawford decision. This argument has been twice rejected by this court, and it should be rejected again. State v. Saunders, 132 Wn. App. 592, 132 P.3d 743 (2006); State v. Mohamed, 132 Wn. App. 58, 130 P.3d 401 (2006). At least as it pertains to the relationship between hearsay and the confrontation clause, Washington law has been remarkably consistent with federal law, suggesting that any textual differences between the Washington and federal constitution do not bear on the questions presented in this case.

- a. Washington Supreme Court Precedent Has Long Permitted Hearsay Like the Statements Made By Bridgette Pugh In This Case.

There are a number of critical weaknesses in Pugh's state constitutional arguments. First, if the term "face to face" in the state constitution means a literal confrontation with a witness in the same physical space, then all out-of-court statements offered to prove the truth of the matter asserted -- all hearsay -- is banned under the state constitution. Essentially, Pugh asks this Court to redact from ER 803 its language concerning the immateriality of the declarant's availability. Though his argument is unclear, he also appears to suggest that long-recognized exceptions to the hearsay ban, including the exception that allows for admission of excited utterances, violate the state constitutional right to confrontation. See Brief of Appellant, at 40. Nothing in this state's constitutional history or in preexisting law supports these contentions.

In fact, the Washington Supreme Court has repeatedly affirmed admission of hearsay even since the earliest years of

statehood. For example, dying declarations were admissible.¹³

Co-conspirator statements were admissible.¹⁴ Public records and business records have been admissible.¹⁵ Prior testimony was also admissible.¹⁶

And, these early decisions were all made when the *only* constitutional right to confront witness was the right found in the state constitution, because Washington courts believed that the Sixth Amendment did not apply to the states. Ortego, 22 Wn.2d at 555-56.

¹³ State v. Long, 163 Wash. 607, 613, 1 P.2d 844 (1931) (recognizing admissibility of dying declarations but disapproving of jury instruction as a comment on the evidence); State v. Webster, 21 Wash. 63, 57 P. 361 (1899) (dying declaration of shooting victim admitted); State v. Baldwin, 15 Wash. 15, 45 P.650 (1896); State v. Eddon, 8 Wash. 292, 297-98, 36 P. 139 (1894).

¹⁴ State v. Payne, 10 Wash. 545, 39 P. 157 (1895) (statements of co-conspirators admissible in manslaughter prosecution); State v. Mann, 39 Wash. 144, 81 P. 561 (1905) (admissions of wife admitting crime and implicating husband were admissible against husband where the couple were coconspirators in arson); State v. Williams, 62 Wash. 286, 113 P. 780 (1911) (evidence of conversations and statements of codefendants were admissible to show concerted action in theft by deception, even where conspiracy was not charged); State v. McGonigle, 144 Wash. 252, 258 P. 16 (1927).

¹⁵ State v. Bolen, 142 Wash. 653, 657-64, 254 P. 445 (1927) (fingerprint report admissible as public record; no violation of art. I, § 22); State v. Johnson, 194 Wash. 438, 448-49, 78 P.2d 561 (1938) (art. I, § 22 does not bar admission of documentary evidence from prison warden).

¹⁶ State v. Ortego, 22 Wn.2d 552, 556, 157 P.2d 320 (1945) (noting that article I, § 22 is not absolute and that prior testimony could be admitted); State v. Cushing, 17 Wash. 544, 50 P. 512 (1897).

Most importantly for this case, however, spontaneous declarations or excited utterances like those made on 911 tapes have long been admissible in Washington under the res gestae exception. Washington's constitution was ratified in 1889, nearly a hundred years after ratification of the federal constitution in 1791. By 1889, the spontaneous declaration exception was well-known.

Indeed, a mere ten years after the ratification of our constitution, in State v. Smith, 26 Wash. 354, 67 P. 70 (1901), a robbery victim suffered a "mental collapse" at trial, he was adjudged "insane," and his testimony was stricken from the record.

Nonetheless, the Washington Supreme court held that the victim's hearsay statements describing the robbery were admissible under the res gestae exception to the hearsay rules. The court noted that, "Declarations of the person robbed, when of the res gestae, are admissible in evidence." Smith, 26 Wash. at 357 (citing 2 Bish. New Cr. Proc. § 1007a1; State v. Ah Loi, 5 Nev. 99 (1869); Rex v. Wink, 6 Car. & P. 397) (1834). Ah Loi and Wink were decided decades before Washington became a state.

The rule was discussed and applied in yet another early case. State v. Hazzard, 75 Wash. 5, 134 P. 514 (1913). In Hazzard, a doctor was charged with manslaughter for essentially

starving a woman to death by placing her on an extreme diet, and then misappropriating the property of the woman and her sister.

Hearsay statements of the deceased sister were offered into evidence. In affirming use of the hearsay, the Washington Supreme Court described the res gestae rule in detail:

The rule is that, where a transaction is continuous, the statements and acts accompanying it and so woven into it by the circumstances as to receive credit from it are a part of the res gestae. In 1 Wharton's Criminal Evidence (10th Ed.) § 262, the rule is stated as follows: 'Res gestae are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of the participants when narrating the events. What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is res gestae; it is part of the transaction itself. As long as the transaction continues, so long do acts and deeds emanating from it become part of it, so that in describing it in a court of justice they can be detailed.' In Abbott's Trial Brief, Criminal Causes (2d Ed.) § 266, the rule is stated thus: 'The rule of the res gestae admits declarations made under the impulse of the occasion, though somewhat separated in time and place, if so woven into it by the circumstances as to receive credit from it.' See, also, to the same effect: Mitchum v. State, 11 Ga. 615; McGowen v. McGowen, 52 Tex. 657; Little Rock M. R. & T. Co. v. Leverett, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230. It seems clear to us that, under the rule announced in these authorities, the evidence complained of was admissible.

State v. Hazzard, 75 Wash. at 23-24. Each cited case -- Mitchum, McGowen, Littlerock -- predates ratification of the Washington constitution.

In State v. Beaudin, 76 Wash. 306, 136 P. 137 (1913), the details of statements of 2 ½ year old child were not admissible in a sodomy prosecution but the court suggested that such statements might have been admissible if they had been made contemporaneously with the event because then they would have fallen within the res gestae exception. See also State v. Ripley, 32 Wash. 182, 190, 72 P. 1036 (1903) (hearsay statements by a robbery victim were admitted under the res gestae exception).

Pugh fails to provide any foundation in preexisting Washington law for his contention that the recognition of excited utterances as exceptions to the hearsay rule should be abandoned. He incorrectly suggests that the "excited utterance" rule was not recognized in this state until 1939, in the opinion of Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939). See Br. of App. at 42. Indeed, the Beck court made clear that it was merely summarizing a voluminous number of pre-existing cases on the subject:

We have taken the pains to examine the cases on the subject as listed in Washington Digest Annotated, topic "Evidence," key numbers 118 to 128 inclusive;

we make this reference only because the cases are too numerous to set forth by specific citation in this opinion.

Beck, 200 Wash. 1 at 9, 92 P.2d 1113; see also Walters v. Spokane International Ry. Co., 58 Wash. 293, 297, 108 P. 593 (1910) (recognizing the res gestae/excited utterance exception, citing Wigmore). The Beck court then set forth its understanding of the long-standing exception, which it referred to as “res gestae.”

The res gestae rule as restated in Beck is essentially identical to the current “excited utterance” provision as it has been interpreted by modern courts, with the exception that pre-ER 803 courts did not need to determine that a startling event had occurred. Compare Beck, 200 Wash. at 9-10, and State v. Chapin, 118 Wn.2d 681, 686, 829 P.2d 194 (1992). Nowhere in early Washington case law is it required that the declarant be available to testify, or that the trial court need determine the declarant’s unavailability. See, e.g., Britton v. Washington Water Power Co., 59 Wash. 440, 444, 110 P. 20 (1910) (holding that the exclamation of a bystander who had just witnessed a startling event should have been admitted under “res gestae” exception; the court did not

suggest that the bystander needed to be available or that his unavailability needed to be determined).¹⁷

Not surprisingly, these state exceptions correspond to exceptions that were recognized exceptions under the Sixth Amendment, too. See Crawford v. Washington, 124 S. Ct. at 1367, n.6 (the use of dying declarations, co-conspirator statements, business records, and certain excited utterances does not violate the confrontation clause). See also Mattox v. United States, 156 U. S. 237, 15 S. Ct. 337, 39 L. Ed. 409 (1895) (cited with approval in State v. Waite, 141 Wash. 429, 432, 251 P. 855 (1926)).

Thus, it appears that the Washington Supreme Court has consistently interpreted the state confrontation clause in a manner quite similar to the interpretation given by the Supreme Court to the federal clause. Thus, even if there exist textual differences between the two clauses, those differences do not suggest that hearsay must be excluded in Washington.

¹⁷ More contemporary courts have reached the same conclusion. See, e.g., State v. Palomo, 113 Wn.2d 789, 794-98, 783 P.2d 575 (1989) (engaging in extensive Confrontation Clause analysis and review of state case law, and concluding that unavailability need not be determined by a trial court as prerequisite to admission of excited utterances under ER 803(a)(2), citing, *inter alia*, United States v. Inadi, 475 U.S. 387, 394-96, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986)).

Pugh offers no rule, test, or system of analysis by which an out-of-court statement can be scrutinized to determine its admissibility under art. I, § 22. His arguments should be rejected.

b. Neither State v. Foster Nor Pre-existing Law Support Pugh's Position.

As a basis for his constitutional analysis, Pugh relies primarily on State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998). Foster concerned the constitutionality of RCW 9A.44.150, which provided for the use of a closed-circuit television system whereby an alleged victim of child molestation could testify against the defendant while seated in a different room. At Foster's trial, the child complainant testified in the judge's chambers, accompanied by the prosecutor, defense counsel, and the court reporter; her testimony was broadcast, live, into the courtroom, where the defendant and the jury were seated. Foster, 135 Wn.2d at 444. On appeal, Foster contended that his state constitutional right to meet adversarial witnesses "face to face" was compromised by this arrangement. Id. at 449-50.

By a 5-4 decision, Foster's conviction was upheld. After engaging in a Gunwall analysis,¹⁸ four justices concluded that the federal and state constitutional rights to confrontation provided identical protection. Foster, 135 Wn.2d at 466. Four other justices concluded that art. I, § 22, provided more expansive protection than the Sixth Amendment, decided that RCW 9A.44.150 violated the state constitutional provision, and believed that Foster had been deprived of his right to confront witnesses. Id. at 497-98 (dissent). Separately, Justice Alexander held that the state and federal guarantees of confrontation were not identical, and that separate analysis under art. I, § 22, was necessary, but did not agree that RCW 9A.44.150 violated the state constitution. Id. at 474 (concurrence/dissent). Foster's conviction was thus affirmed.

Foster provides little support to Pugh's position. At its broadest, Foster stands only for the proposition that the state constitution provides greater protection than the federal constitution in the area of testimony presented by closed-circuit television, and that RCW 9A.44.150 comports with the state constitutional

¹⁸ See Foster, 135 Wn.2d at 454, citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) (outlining the criteria by which a court should compare guarantees under the state and federal constitutions, in order to decide whether the state's guarantee provides broader protection.)

provision. The Foster decision predates Crawford, which significantly extended the Sixth Amendment's guarantee of confrontation. And as the dissenting judges in Foster complained, the concurrence/dissent did not adopt the dissent's view of the breadth of art. I, § 22; nor did the concurrence/dissent express its own understanding of the difference between the federal and state rights to confrontation. Most significantly, even the dissent affirmed the continued vitality of exceptions to the hearsay rule that did not require the declarant's availability at trial. See Foster, 135 Wn.2d at 495 (dissent). The dissenting justices' objection was only to the means by which an *available* witness could be examined. Id. None of the Gunwall analyses conducted in Foster led *any* of the justices to conclude that a declarant's in-court appearance was a necessary condition precedent to the admission of out-of-court statements that fit within the long-recognized exceptions to the hearsay rule under ER 803.

As to state constitutional history, insofar as it evidences the intent of the drafters, the record is scanty. See Foster, 135 Wn.2d at 460 (plurality opinion), 474 (Alexander, J., concurring/dissenting). The most that can be said, as it pertains to the intended scope of the state's confrontation right, and to the viability of the challenged

exceptions to the hearsay rule, is that the state constitution's framers borrowed language from the constitutions of other states when they created art. I, § 22. See Foster, 135 Wn.2d at 488 (dissent, noting identical language in Oregon and Indiana constitutional provisions); see also State v. Medlock, 86 Wn. App. 89, 98, 935 P.2d 693 (1997). As the Medlock court recognized, the fact that language was borrowed from the constitutions of other states proves nothing in and of itself. Medlock, 86 Wn. App. at 98. And Pugh's reliance on the interpretation by Oregon courts of that state's confrontation clause carries little weight. See Br. of App. at 40, citing State v. Campbell, 705 P.2d 694 (Or. 1985) (requiring demonstration of unavailability of declarant before child sexual hearsay could be admitted, pursuant to Or. Const. art. I, § 11).¹⁹ The courts of other states, whose constitutional confrontation provision mirrors Oregon's and Washington's, have reached a different conclusion than Oregon's judiciary. See, e.g., Miller v. State, 517 N.E.2d 64, 68 (Ind. 1987) (noting that "with few exceptions, Indiana appellate courts have analyzed... confrontation

¹⁹ The Campbell court's analysis of the state constitutional provision is brief and conclusory, and contains no discussion of the history of the Oregon constitution's enactment. See Campbell, 705 P.2d at 703.

questions with reference to federal case law and treated the state [constitutional confrontation] provision as providing guarantees similar to its federal counterpart.”); State v. Hester, 801 S.W.2d 695, 697 (Mo. 1991) (rejecting argument that a defendant’s state constitutional right to “meet the witnesses against him face-to-face” is more restrictive than the Confrontation Clause); State v. Jacob, 494 N.W.2d 109, 119 (Neb. 1993) (holding that Sixth Amendment’s confrontation right and state constitutional right to “meet the witnesses [against the accused] face to face” are co-extensive); State v. Burns, 332 N.W.2d 757 (Wis. 1983) (holding that a defendant’s state constitutional right to “meet the witnesses face-to-face” is identical to the Sixth Amendment’s confrontation clause). There is no basis to view state constitutional history as requiring the dramatic overhaul of our evidentiary rules on hearsay admissibility that Pugh seeks.

In sum, Pugh fails to meet the burden of demonstrating that the state constitutional right to confrontation exceeds the Sixth

Amendment, post-Crawford. His reliance on early Washington cases concerning out-of-court statements by rape victims is misguided, as those cases involve hearsay that does not fit into any of the long-recognized exceptions to the general ban.²⁰

Indeed, it can be argued, as the dissenting justices in Foster observed, that a “strict reading of the confrontation clause in article I, § 22, does not implicate hearsay concerns.” Foster, 135 Wn.2d at 495. Rather, the state constitutional provision addresses the “method by which the accused is guaranteed confrontation, not whether the accused is guaranteed confrontation at all.” Id. In any case, an examination of state constitutional history and preexisting law shows only that certain, limited forms of hearsay are, and have always been, admissible in this state. Because it lacks legal or historical support, Pugh's argument should be rejected.

²⁰ See Brief of Appellant, at 44, citing State v. Hunter, 18 Wash. 670, 52 P. 247 (1898) (recognizing that limited “fact of complaint” doctrine allows admission of hearsay evidence that sexual assault victim reported an attack, but does not authorize admission of victim’s out-of-court description of that attack).

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this court to affirm Pugh's convictions for witness tampering and felony violation of a no-contact order.

DATED this 13th day of October, 2006.

Respectfully submitted,

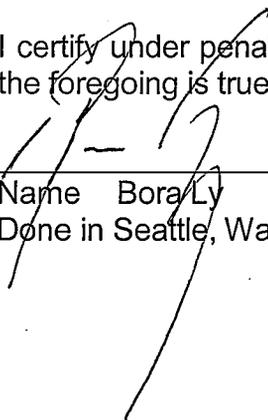
NORM MALENG
King County Prosecuting Attorney

By: 
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. TIMOTHY PUGH, Cause No. 56935-0-I, in the Court of Appeals, Division I, for the State of Washington.

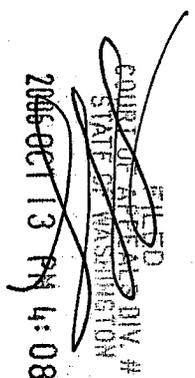
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name Bora Ly
Done in Seattle, Washington

10/13/06

Date


FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 OCT 13 PM 4:08