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STATE OF WASHINGTON

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SUPREME No. _____
COA No. 40534-2-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent

v.

TIMOTHY DOBBS,
Petitioner

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STATE OF WASHINGTON
BY _____
DEPUTY

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COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning and James Stonier, Judges

PETITION FOR REVIEW

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STATE OF WASHINGTON

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TABLE OF CONTENTS

	Page
A. <u>IDENTITY OF PETITIONER</u>	1
B. <u>COURT OF APPEALS DECISION</u>	1
C. <u>INTRODUCTION AND ISSUES PRESENTED FOR REVIEW</u>	1
D. <u>STATEMENT OF THE CASE</u>	3
1. <u>Procedural Posture</u>	3
2. <u>C.R.'s Nonappearance and the State's Claimed "Forfeiture" of Confrontation Rights</u>	4
3. <u>Publshed Division Two Decision</u>	10
F. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u>	11
1. REVIEW SHOULD BE GRANTED BECAUSE THE DIVISION TWO MAJORITY EXPANDED THE EXCEPTION SO FAR AS TO SWALLOW THE RULE. .	11
2. REFLEXIVE FORFEITURE IS NOT – AND SHOULD NOT BECOME – A “DOMESTIC VIOLENCE” EXCEPTION TO THE CONFRONTATION CLAUSE.	17
3. THIS COURT ALSO SHOULD REVIEW WHETHER INDEPENDENT RELIABILITY REQUIREMENTS OF THE EVIDENTIARY RULES ARE FORFEITED WHENEVER CONFRONTATION RIGHTS ARE FORFEITED.	19
G. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Anica v. Wal-Mart Stores, Inc.</u> 120 Wn. App. 481, 84 P.3d 1231 (2004).....	16
<u>Merriman v. Cokeley</u> 168 Wn.2d 627, 230 P.3d 162 (2010).....	15
<u>State v. Dobbs</u> ___ Wn. App. ___, ___ P.3d ___, 2012 WL 1636154 (May 1, 2012, No. 40534-2-II, 40636-5-II)....	1, 3, 6, 7, 10 11, 16, 19
<u>State v. Fallentine</u> 149 Wn. App. 614, 215 P.3d 945 <u>rev. denied</u> , 166 Wn.2d 1028 (2009).....	9, 12, 13, 14, 15, 19
<u>State v. Mason</u> 160 Wn.2d 910, 925, 162 P.3d 396 (2007) <u>cert. denied</u> , <u>Mason v. Washington</u> , 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008)	11, 12, 15, 16
<u>FEDERAL CASES</u>	
<u>Crawford v. Washington</u> 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	17, 19
<u>Davis v. Washington</u> 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).....	18
<u>Giles v. California</u> 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008)....	12, 16, 18
<u>OTHER JURISDICTIONS</u>	
<u>State v. Altrui</u> 188 Conn. 161, 448 A.2d 837 (1982).....	13
<u>State v. Henry</u> 76 Conn. App. 515, 820 A.2d 1076 (2003)	13

TABLE OF AUTHORITIES (CONT'D)

Page

Vasquez v. People
173 P.3d 1099 (Colo., 2007) 19

RULES, STATUTES AND OTHER AUTHORITIES

Byron L. Warnken
“Forfeiture by Wrongdoing” After Crawford v. Washington:
Maryland’s Approach Best Preserves the Right to Confrontation
(2008) 18

Liningier
Prosecuting Batterers after Crawford
(2005) 18

Tegland
5C Wash. Pract. Evidence Law and Practice, § 1300.14 19

RAP 13.4(b) 20

RAP 13.4(b)(3) 16, 17, 19

RAP 13.4(b)(4) 16, 17, 19, 20

RAP 13.6 20

U.S. Const. Amend. VI 17

A. IDENTITY OF PETITIONER

Petitioner Timothy Dobbs, the appellant below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Dobbs seeks review of Division Two's partially published decision in State v. Dobbs, ___ Wn. App. ___, ___ P.3d ___, 2012 WL 1636154 (May 1, 2012, No. 40534-2-II, 40636-5-II).¹ The two-judge majority held the trial court did not err in admitting unconfrosted testimonial hearsay statements from the complaining witness, reasoning that Dobbs had forfeited his confrontation rights by wrongdoing. Dobbs, slip op. at 1-15 (Worswick and Quinn-Brintnall, JJ). In dissent, Judge Van Deren would have held the state failed to prove – through the requisite clear, cogent, and convincing evidence – that Dobbs intended to prevent the witness' testimony and that his acts were the reason the witness declined to show up for trial. Dobbs, slip op. at 16-18 (Van Deren, J., dissenting).

C. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

A complaining witness may decline to appear and testify at trial for numerous reasons. If the witness' statements to police were lies, later truthful testimony might subject her to perjury charges. A

witness may not want to take time off from work or may have physical difficulty getting to court. In the context of “tumultuous”² domestic relationships, a wide variety of potential factual scenarios might explain why a witness recants or does not wish to testify. This uncertainty shows why it is important for the state to establish a nexus between an accused’s alleged wrongdoing and a witness’s unexplained absence from trial.

In this trial, the state charged Dobbs with numerous offenses the state called “domestic violence.” CP 1-4. In efforts to prove those offenses, the state offered unfronted testimonial hearsay from the absent complaining witness, to show that Dobbs threatened her and encouraged her to not cooperate with the police.

Dobbs was arrested shortly after the alleged conduct and remained in jail pending trial. After Dobbs’ arrest, the complaining witness received one phone message, allegedly from Dobbs, which pleaded with her to not press charges, then “turned into kind of a threatening of don’t do this to me or you’ll regret it.” RP 123.

¹ A copy of the decision is attached as appendix A.

² Dobbs, slip op. at 2.

1. Did the trial court and Court of Appeals majority err in finding sufficient evidence to show a nexus between the witness' absence and any alleged wrongdoing?

2. Should this Court grant review of this important constitutional question to ensure that the "forfeiture by wrongdoing" exception remains an exception, and does not negate confrontation rights in any case where the state alleges domestic violence and the state's witness is not fully cooperating with the state?

3. The Division Two majority also found that the forfeiture of confrontation rights led to the forfeiture of all reliability protections provided by hearsay rules. Dobbs, slip op. at 10-13. Should this Court grant review to provide a reasoned analysis as to whether Washington will admit unreliable hearsay statements whenever a court determines the accused forfeited his confrontation rights?

D. STATEMENT OF THE CASE

1. Procedural Posture

The state charged Dobbs with eight counts arising from incidents involving C.R., the complaining witness.³ CP 1-4. The trial court found him not guilty of second degree assault and first degree

³ The transcripts and both parties' briefs referred to C.R. by her full name, but Division Two referred to her by initials.

burglary. CP 3; RP 308. But the court found Dobbs guilty of six counts, four of which included “domestic violence” allegations.⁴

The complaining witness did not show up for trial. Over defense objection the trial court admitted numerous testimonial hearsay statements she made to other witnesses. In arguing to admit the evidence, the state asserted Dobbs had “forfeited” his confrontation rights by alleged “wrongdoing.” RP 248-55. The trial court relied on those statements to find Dobbs guilty of the charged offenses. RP 306-10.⁵

2. C.R.’s Nonappearance and the State’s Claimed “Forfeiture” of Confrontation Rights

The charged conduct occurred between November 5 and 10, 2009. CP 1-4. Trial was held January 25-26, 2010. RP 17, 196.

During a pretrial hearing on January 12, 2010, both counsel noted that C.R. had not been cooperating with defense interview

⁴ “The trial court convicted Dobbs of [1] stalking – domestic violence with a deadly weapon enhancement; [2] felony harassment – domestic violence; [3] intimidating a witness – domestic violence; [4] drive by shooting – domestic violence; [5] first degree unlawful possession of a firearm; and [6] obstructing a law enforcement officer.” Dobbs, slip op. at 1, n.1; see also RP 306-10 (court’s oral ruling). The court entered no written findings and conclusions.

requests. The state had not yet served her with a subpoena. RP 7. Defense counsel said “there are a number of indications in the police report that she is unwilling to cooperate so I would seriously doubt they have even served her at this point.” RP 7-8.

At trial on January 25th, the prosecutor said C.R. was served January 12th with a subpoena requiring her presence at 10:30 a.m. on the 25th. Officer Headley had contacted her the night of the 24th, advising her to be present at 9:00 a.m. on the 25th. When she did not appear at 9:00 a.m., the prosecutor asked for a material witness warrant. The court said it would wait until 10:30 to see if she appeared. RP 18-19, 77-78.

At about 10:50 a.m., the prosecutor renewed the request and the court said it would issue a no-bail warrant requiring C.R. to be brought to court. RP 77-78, 86. After lunch, at 1:11 p.m., the prosecutor said detectives “have leads but they have not yet [located her], Your Honor.” RP 86. The court then signed the warrant at the prosecutor’s request. RP 86-87.

During testimony on the 26th, the prosecutor asked Sergeant Michael Hallowell what efforts were taken to detain C.R. under the

⁵ The state made no harmless error argument in its brief. If this Court determines the trial court erred, there is no way the error could be

warrant. Hallowell said three officers responded to her apartment and C.R. was not there. RP 238. Hallowell said he briefed the swing shift sergeant and the graveyard shift officer. He checked a few other places in town where he thought she might be. RP 239. Hallowell said the swing shift officer (Headley) was unsuccessful in finding C.R. at the residence at 10:45 the night before. RP 240. Hallowell said he checked C.R.'s apartment at 8:00 a.m. that morning. He noted the door knob was broken, but he opened the door, called to anyone who might be inside, and no one responded. RP 240.

On cross, Hallowell admitted since the initial incidents he had multiple conversations with C.R. but she did not show up for three appointments at his office. She never returned his calls. RP 241.

The prosecutor then offered testimony on the question whether Dobbs had forfeited his confrontation rights by wrongdoing. RP 87. That testimony is discussed in detail in the party's briefs and the published decision. BOA at 1-6; BOR at 1-9; Dobbs, slip op. at 2-4. In general, the state theorized C.R. did not show up based on the threatening conduct alleged by the state and established by C.R.'s hearsay statements to others. RP 248-55.

harmless under any standard.

Briefly summarized, the state offered evidence to support the initial charges, to show: Dobbs threatened to shoot C.R. if she would not continue to be his girlfriend, that he slashed her car tires outside her apartment, that he made threatening phone calls and sent threatening text messages, that he stalked C.R., that he left her a threatening note, that he fired shots into her apartment, and that he showed up at C.R.'s apartment with a gun. After receiving the note, C.R. called the police and implored them to find Dobbs, saying if they did not, the police would find her dead. These alleged acts occurred between November 7 and 10. Dobbs, slip op. at 2-4; BOA at 1-8; BOR at 1-9.

Dobbs was found and arrested November 10. On November 11, C.R. met with police. She showed two text messages and played two telephone messages Dobbs allegedly left on her phone. Much of the above was admitted through hearsay statements C.R. made to various other witnesses. Id.

Only one phone message was left after Dobbs' arrest. Officer Woodard described it as "essentially pleading with [C.R.] not to go forward and not to press charges against him and it – it kind of quickly turned into kind of a threatening of don't do this to me or – you'll regret it." RP 123.

After presenting evidence about Dobbs' alleged threats to C.R., the prosecutor argued there was clear, cogent and convincing evidence that Dobbs "engaged in wrongdoing with the intent to prevent the witness or the victim from testifying or providing information in Court or to the justice system." RP 248. The prosecutor then summarized the evidence supporting the state's allegations. RP 248-49. From this, the state asserted Dobbs' actions had "now come to fruit in that [C.R.] has not appeared and – has not appeared and obeyed the lawful subpoena of the court and has not been" located by the police." RP 250. The state asked the court to conclude Dobbs had thereby forfeited both his confrontation rights and any protections of the hearsay rules. RP 250-51.

Defense counsel countered that the evidence showed little more than C.R.'s refusal to cooperate with the police. As early as November 17th she was not showing up for appointments at the police station, and no testimony suggested it was because she was afraid. Other offered evidence lacked any foundation to link the threatening note, text messages, or phone calls to Dobbs. RP 252-53.

In rebuttal, the prosecutor argued there were threatening messages left immediately after Dobbs' arrest, and from that point on C.R.'s cooperation plummeted. According to the prosecutor, "it is

rational and reasonable to expect that her fear would continue even after the defendant was incarcerated.” RP 254. The prosecutor asked the court to infer C.R. was intimidated by a “pattern of conduct[.]” RP 255.

The court concluded it was “satisfied that there is a sufficient basis that the defendant’s conduct is the fact to why she is not here.” RP 256. Listing the evidence offered by the state, the court said “it is clear, cogent and convincing that she was afraid of him and that’s why she isn’t here to testify.” RP 256.

The state then made efforts to show that several testimonial statements were not hearsay, and several hearsay statements would be admissible under exceptions for present sense impressions or excited utterances. RP 256-81. The court ruled the some evidence would and some would not be admissible under exceptions to the hearsay rules, but that a footnote in a Division One decision supported the conclusion that forfeiture of confrontation rights also leads to forfeiture of any reliability protections offered by the hearsay rules. RP 282-85 (citing State v. Fallentine, 149 Wn. App. 614, 623 n.34, 215 P.3d 945, rev. denied, 166 Wn.2d 1028 (2009)). The court admitted and then relied on the evidence to convict Dobbs. RP 282-85, 306-10.

3. Published Division Two Decision

In dissent, Judge Van Deren reviewed this record and concluded it lacked clear, cogent and convincing evidence that Dobbs' conduct accomplished C.R.'s absence. Slip op. at 16-18 (Van Deren, J., dissenting). Nor did the trial court enter factual findings that Dobbs had the specific intent to prevent C.R. from testifying. Slip op. at 17.

Although the record is replete with allegations about Dobbs' conduct toward the alleged victim, the record lacks even a scintilla of evidence about why the witness actually chose to not attend trial.

Dobbs, slip op., at 17 (Van Deren, J., dissenting). When Headley reminded her the night before her scheduled testimony, she did not suggest she would not appear. "The record shows only speculation about her reasons for not appearing in court, based on the pending charges and on a statement Dobbs allegedly made to her after his arrest, and after he made a telephone call from the jail." Id., at 17.

The two-member majority disagreed, reasoning that the evidence of threats and conduct was "substantial evidence that Dobbs intentionally engaged in misconduct to keep C.R. from testifying." Dobbs, slip op. at 8-9. Regarding the nexus between the alleged wrongdoing and C.R.'s absence, the majority offered this terse conclusion: "[t]here is sufficient evidence to show that Dobbs caused

C.R.'s unavailability. The trial court did not err in applying the doctrine of forfeiture by wrongdoing." Dobbs, slip op. at 9-10.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE GRANTED BECAUSE THE DIVISION TWO MAJORITY EXPANDED THE EXCEPTION SO FAR AS TO SWALLOW THE RULE.

This Court addressed whether confrontation rights may be forfeited in State v. Mason, 160 Wn.2d 910, 925, 162 P.3d 396 (2007), cert. denied, Mason v. Washington, 553 U.S. 1035, 128 S.Ct. 2430, 171 L.Ed.2d 235 (2008). Mason was convicted of murdering Santoso. On appeal, he argued the trial court violated his confrontation rights when it admitted Santoso's hearsay statements to other witnesses. Mason, 160 Wn.2d at 917-27.

Rejecting Mason's claims, this Court adopted the "forfeiture by wrongdoing" doctrine. In the context of murder, this Court reasoned:

we will not allow Mason to complain that he was unable to confront Santoso when Mason bears responsibility for Santoso's unavailability. Mason made his right impossible to implement; he has only himself to blame for its loss.

Mason, 160 Wn.2d at 925. The court also rejected Mason's claim that the state had to show he intended to prevent Santoso's testimony before a forfeiture could be established. Mason, at 926-27.

This latter part of Mason was expressly rejected by the United States Supreme Court. In Giles v. California,⁶ the Court held

that out of court testimonial statements of an absent witness may be admitted at trial under the forfeiture by wrongdoing doctrine as an exception to the right of confrontation, but only where the defendant's wrongful act was designed to prevent the witness from testifying. Testimonial statements under the forfeiture doctrine are thus admissible only when the evidence shows the wrongdoing was intended to prevent the testimony, and the evidence is clear, cogent and convincing.

State v. Fallentine, 149 Wn. App. at 620 & n.13 (note omitted, citing Giles, 128 S.Ct. at 2683, 2688).

After Giles and Mason, it is clear the state must show the accused's wrongful acts were intended to prevent the witness' testimony, and that the wrongdoing rendered the witness unavailable. The state must not only prove the wrongdoing, but a nexus between the wrongdoing and the witness' absence. Fallentine, 149 Wn. App. at 620-21; Mason, at 927.

In Giles and Mason, the nexus was easy to establish: the witness was dead and therefore unavailable to testify. For this reason in murder cases the state can darkly quip: "[t]hough justice may be blind it is not stupid." Mason, at 925 (quoting State v. Henry, 76

⁶ Giles v. California, 554 U.S. 353, 377, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).

Conn. App. 515, 533, 820 A.2d 1076 (2003) (quoting State v. Altrui, 188 Conn. 161, 173, 448 A.2d 837 (1982))). But the nexus is more difficult for the state to prove when a living witness simply does not show up for trial.

In Fallentine, Division One addressed forfeiture where the witness was still alive. The state charged Fallentine with arson, burglary, and possession of stolen property. An arson investigator reviewed surveillance videos and interrogated another suspect, Clark.

In a recorded interview Clark ultimately admitted he set the fire, but at Fallentine's direction and encouragement. Fallentine, at 617-18.

The state charged Clark with arson and he pled guilty. Charges against Fallentine were twice dismissed without prejudice while Clark's case was pending. After Clark was sentenced, the state refiled the charges against Fallentine. But even though Clark was granted immunity from further prosecution, he remained unwilling to testify against Fallentine. Fallentine, at 618.

To establish forfeiture, the state offered testimony from Clark's former social worker to show Fallentine's influence over Clark. She said Clark had low self esteem, was a "follower," did not want to return to foster care under any circumstances, and was motivated to have

an ongoing relationship with his sister and Fallentine. After Clark's first interview with the arson investigator, the social worker said Clark told her Fallentine carried a firearm and was dangerous, Clark felt he could not get away from Fallentine, and was worried what would happen if Fallentine found him. Fallentine, at 621-22.

After Clark's second recorded interview with the investigator, he appeared "frightened, hypervigilant, and somewhat paranoid." The social worker found Clark on the floor in a fetal position, sobbing. Clark repeatedly told the social worker he believed Fallentine had "put out a hit" on him with the Gypsy Joker motorcycle gang. Clark said he did not want to be labeled a snitch and that Fallentine said if Clark rolled on him Fallentine would have the Gypsy jokers put out a hit on Clark. Clark said he just wanted to do his time "and not have to look over my shoulder all the time." Fallentine, at 622-23.

Division One concluded that this evidence, viewed in the state's favor, showed that "Fallentine told Clark if Clark testified against him, he would be killed, and that threat actually prevented Clark from testifying." Fallentine, at 623.

This record lacks any similar evidence to explain C.R.'s absence. Although the state offered evidence from various hearsay and non-hearsay sources to show threatening pre-arrest conduct, that

conduct merely formed the basis for the charges. Unlike the record in Fallentine, this record shows no nexus between any wrongful conduct and C.R.'s decision not to attend trial. Even under the most state-friendly view of the record, Dobbs' last effort to contact C.R. was a call from the jail on November 11. That call was described as some combination of pleading and threatening. But between that date and trial, the police contacted her while Dobbs remained in jail. There was no proof, nor reasonable inference, that C.R. feared Dobbs so much that she refused to testify.

Mason requires the state to prove the wrongdoing and nexus by clear, cogent, and convincing proof. Mason, at 927. "Clear, cogent, and convincing proof" requires the state to establish the asserted fact to be "highly probable." Merriman v. Cokeley, 168 Wn.2d 627, 630-31, 230 P.3d 162 (2010). As this Court stated in Mason, "[w]e recognize that this is not an easy standard to meet, but the right of confrontation should not be easily deemed forfeited by an accused." Mason, at 927.

Contrary to Mason and Fallentine, the Division Two majority simply assumed the nexus between Dobbs' alleged threats and C.R.'s absence. This assumption suffers a logical fallacy: "post hoc ergo propter hoc" (after this therefore because of this). The assumption is

fallacious because it confuses coincidence with causation. Anica v. Wal-Mart Stores, Inc., 120 Wn. App. 481, 489, 84 P.3d 1231 (2004). This logical fallacy is not “highly probable” proof that C.R.’s absence was related to any alleged wrongdoing by Dobbs.

Judge Van Deren’s dissent properly recognized this “record lacks even a scintilla of evidence about why the witness actually chose not to attend trial.” Dobbs, slip op. at 17. Whatever appellate lawyers and judges might like to believe in our ivory towers, the truth is that our society spawns a wide spectrum of mutually manipulative, abusive, and violent relationships. Potential witnesses may refuse to testify for a variety of reasons. They may recant, they may have been lying when the initial allegations were made, or, perhaps, they may have been intimidated into not appearing in court. But when the constitutional right to confront is at stake, the nexus between wrongful conduct and effect cannot be assumed. The state must prove it.

If the state’s weak showing here is to become Washington’s standard for the “clear, cogent, and convincing” proof demanded by Giles and Mason, the imprimatur should come from this Court, not from a split Court of Appeals decision with a persuasive dissent. RAP 13.4(b)(3), (4). The Division Two majority’s conclusion conflicts with Mason and Giles. RAP 13.4(b)(1).

The other obvious problem with the Division Two majority's unwarranted expansion of the forfeiture exception is that it will discourage the state from making efforts to procure reluctant witnesses for trial. Although this record may not conclusively show state officers acted in bad faith, a broadly expanded forfeiture exception will raise questions whenever the state's witness recants or declines to cooperate for any reason. See BOA, at 16-17. For all these reasons, this Court should grant review of these significant constitutional questions. RAP 13.4(b)(3), (4).

2. REFLEXIVE FORFEITURE IS NOT – AND SHOULD NOT BECOME – A “DOMESTIC VIOLENCE” EXCEPTION TO THE CONFRONTATION CLAUSE.

As discussed in argument 1, the narrow issue is whether the state failed to clearly, cogently, and convincingly prove a nexus between C.R.'s absence and Dobbs' alleged wrongdoing. But that narrow issue exists in the broader context of the Supreme Court's post-Crawford⁷ caselaw that has consistently rejected a “domestic violence” exception to confrontation rights.

In Crawford v. Washington, the Supreme Court held that the Sixth Amendment's Confrontation Clause bars admission against a

⁷ Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

criminal defendant of an un-cross-examined testimonial statement that an unavailable witness previously made out of court. Crawford, 541 U.S. at 68. Since that time prosecutors and advocates for alleged victims of domestic violence have tried to chip away at Crawford's holding. See, e.g., Lininger, Prosecuting Batterers after Crawford, 91 Va. L.Rev. 747 (2005); Byron L. Warnken, "Forfeiture by Wrongdoing" After Crawford v. Washington: Maryland's Approach Best Preserves the Right to Confrontation, 37 U. Balt. L. Rev. 203 (2008).

In Davis v. Washington⁸ and its companion case Hammon v. Indiana, prosecutors saw an opportunity to request a general "domestic violence" exception to confrontation requirements. The Supreme Court rejected the request. Davis, 547 U.S. at 832-34.

Two years later in Giles, the same interest groups again sought to create a broad exception to confrontation rights when the state alleged domestic violence. Again, the Supreme Court rejected the argument. Giles, 554 U.S. at 376-77 (expressly rejecting the dissent's

⁸ Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

suggestion that a different confrontation or forfeiture rule should apply when the state alleges domestic violence against women).

The Division Two majority in Dobbs represents the latest effort to expand the forfeiture exception to swallow the Crawford rule. This Court should grant review to reestablish the narrow boundaries of this troubling exception. RAP 13.4(b)(3)(4).

3. THIS COURT ALSO SHOULD REVIEW WHETHER INDEPENDENT RELIABILITY REQUIREMENTS OF THE EVIDENTIARY RULES ARE FORFEITED WHENEVER CONFRONTATION RIGHTS ARE FORFEITED.

The second problem with the Division Two majority decision is that it affirmed the admission of numerous testimonial hearsay statements even though the trial court found they did not satisfy the reliability requirements of hearsay and other evidentiary rules. Dobbs, slip op. at 10-13. While some courts have held forfeiture of confrontation rights automatically precludes a hearsay objection, some courts have not. See e.g., Vasquez v. People, 173 P.3d 1099, 1106 (Colo., 2007) (“the more prudent course is to require that the hearsay rules be satisfied separately”). Prior to Dobbs, the only Washington decision to address the issue did so in a footnote. Fallentine, 149 Wn. App. at 623 n.34; Tegland, 5C Wash. Pract., Evidence Law and Practice, § 1300.14 (noting the question remains

unresolved in Washington). This Court should grant review to clarify this rule, and to ensure that unreliable hearsay is not used to allow convictions in Washington. RAP 13.4(b)(4).

G. CONCLUSION

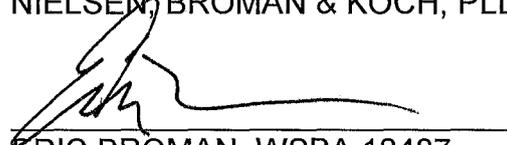
For the reasons set forth above, this Court should grant review.

RAP 13.4(b), 13.6.

DATED this 31st day of May, 2012.

Respectfully submitted,

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APPENDIX A

FILED
COURT OF APPEALS
DIVISION II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BY [Signature]
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

TIMOTHY J. DOBBS,
Appellant.

In the Matter of the Personal Restraint
Petition of

TIMOTHY J. DOBBS,
Petitioner.

No. 40534-2-II

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CONSOLIDATED WITH

No. 40636-5-II

PART PUBLISHED OPINION

WORSWICK, A.C.J. —Timothy J. Dobbs appeals multiple felony convictions,¹ claiming that the trial court erred by admitting the statements of a missing witness under the doctrine of forfeiture by wrongdoing. Dobbs argues that (1) the doctrine did not apply in his case and (2) even if the doctrine applied, the State was required to show that a hearsay exception applied as a prerequisite to the admissibility of the victim's statements. In a statement of additional grounds

¹ The trial court convicted Dobbs of stalking—domestic violence with a deadly weapon enhancement; felony harassment—domestic violence; intimidating a witness—domestic violence; drive by shooting—domestic violence; first degree unlawful possession of a firearm; and obstructing a law enforcement officer.

40534-2-II
Consolidated with 40636-5-II

and a personal restraint petition, Dobbs challenges the sufficiency of the evidence. We affirm his convictions and deny his petition.

FACTS

In 2009, Dobbs was involved in a tumultuous relationship with C.R. On November 7, 2009, Longview Police Officer Matthew Headley responded to a domestic violence report at 4:48 AM in response to C.R.'s call from her garage apartment. There, Officer Headley spoke with C.R., who told him that her ex-boyfriend had just been there and had slashed the tires on her car. She explained that he had come to her home and beat on the door asking to be let in. She did not let him in and they argued through the door until he eventually left, after which she heard a hissing noise and found her car tires flat. She identified Timothy Dobbs as her ex-boyfriend. A later investigation revealed puncture marks on the tires.

C.R. expressed her fear of Dobbs, explaining that he had been following her the past few days and that he was carrying a weapon. She said that he had threatened to shoot her if she would not be his girl friend anymore. While Officer Headley was speaking with C.R., she received text messages and a telephone call from Dobbs. During that telephone call, Dobbs told her, "I warned you not to call the police." 1 Report of Proceedings (RP) at 98. After she repeatedly asked him not to call her anymore, he said, "You're going to get it," and hung up. 1 RP at 98. C.R. then told Officer Headley that Dobbs had previously threatened to shoot up the house and everyone in it.

On November 10, 2009, Officer Nicholas Woodard responded to a call to C.R.'s residence. C.R. complained that Dobbs was still stalking her but that he had fled when the police arrived. She was hysterical and she implored Officer Woodard to find Dobbs, saying that if they

did not, the police would find her dead. C.R. showed Officer Woodard a note that she said

Dobbs had left her. It read:

Last days. The countdown on your . . . ass. You should know me by now, [C.R.]. You [f***ed] up and tripped with . . . the wrong brother. You will regret what has —what you did and said to me. You never loved me. You never cared about me and now you will reap a world of trouble and pain. Number 1, you can apologize to me and talk with me face-to-face or Number 2, you know you can't and won't be (inaudible) here in Longview or Washington. I'm going all out on this with you. You're [f***ed up, b***ch].^[2]

1 RP at 120. On the back of the note was the letter "D" followed by spaces and then the phrase "is on you, [b***ch]." 1 RP at 120.

Later that day, James Applebury, who lived in the home adjacent to C.R.'s garage apartment, saw a black man, who appeared to him to be Dobbs, leave in a black car. A minute or so later, he heard gunshots in the alley, looked out the window, and saw a black man getting into his car. Applebury thought it was the same man he had just seen leaving. Applebury called the police.

That evening, Applebury was home when C.R. ran into his house, screaming, "He's got a gun." 1 RP at 42-43. Applebury could see Dobbs in C.R.'s apartment holding a gun in his hand while talking with C.R.'s sister. When someone stated that Dobbs was leaving, Applebury looked out and saw Dobbs going over a fence into the neighbor's yard.

Applebury's wife, Sarah Ellis, was sitting on the porch when she saw Dobbs arrive. She went inside to tell her husband and when she came back outside, Dobbs was in C.R.'s apartment.

² Dobbs did not designate this note as part of the record on appeal. Officer Woodard read it at trial.

40534-2-II
Consolidated with 40636-5-II

Minutes later, C.R. ran into their house and yelled, "He's here. He's here. He has a gun." 1 RP at 72.

Officer Woodard responded to Applebury's call and saw Dobbs fleeing. Officer Woodard yelled for Dobbs to stop but Dobbs ran between the houses, over the fence, down the alley, and disappeared. Using a police dog, Officer Timothy Deisher tracked Dobbs to a laundromat and arrested him.

Officer Woodard interviewed C.R. again on November 11. During that interview, she played two telephone messages that Dobbs had left on her phone. One was from November 10 and the other was from after his arrest. During the first, Dobbs said, "You heard that. That was me and that's what I can do." 1 RP at 123. C.R. understood this to be referring to the bullets Dobbs shot into her home. In the second phone call, which originated from the jail, Dobbs pleaded with her not to go forward with the charges and threatened to harm her if she did.

C.R. also showed Officer Woodard two text messages Dobbs had sent her. The first said, "Next time it is you, [b***ch]. On, Bloods." 1 RP at 126. The other said, "[B***ch], you move and there will be hell to pay. Plus, my bro lives down there and he's a known figure. You can't get away from me. I told you you're mines [sic]." 1 RP at 126-27.

Sergeant Michael Hallowell retrieved a revolver from Ken Norton, Applebury's neighbor, who testified that he found it in his backyard the morning of November 11. Sergeant Hallowell also interviewed Dobbs. Dobbs told him that the gun he had with him at C.R.'s was a toy gun and he denied slashing C.R.'s car tires. Dobbs explained that C.R. had a lot of enemies and that any one of them could have done it.

40534-2-II

Consolidated with 40636-5-II

Dobbs waived his right to a jury trial. On the first day of Dobbs's trial, the State explained that it had subpoenaed C.R. to appear at 10:30 AM but that she was not there. Because the State had served the subpoena, the trial court issued a material witness arrest warrant. Officer Headley later testified that he had contacted C.R. at her home the prior night and had reminded her to be in court at 9:00 AM. C.R. responded, "Okay" and then closed the door. 1 RP at 105-06.

On the second day of trial, Sergeant Hallowell testified about his efforts to contact C.R. the previous night and before trial. Sergeant Hallowell contacted C.R.'s acquaintances, had other police officers go to her home twice, and personally went to her home twice; once was before trial that morning.

The State argued that Dobbs's misconduct was the reason C.R. did not appear to testify and that Dobbs had forfeited his right to challenge the admission of her statements as inadmissible hearsay. Dobbs argued that the State had presented no evidence that C.R. did not show up because she was afraid. Further it argued that the State had not shown sufficient foundation to admit the note, the text messages, and the telephone calls.

The trial court ruled:

Clear, cogent and convincing evidence. I'm satisfied that there is a sufficient basis that the defendant's conduct is the fact to why she is not here. There is testimony that she felt he was—the defendant was following her. She knew he carried a weapon. Others had seen a black handgun. She had threatened to—he had threatened to shoot her in the past, if she wouldn't let him be her boyfriend. She said she was receiving text messages calling her names. There is evidence that—I'm deciding this by clear, cogent and convincing evidence. I have not decided this case based upon beyond a reasonable doubt. So, that should be emphasized. There is the—she believed it was the defendant that punctured her tires. She said she believed the defendant would—he would hurt her because of what she had said in the—because of what he had said in the past, she believed he

would shoot her. He had a handgun. So, I think that based upon the evidence that is in front of this Court, it is clear, cogent and convincing that she was afraid of him and that's why she isn't here to testify. And, that based on that evidence, he does forfeit the right to object on the confrontation issues, not as to the basis for any hearsay.

2 RP at 255-56. After further discussion, the trial court ruled:

Well, considering the *Fallentine*^[3] decision, which I think is the—it's a critical decision. It's based on a Supreme Court decision of *Mason*,^[4] and, it talks about reflexive forfeiture being a legitimate basis for the—the concept of forfeiture by wrongdoing. And, this case is—has a stronger basis than I think the *Fallentine* decision.

And then, you get to footnote 34 that says that there is also a waiver of hearsay objections if the Court finds forfeiture by wrongdoing. I think it resolves the issue with a broad brush.

I will make specific findings. I don't find that these are excited utterances. I don't think they meet the level. There is some nervousness, there is some anxiety. There is not—not—she is not hysterical. So, I don't think it rises to the level of trustworthiness that you would necessarily find as that exception to the hearsay rule. And, all the exceptions do require that if you are looking at exceptions to the hearsay rule, which apparently, under *Fallentine*, we're not.

2 RP at 282.

The trial court found Dobbs guilty of stalking, felony harassment, intimidating a witness, drive-by shooting, unlawful possession of a firearm, and obstructing law enforcement. It found him not guilty of second degree assault and first degree burglary.

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

⁴ *State v. Mason*, 160 Wn.2d 910, 162 P.3d 396 (2007) (Sanders, J. dissenting), *cert. denied*, 553 U.S. 1035 (2008).

DISCUSSION

I. FORFEITURE BY WRONGDOING

The doctrine of forfeiture by wrongdoing holds that a criminal defendant waives his Sixth Amendment confrontation rights if the defendant is responsible for the witness's absence at trial. *State v. Mason*, 160 Wn.2d 910, 924, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035 (2008). Once the State shows that the defendant's conduct is the reason for the witness's absence, the State may introduce the witness's out-of-court statements. *Mason*, 160 Wn.2d at 924. To apply this doctrine, the State must prove the causal link between the defendant's conduct and the witness's absence by clear, cogent, and convincing evidence. *Mason*, 160 Wn.2d at 926-27.

Dobbs argues that the trial court erred in applying the doctrine of forfeiture by wrongdoing because the State failed to present direct evidence that Dobbs procured C.R.'s unavailability or establish any causal link between his alleged malfeasance and her absence at trial. We disagree.

Dobbs argues that (1) the trial court, in applying the doctrine, should have considered only actions Dobbs took after the State initiated criminal proceedings; (2) the State did not prove by clear, cogent, and convincing evidence that Dobbs's actions were designed to prevent C.R. from testifying at his trial; and (3) the State failed to present any evidence that Dobbs's threats were the reason she did not testify. Additionally, Dobbs suggests that the reason C.R. did not testify is because she may have resumed her relationship with him and posits that domestic violence victims often return to their abusers.

We review the trial court's finding that Dobbs's actions were intended to keep C.R. from testifying against him for substantial evidence in the record that could reasonably be found to be

clear, cogent, and convincing. *State v. Fallentine*, 149 Wn. App. 614, 620-21, 215 P.3d 945 (2009) (citing *In re Det. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986)).

A. *Prior Acts*

Dobbs argues that the trial court could consider only those actions he took after the State initiated criminal proceedings. We disagree.

There is no rule that the trial court may consider only acts occurring after the defendant is charged in deciding whether the forfeiture doctrine applies. Dobbs cites no such case and the Supreme Court suggests that the trial court can consider prior events:

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.

Giles v. California, 554 U.S. 353, 377, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). Dobbs's argument fails.

B. *Evidence of Wrongdoing*

Dobbs argues that the State did not prove that his actions were designed to prevent C.R. from testifying. We disagree.

Here, the evidence showed that Dobbs engaged in repeated and persistent acts of violence against C.R. and that his violence escalated as time progressed. First there were verbal threats and arguing; then tire slashing; then a drive-by shooting; and, finally, he entered her apartment

without permission while wielding a gun. Dobbs's text messages, telephone calls, and note showed that he was not afraid of the police, that he told C.R. she would die if she continued to cooperate with them, and that his friends would "reap a world of trouble and pain" on her. 1 RP at 120. Even after his arrest, he pleaded with her not to press charges, and then threatened her, saying, "[Y]ou'll regret it." 1 RP at 123. This is substantial evidence that Dobbs intentionally engaged in misconduct to keep C.R. from testifying. The trial court did not err in finding that the doctrine of forfeiture by misconduct applied.

C. *Reflexive Forfeiture*

Dobbs argues that applying the forfeiture doctrine in cases such as this results in "reflexive forfeiture." Br. of Appellant at 15. "Reflexive forfeiture" offends the presumption of innocence because the trial court must assume the defendant is guilty prior to trial. *Mason*, 160 Wn.2d at 940 (Sanders, J., dissenting). He argues that our Supreme Court adopted reflexive forfeiture in *Mason* because that was a murder case and the act of murder will always be the reason the victim is unavailable to testify. Extending the forfeiture doctrine to domestic violence cases, he argues, "could cause a situation in which anyone charged with an act of domestic violence forfeits his or her right to confrontation by virtue of the nature of the act alone." Br. of Appellant at 17 (citing Tom Lininger, *Yes, Virginia, There is a Confrontation Clause*, 71 BROOKLYN L. REV. 401, 407 (2005) ("the forfeiture exception would swallow the rule of confrontation.")).

Dobbs's concerns about reflexive forfeiture are not present in this case. Here, we have evidence that Dobbs's violent behavior became more aggressive because of C.R.'s cooperation with the police; this includes evidence of his behavior after his incarceration. There is sufficient

evidence to show that Dobbs caused C.R.'s unavailability. The trial court did not err in applying the doctrine of forfeiture by wrongdoing.

II. HEARSAY

Dobbs argues that even if the doctrine of forfeiture by wrongdoing applied, the trial court erred in ruling that it need not find hearsay exceptions that applied to C.R.'s statements before admitting them at trial. He relies on ER 804(a)(6), which provides, "A declarant is not unavailable as a witness if the . . . absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." He argues that once a witness is deemed unavailable under this rule, the exceptions under ER 803 apply to determine admissibility.

He notes that the trial court and the State agreed that certain evidence would have been inadmissible but for the doctrine of forfeiture by wrongdoing. This evidence consisted of two handwritten statements C.R. made that would have been arguably admissible only if they contradicted her in-court testimony, and numerous statements C.R. gave that did not qualify under the hearsay exceptions for present sense impressions and excited utterances. *See State v. Nelson*, 74 Wn. App. 380, 387, 874 P.2d 170 (1994) (discussing reliability factors for assessing prior inconsistent statements).

In *Mason*, our supreme court adopted the doctrine of forfeiture by wrongdoing, explaining:

Forfeiture is grounded in equity—the notion that people cannot complain of the natural and generally intended consequences of their actions. Specific intent to prevent testimony is unnecessary. Knowledge that the foreseeable consequences of one's actions include a witness' unavailability at trial is adequate to conclude a forfeiture of confrontation rights. The finding of a *specific* intent to keep a witness

40534-2-II
Consolidated with 40636-5-II

from testifying argued by Mason is more than is warranted by the “equitable” grounds upon which the rule is based.

160 Wn.2d at 926.

In *Fallentine*, Clark, a co-participant in an arson, refused to testify against Fallentine out of fear of physical violence against himself. 149 Wn. App. at 622-23. The trial court applied the doctrine of forfeiture by wrongdoing and admitted Clark’s recorded statements to the arson investigator. 149 Wn. App. at 623. In a footnote, the appellate court noted:

Fallentine concedes that a finding of forfeiture by wrongdoing prohibits a challenge to the admissibility of statements on hearsay as well as confrontation grounds. See *Giles*, 128 S. Ct. at 2686. For the first time in his reply brief, Fallentine contends *Giles* leaves open the question of whether unreliable testimony, excludable on due process grounds, may be introduced by virtue of an accused person’s act of wrongdoing. We decline to address this argument. See *State v. Johnson*, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992).

149 Wn. App. at 623-24 n.34.

In *Giles*, the Supreme Court suggested that indeed the defendant has waived any hearsay objections when the doctrine of forfeiture by wrongdoing applies:

No case or treatise that we have found, however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding excluded hearsay evidence in large part *because* it was unconfuted. See, e. g., 2 [William] Hawkins[, A Treatise on the Pleas of the Crown] 606 (6th ed. 1787); 2 M[atthew] Bacon, A New Abridgment of the Law 313 (1736). As the plurality said in *Dutton v. Evans*, 400 U.S. 74, 86, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), “[i]t seems apparent that the Sixth Amendment’s Confrontation Clause and the evidentiary hearsay rule stem from the same roots.”

Giles, 554 U.S. at 365. This is consistent with former Federal Rule of Evidence 804(b)(6) (2010), which provides that a defendant’s forfeiture by wrongdoing acts as an exception to the hearsay rule.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(6) Forfeiture by wrongdoing. A statement 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.

Former FED. R. EVID. 804(b)(6).

“Because both the hearsay rule and the confrontation clause are designed to protect against the dangers of using out-of-court declarations as proof, a defendant's actions that make it necessary for the government to resort to such proof should be construed as a forfeiture of the protections afforded under both.” *United States v. White*, 116 F.3d 903, 912 (D.C. Cir. 1997) (noting more common trend is loss of confrontation rights and hearsay objections). *But see Vasquez v. People*, 173 P.3d 1099 (Colo. 2007) (adopting the more “prudent” approach and requiring proof of reliability separately because hearsay is inherently unreliable). We hold the trial court did not err in admitting the evidence.

Dobbs next argues that under ER 804(a)(6), a “declarant is deemed not unavailable when his or her failure to testify was procured by the wrongdoing of the party objecting to the admission of the statement.” Br. of Appellant at 22. But he misconstrues ER 804(a)(6), which actually states that a declarant is deemed not unavailable if the witness’s failure to testify “is due to the procurement or wrongdoing of the *proponent* of a statement.” (Emphasis added.). ER 804(a)(6) simply does not apply here.

Finally, Dobbs argues that the State is unjustly enriched under its theory that any hearsay objections are waived. He argues that this approach allows the State to introduce otherwise inadmissible evidence without having to make a showing of reliability. For example, C.R. gave two written statements that would have been admissible only had she testified differently than

the affidavits.⁵ But we agree with the State's position that Dobbs's conduct made its best evidence, namely, C.R.'s testimony, unavailable and instead it had to rely on hearsay and other less direct evidence to prove the charges.

Although there may be some statements so lacking in reliability that their admission would raise due process concerns, *see United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992) (although finding no due process violation in case at hand, recognizing admission of facially unreliable hearsay may raise due process concerns in some cases), here Dobbs make no such claim. We affirm the trial court's ruling that Dobbs waived any hearsay objections.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

III. STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds for review, Dobbs argues that he never had a weapon, did not shoot at C.R.'s apartment, and the weapon the police found did not contain his DNA (deoxyribonucleic acid) or fingerprints. Additionally, Dobbs argues that he did nothing more than break up with his ex-girl friend and she got mad and lied to the police.

These challenges are to the sufficiency of the evidence. When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable

⁵ This type of victim statement is frequently referred to as a "Smith affidavit" based on *State v. Smith*, 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982) (holding ER 801 801(d)(1)(i) permits admission of a trial witness's prior inconsistent statement as substantive evidence when that statement was made as a written complaint (under oath subject to penalty of perjury) to investigating police officers subject to reliability analysis).

40534-2-II
Consolidated with 40636-5-II

to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Here, there was ample evidence that Dobbs possessed a firearm, including Applebury's eyewitness testimony that a man he believed to be Dobbs fired shots at the apartment from the alley and his seeing Dobbs later that day in C.R.'s apartment with a gun. Further, the trial court admitted C.R.'s statements that Dobbs had come into her apartment with a gun. Also, Dobbs admitted having a toy gun but could not specifically describe the toy gun to Sergeant Hallowell.

As to Dobbs's second claim that C.R. lied to the police, this relies on matters outside the record and thus we will not consider it on direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

IV. PERSONAL RESTRAINT PETITION

In his personal restraint petition consolidated to this appeal, Dobbs argues that we should dismiss his unlawful possession of a firearm conviction because it resulted from an illegal seizure. He does not explain the basis of his claim, provides incomplete citations, and claims that there was no proof of a material element of the crime.

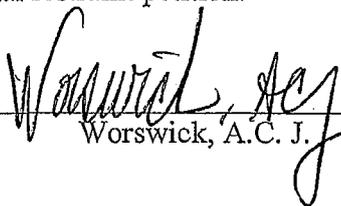
To prove first degree unlawful possession of a firearm, the State had to show that Dobbs had a prior serious offense and that he knowingly possessed a firearm during the time charged (November 5, 2009 to November 10, 2009). RCW 9.41.040(1). In this regard, the State

40534-2-II

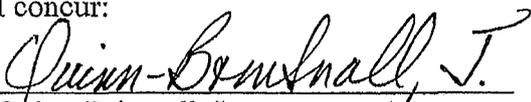
Consolidated with 40636-5-II

presented evidence that Dobbs had a prior serious felony from Missouri, it presented evidence that Dobbs was in C.R.'s apartment with a gun, it presented evidence that he fired a gun at C.R.'s residence, and it presented evidence that he fled the scene through a neighbor's yard and the police recovered a gun from the owner of that property. This is ample evidence to support the conviction. Petitioner's claim has no merit.

We affirm the convictions and deny Dobbs's personal restraint petition.


Worswick, A.C. J.

I concur:


Quinn-Brintnall, J.

VAN DEREN, J. (dissenting) — I respectfully dissent. I agree with the United States

Supreme Court that:

Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendant is not in the State’s arsenal.

Giles v. California, 554 U.S. 353, 376, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

Because the abridgment of defendant’s right of confrontation in domestic violence cases should not be an option, I would hold that the State is not allowed to invoke the doctrine of forfeiture by wrongdoing in domestic violence cases without clear, cogent, and convincing evidence that the alleged victim’s failure to appear in response to the State’s witness subpoena was due to the defendant’s actions that do not form the basis of the criminal charges against the defendant.

Evidence must be clear, cogent, and convincing that the defendant accomplished the absence of the witness. *State v. Mason*, 160 Wn.2d 910, 927, 162 P.3d 396 (2007).⁶ Here, the

⁶ *Giles* overruled *Mason* to the extent *Mason* holds that specific intent to prevent testimony need not be shown to invoke the forfeiture doctrine. *State v. Fallentine*, 149 Wn. App. 614, 620, 215 P.3d 945 (2009). I would agree that application of the forfeiture doctrine does not offend the Sixth Amendment right of confrontation in murder cases where the witness is dead and there is “overwhelming and untainted” evidence that the defendant intended to and did procure the absence of the victim by killing him. *Mason*, 160 Wn.2d at 927 (quoting *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005)). In those cases, the State may offer evidence of the murder victim’s fear of the defendant or evidence of a murder defendant’s actions toward the murder victim that suggests the defendant’s motive or means of accomplishing the victim’s silence or lack of cooperation with a criminal prosecution for the defendant’s earlier possibly criminal conduct toward the murder victim. See *Giles v. California*, 554 U.S. at 377; *Mason*, 160 Wn.2d at 916-17. In *Mason*, everything the murder victim said to the police was said to four

majority relies in part on acts that were the basis of the charges against Dobbs to find that his conduct caused the alleged victim to not appear for trial. Majority at 8-9. In doing so, the majority, as well as the trial court, had to assume that he was guilty of the charges, without benefit of a trial and in the absence of overwhelming and untainted evidence of those charges. I am not persuaded that admission of hearsay statements from the alleged victim regarding the charges, without more, constitutes clear, cogent, and convincing evidence that the witness did not appear at trial due to the defendant's actions.

The trial court's factual findings do not indicate that Timothy Dobbs had the specific intent to prevent the complaining witness from testifying against him. Nor could the trial court have found on the record before it that Dobbs' intended to, and did, prevent the complaining witness from testifying against him by clear, cogent, and convincing evidence sufficient to waive his United States Constitution Sixth Amendment right to confrontation.

Although the record is replete with allegations about Dobbs' conduct toward the alleged victim, the record lacks even a scintilla of evidence about why the witness actually chose to not attend trial. The night before, she responded to Longview Police Officer Matthew Headley's reminder about appearing in trial without any suggestion that she would not appear. The record shows only speculation about her reasons for not appearing in court, based on the pending charges and on a statement Dobbs allegedly made to her after his arrest, and after he made a telephone call from the jail. Majority at 9. This evidence, under any measure, is not clear, cogent, and convincing that Dobbs procured the witness's absence.

civilian witnesses whose testimony Mason did not challenge, making any confrontation clause error harmless. 160 Wn.2d at 927. That is not the case here.

40534-2-II
Consolidated with 40636-5-II

Because I believe that Dobbs' constitutional right to confront the witness against him has been violated by an overly expansive application of the forfeiture by wrongdoing doctrine, I respectfully dissent.

Van Deren, J.

VAN DEREN, J.