

Forfeiture by Wrongdoing

Or

How to Bury a Defendant Who Keeps Digging Deeper

The Right to Confront, not the Right to Obstruct



FbW from Blackstone to Crawford

- Pre-1789 and the Common Law
- The Constitution to Crawford
- Did Crawford change anything?

Pre-1789

- Why do we care?
 - “[i]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.”
 - *Giles v. California*, 554 U.S. 353, 365 (2008)
 - “the right to be confronted with the witnesses against him is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”
 - *Crawford v. Washington*, 541 U.S. 36, 54 (2004)

Pre-1789

- So what were the common law roots of “confrontation”?
 - *Raleigh’s Case*, 2 How. St. Tr. 1 15-16, 24 (1603)
 - Accused of Treason
 - Convicted based on accomplice’s un-confronted deposition
 - Accomplice never testified
 - Legal community’s reaction demanded confrontation in all cases
 - Accuser’s testimony must be confronted either at trial or previously
 - Several other very English-sounding cases on point.
 - Also, *Sewall v. Hancock*

Pre-1789

- The common law exceptions to confrontation:
 - Dying Declarations
 - Non-Testimonial Statements
 - Forfeiture by Wrongdoing
 - *Lord Morley's Case*, 6 How. St. Tr. 770 (H.L. 1666)
 - *Rex v. Barber*, 1 Root 76 (Conn. 1775)

Constitution to *Crawford*

- 6th Amendment
 - In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Constitution to *Crawford*

- Forfeiture by Wrongdoing survived the Constitutional Convention
 - *Drayton v. Wells*, 10 S.C.L (1 Nott&McC) (1819)
 - *Reynolds v. United States*, 98 U.S. 145 (1878)

Crawford

- What was *Crawford* about?
- Facts:
 - Crawford stabbed his wife's attempted rapist;
 - At trial, state played wife's recorded statement detailing the stabbing over Crawford's objection;
 - Wife did not testify;
 - Court admitted the un-confronted statement.

Crawford

- What was Crawford about?
 - The new Confrontation regime
 - Un-confronted testimony is not admissible
 - If the witness is not present in court, then two requirements must be met:
 - Confrontation requires the opportunity to cross-examine the witness, and
 - The witness must be unavailable

Crawford

- Does *Crawford* change the doctrine of Forfeiture by Wrongdoing?
 - No
 - “the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds.”

Forfeiture by Wrongdoing

- Elements (*Giles v. California* at 367 and *Crawford v. Commonwealth*, 55 Va. App. 457, 472 (2009)):
 - Witness must be unavailable
 - Witness' unavailability must be a result of the defendant's actions
 - The defendant's actions must have been undertaken with the intent to produce the witness' unavailability.

Forfeiture by Wrongdoing

- When is a witness “unavailable”? (Friend, Section 15-10)
 - Witness is dead
 - Witness is too ill to testify
 - Witness is insane
 - Witness is absent from the state and there exists an inability to obtain the witness’ deposition
 - Witness cannot be located after diligent inquiry
 - Witness cannot be compelled to testify (for any reason including invocation of privilege)
 - Opposing party has caused the witness’ absence
 - Witness loses memory (real memory loss or feigned memory loss)
 - Case law is open to other means of unavailability

Forfeiture by Wrongdoing

- Proponent of the statement bears the burden of proving the declarant's unavailability.
 - *Burton v. Oldfield*, 195 Va. 544 (1954)

How Do We Prove It?

- “Hearsay evidence, including the unavailable witness’s out-of-court statements, may be considered.”
 - *Davis v. Washington*, 547 U.S. 813, 833

How Do We Prove It?

- Standard is Preponderance of the Evidence.
 - *Davis* at 833

How Do We Prove It in a Domestic Context?

- “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.” *Giles v. California*, 554 U.S. 353, 377 (2008).

How Do We Prove It in a Domestic Context?

- Special Considerations in Domestic Cases (*Giles* at 377)
 - Repeated abuse (especially if culminates in murder)
 - Past intimidation
 - Efforts to isolate the victim (from police or any source of help)
 - Past recantations?

So the Court Finds a Forfeiture?

- All relevant statements are admissible regardless of hearsay and confrontation rules
 - “No case or treatise that we have found . . . 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 unfronted.” *Giles v. California*, 554 U.S. 353, 365 (2008).
 - “‘Forfeiture by wrongdoing’ is a common-law doctrine that ‘permitted the introduction of statements of a witness who was ‘detained’ or kept away’ by the ‘means or procurement’ of the defendant.” *Crawford v. Commonwealth*, 55 Va. App. 457, 472 (2009).

So the Court Finds a Forfeiture?

- “[Forfeiture by wrongdoing] has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong.” *Reynolds v. U.S.*, 98 U.S. 145, 159 (1878).

What Can Defense Do About It?

- Not much.
- Impeachment is limited.
- Defense can still impeach under Rules
 - 2:607 (with some exceptions)
 - 2:608 (except possibly subsections (d) and (e))
 - 2:610

What Can Defense Do About It?

- Defense may NOT impeach by:
 - Unadjudicated Perjury
 - Prior False Accusations in Sexual Assault Cases
 - Evidence of Criminal Conviction
 - Prior Inconsistent Statements

What Can Defense Do About It?

- Why Not?
 - Rules 2:608(d) and (e), 2:609, and 2:613 both require that the witness be questioned or confronted by the impeaching evidence.
 - Rule 2:607(a) states that the party calling a witness may not impeach the witness.
 - Caution – Rule 2:607 (c)(i) does allow, subject to the discretion of the court, impeachment by prior inconsistent statement.

Can the Jury Hear Forfeiture Evidence?

- Any wrongful conduct occurring during the offense or after it is admissible:
 - “Evidence that a person charged with a crime procured, or attempted to procure, the absence of a witness, or to bribe or suppress testimony against him, is admissible, as it tends to show the unrighteousness of the defendant's cause and a consciousness of guilt.” *McMillan v. Commonwealth*, 188 Va. 429, 432-33 (1948).
- Any other evidence would be subject to the normal rules of evidence.

How to Build a Forfeiture Case

- Start with police interviews of victims:
 - Prior abuse?
 - Threats?
 - Pleading/Encouragement
 - Isolation:
 - Financial
 - Friends/Family
 - Services
 - Police

How to Build a Forfeiture Case

- Where can we go as prosecutors for information?
 - Jail Calls
 - Jail Letters
 - Prior Police Reports
 - LAP
 - Victim Interviews – Get to them early!
 - Other Household Members
 - Friends
 - Counselors/Psychiatrists
 - Medical Records
 - Forensic Nurse's Exams
 - Phone Dumps/Records