STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Kathleen Jansen, Mark J. Cavanagh, Joel P. Hoekstra

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

DAVID BARRY BURNS, III

Defendant-Appellee.
_____/

Supreme Court No. 145604

Court of Appeals No. 304403

Lower Court No.10-10787FC

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Attorney for Plaintiff-Appellant

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. WAS THE TRIAL COURT'S ADMISSION OF THREE HEARSAY STATEMENTS—THROUGH VIOLA GONZALES, BONNIE SKORNIA, AND THE FORENSIC INTERVIEW RECORDING—AS THE ONLY SUBSTANTIVE EVIDENCE AGAINST MR. BURNS, BASED ON AN IMPROPER DETERMINATION OF FORFEITURE BY WRONGDOING, AN ABUSE OF DISCRETION THAT RENDERED THE TRIAL UNFAIR AND VIOLATED DUE PROCESS?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

II. WAS THE TRIAL COURT'S ADMISSION OF TESTIMONIAL HEARSAY AS SUBSTANTIVE EVIDENCE THROUGH BONNIE SKORNIA AND THE FORENSIC INTERVIEW RECORDING, BASED ON AN IMPROPER DETERMINATION OF FORFEITURE BY WRONGDOING, AN UNFAIRLY PREJUDICIAL VIOLATION OF MR. BURNS'S CONFRONTATION RIGHT?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

III. DID THE COURT OF APPEALS PROPERLY CONCLUDE THAT THERE WAS A TOTAL LACK OF EVIDENCE IN THE RECORD FROM WHICH THE TRIAL JUDGE COULD DETERMINE THAT THE COMPLAINANT REFUSED TO TESTIFY IN COURT BECAUSE OF ANY THREATS ISSUED BY MR. BURNS AGAINST HER? WAS THIS A PROPER REVIEW OF THE RECORD AND APPLICATION OF THE LAW TO THE EVIDENCE?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

IV. DID THE COURT OF APPEALS CORRECTLY DECIDE THAT THE MEDICAL TREATMENT EXCEPTION TO HEARSAY UNDER MRE 803(4) DOES NOT APPLY?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

COUNTER STATEMENT OF FACTS

A Bay County jury convicted David Barry Burns, as charged, on a single count of first-degree criminal sexual conduct with a victim under 13.[1] *1a, 4a*[2]. The complainant was his daughter, four-year old Charity Burns. *135a.* The trial judge sentenced Mr. Burns to 25-to-41 years in prison. *4a.* Mr. Burns appealed to the Michigan Court of Appeals as of right. The Michigan Court of Appeals reversed and remanded for a new trial. *135a-139a.* The Court of Appeals concluded that the trial court abused its discretion when it admitted, pursuant to MRE 804(b)(6), the complainant's hearsay statements allegedly made to the associate pastor and the SANE nurse, as well as the recording of the forensic interview because the "prosecutor failed to establish by a preponderance of the evidence that defendant engaged in wrongdoing, that the wrongdoing was intended to procure the victim's unavailability, and that the wrongdoing did procure the victim's unavailability." *137a.*

The Court of Appeals further concluded that remand for new trial was appropriate because it appeared more probable than not that the erroneous admission of the complainant's alleged statements to the associate pastor and the SANE nurse, as well as the recording of the forensic interview were outcome determinative. *139a.* The People filed an application for leave to appeal in this Court, which this Court granted by order dated October 31, 2012 and instructed that "[t]he parties shall include among the issues to be briefed: (1) whether the trial court abused its discretion in admitting the complainant's out-of-court statements under the forfeiture-by-wrongdoing exception to the hearsay rule set out in MRE 804(b)(6); and (2) whether the Court of Appeals substituted its judgment for that of the trial court and, in so doing, invaded the fact-finding authority vested in the trial court." *140a.*

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[1] MCL § 750.520b

[2] References indicated by a page number followed by the letter a are to the Prosecution's Appendix.

Overview

Charity Burns repeatedly refused to testify against Mr. Burns despite several accommodations by the trial court. The prosecution relied instead on two adult witnesses and a recorded forensic interview to admit Charity's out-of-court statements to the jury. Over defense counsel's objection, the trial court admitted this testimony based on forfeiture by wrongdoing under MRE 804(b)(6).

Events Leading to Mr. Burns's Arrest

On August 18, 2010, Charity's mother, Angela Gomez, was notified of a report filed by Charity's Bible school teacher alleging that Mr. Burns had sexually abused Charity.[3] *Tr II at 34, 40.* Immediately after the allegation arose, Mr. Burns—obeying the order of local authorities—left the home he shared with Ms. Gomez, and Charity had no further contact with him. *Tr IV at 151—52.* On September 2, 2010, police arrested Mr. Burns. *Tr IV at 73.*

Out-of-Court Statements By Charity Burns

According to prosecution witnesses, Charity made statements about the charged offense at least four times prior to Mr. Burns's trial. *Tr II at 64, Tr IV at 13, Tr II at 111, Tr II at 38—39.*

Statement #1

Viola Gonzales, a local pastor, first reported that Charity made an allegation to her on August 17, 2010, during a Bible lesson. *35a.* According to Ms. Gonzales, Charity said "Dave Junior" hurt her. *35a.* Ms. Gonzales said that Charity described the conduct as "Dave Junior"

[3] According to Ms. Gomez's testimony, Charity had previously been accused of attempting to penetrate another girl's anus with her finger while at McDonald's. *Tr II at 37.* Charity had also come home mentioning sex and moaning the name of an imaginary friend who had taken her away from daycare with his girlfriend. *Tr II at 36—37.*

licking and digitally penetrating her "butt." *35a.* Ms. Gonzales also reported that Charity said he put "milk" from his "butt" onto a "string" and put it into her mouth. *Tr II at 66.*

Statement #2

Charity made another statement on September 1, 2010, at the Child Advocacy Center in Bay City. *113 a.* At the Center, Charity met with forensic interviewer Jill Krol.[4] *126a.* During the interview, Charity said her "dad" put his "string" in her mouth and hurt her "butt all the time." *17a.* She also said that she did not tell anyone what had happened to her, including Ms. Gonzales. *18a.* Charity said her "daddy" had said "not to tell." *20a.* Later she said, "I can tell you, but my Dad told me not to tell anybody 'cause I'll get in trouble, but I won't get in trouble." *25a.* Charity gave a variety of responses when asked if everything she had told Ms. Krol had actually happened; at first she said it was "a lie," then that it had really happened, and then she acted "silly." *30a.* At the end of the interview, Charity said she still saw her "daddy" all the time, though at the time she had not seen her father for almost two weeks. *32a.*

Statement #3

Charity's third statement about the allegations took place on September 7, 2010, prior to a forensic medical examination. *52a.* Charity met privately with Bonnie Skornia—a nurse and the Center's director—before a doctor examined her. *52a.* During the interview, Charity indicated that her father put his "string" in her "front butt" and that "butt milk" came out of the "string." *Tr II at 113—16.* Though Charity had previously complained of being hurt "all the time," the medical examination—using a camera with up to 20-times magnification—revealed no evidence of trauma. *17a, Tr II at 116, 122.*

Statement #4

[4] As discussed in Issue I and II, *infra*, the prosecution introduced the DVD recording of Charity's forensic interview with Ms. Krol.

Ms. Gomez testified that Charity made a statement to her about the allegations in November 2010, around the time Mr. Burns appeared in court for preliminary examination. *Tr II at 38—39.* At the time, Charity had not had any contact with Mr. Burns for nearly three months. *Tr IV at 151.* Any subsequent contact took place at the courthouse during trial and was witnessed by staff from the Bay City prosecutor's office. *Tr IV at 29.*

Four Attempts to Qualify Charity Burns as a Witness

During the preliminary examination, Charity Burns repeatedly refused to testify against Mr. Burns. *Tr II at 58.* At trial defense counsel alerted the trial judge to her prior refusals to testify. *Tr II at 58, 81.* To encourage Charity to testify, the trial court made several accommodations: having the parties switch tables such that the prosecution was closer to Charity during her testimony; allowing an advocate from the prosecutor's office to accompany Charity while testifying; clearing the courtroom of visitors during Charity's appearances; moving the jury to a different room to watch Charity's appearance via closed-circuit television; and allowing a private deposition in the prosecutor's office without Mr. Burns or the jury present. *Tr I at 264—270, Tr I at 263—64, Tr II at 76—77, Tr III at 46—47, Tr IV at 4—6.* Despite these accommodations, Charity refused to testify. *Tr II at 98, 157, Tr III at 74, Tr IV at 158.*

Attempt #1

On March 30, after Ms. Gonzales had testified about Charity's alleged statement to her, the prosecution called Charity as a witness. *36a.* The trial judge closed the courtroom to all visitors before Charity entered and allowed an advocate from the prosecutor's office to stand beside her throughout her appearance. *Tr II at 77—78.* After being called before the jury, Charity said that the jury was scaring her and that she wanted the jury "to leave." *42a-43a.*

When asked why she would not answer questions, Charity said, "'Cause my mom's here and I can't do it." *48a.* Ms. Gomez then left the room. *49a.*

When the prosecution asked Charity to talk about her family, she declined, "Cause my dad's not gonna want me to talk about my family." *50a.* The prosecutor made note of this response to the trial judge while still in front of the jury. *50a.* The trial judge—immediately after confirming the prosecutor's observation—excused Charity after 16 minutes of attempting to elicit her testimony in front of the jury. *51a.*

Attempt #2

Three hours after the first attempt to have Charity testify, the prosecution called her to the stand again. *53a.* The trial judge and prosecution spent 24 minutes attempting to elicit her testimony before the jury. *70a.* Charity again refused to testify. *70a.*

Attempt #3

For its third attempt, on March 31, the prosecution requested that Charity testify via closed-circuit television with the jury in a different room. *Tr III at 18—27.* In a separate hearing without the jury present, the prosecution recalled Ms. Gomez, who said Charity did not want to testify in front of the jury or Mr. Burns. *81a.* The trial court granted the prosecution's request, and Charity was recalled to testify. *Tr III at 46—47, 86a.* With the jury seated in a separate courtroom and watching via closed-circuit television, the trial judge and the prosecution spent 22 minutes attempting to elicit Charity's testimony. *106a.* Charity again refused to testify. *106a.*

Attempt #4

In a final effort to secure Charity's testimony, the trial judge allowed the prosecution to conduct a video deposition in the prosecutor's office with only Charity and counsel present.

107-109a. The jury later viewed a video recording of the attempted deposition. *Tr IV at 158.* Charity again refused to testify. *108a-109a.*

Attempts to Admit Testimony About Charity Burns's Alleged Statement to Viola Gonzales

The prosecution introduced Viola Gonzales to testify about Charity Burns's alleged first statement regarding the charged offense. *34a; Tr II at 62—66.* The prosecution sought to admit Ms. Gonzales's testimony under four separate theories.[5]

Theory #1

Initially the prosecution argued that Ms. Gonzales's testimony about Charity's corroborative statement should come in under MRE 803A. *Tr II at 59.* Defense counsel objected, arguing that a corroborative statement admitted under MRE 803A must be the first made by the declarant and noting that Charity said she had not told her story to anyone who accompanied her to the forensic interview, including Ms. Gonzales. *Tr II at 46—47, 71.* The court upheld its earlier ruling that Ms. Gonzales could testify as to Charity's out-of-court statement and could do so before Charity testified in court. *Tr II at 48.*

Theory #2

After the second unsuccessful attempt to elicit Charity's testimony, the prosecution sought to admit Charity's alleged statement to Ms. Gonzales as an excited utterance under MRE 803(2).[6] *Tr II at 161.* The trial judge rejected the argument, because the evidence did not establish a "definitive time" when the startling event—in this case, the alleged offense—took place. *Tr III at 17.*

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[5] Independent of the admissibility determination, the trial court ruled—over defense counsel's objection—that Ms. Gonzales could testify before Charity, even though her testimony was to serve as corroboration for Charity's in-court statement. *Tr II at 6, 58.*

[6] An alternative theory was necessary, because Rule 803A could apply only if Charity provided in-court testimony for her out-of-court statement to corroborate. Rule 803(2) would allow admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Theories #3 and #4

The prosecution then sought to admit Ms. Gonzales's testimony under MRE 804(b)(6) on a theory that Mr. Burns had rendered Charity unavailable to testify through his own wrongdoing.[7] *78a-79a.* The prosecution claimed Mr. Burns told Charity that a Child Protective Services worker would take her away if she said anything about what happened. *77a.* Though the prosecution said Charity spontaneously told Ms. Gomez of this threat, Ms. Gomez testified—in a hearing without the jury present—that Charity related the alleged threat to Ms. Krol, who then communicated it to Ms. Gomez. *77a, 112a.* During the same hearing, Kristin Monaghan—Charity's advocate from the prosecutor's office—testified that Charity was afraid of the people in the courtroom and scared of being taken away. *119a.*

The prosecution presented another alternative theory of admissibility under MRE 803(3).[8] *Tr IV at 7.* It did not present arguments for the exception on the record. *124a-125a.*

Final Ruling and Resulting Admissions

Over defense counsel's objection, the trial court admitted Ms. Gonzales's testimony under Rule 804(b)(6). *Tr IV at 58.* The court relied on the forensic interview to determine that the wrongdoing occurred and rendered Charity unavailable. *125a-127a.*

Having found forfeiture by wrongdoing, the court also admitted Charity's out-of-court statement to Ms. Skornia and the recording of Charity's forensic interview. *128a-129a, 61—62.* Defense counsel raised no further objection to either admission. *Tr IV at 60—62.* In admitting

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[7] Rule 804(b)(6) provides an exception from the hearsay rule and from the constitutional confrontation right for "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

[8] Rule 803(3) provides an exception to the hearsay rule for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

Ms. Skornia's testimony, the court indicated that defense counsel had waived any Confrontation Clause argument by failing to raise an objection on those grounds. *129a.*

SUMMARY OF ARGUMENT

"No person shall . . . be deprived of life, liberty, or property, without due process of law." US Const, amend V. In a criminal trial, "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v California,* 314 US 219, 236, 62 S Ct 280, 86 L Ed 166 (1941). Mr. Burns's trial never approached the threshold of fairness. The prosecution had no physical evidence connecting Mr. Burns to the charged offense, no third-party eyewitness to the charged offense, and its case rested entirely on out-of-court statements by Charity Burns, who refused to testify despite repeated opportunities and extraordinary accommodations by the trial court. *Tr V at 35-37.* Hearsay is generally inadmissible as substantive evidence. MRE 802. The case should have ended there, but, instead, the prosecution used increasingly novel means to create substantive evidence from inadmissible hearsay, which the trial court erroneously permitted under the forfeiture by wrongdoing doctrine codified in MRE 804(b)(6). *Tr II at 59, 61, Tr III at 11—12, Tr IV at 7.*

The Court of Appeals found that the trial court abused its discretion by admitting out-of-court statements from the complainant Charity Burns, based on the erroneous determination that her refusal to testify was due to intentional wrongdoing by the defendant David Barry Burns. The prosecution argues that this Court should establish a forfeiture-by-wrongdoing doctrine specific to cases involving child sexual conduct, even though the U.S. Supreme Court has rejected modification of the forfeiture doctrine based simply on the nature of the alleged crime. The prosecution further argues that the Court of Appeals usurped the trial court's role in assessing why the complainant would not testify. In fact, the court—having determined as a matter of law that Mr. Burns's alleged statements did not amount to wrongdoing under Rule 804(b)(6)—simply noted that the record did not reveal any threatening or coercive conduct that

would trigger the rule and pointed to other possible reasons the complainant might have refused to testify. The prosecution also contends that the Court of Appeals erred in rejecting the admissibility of hearsay under the medical-treatment exception in MRE 803(4). However, the court properly based its decision on the prosecution's failure to preserve that argument in the trial court and, in any event, failure to offer arguments in the Court of Appeals in support of the hearsay's reliability. The Court of Appeals made each of these decisions without reaching Mr. Burns's constitutional arguments. The Court of Appeals decision was entirely consistent with the requirements of the Confrontation Clause.

I. THE TRIAL COURT'S ADMISSION OF THREE HEARSAY STATEMENTS—THROUGH VIOLA GONZALES, BONNIE SKORNIA, AND THE FORENSIC INTERVIEW RECORDING—AS THE ONLY SUBSTANTIVE EVIDENCE AGAINST MR. BURNS, BASED ON AN IMPROPER DETERMINATION OF FORFEITURE BY WRONGDOING, WAS AN ABUSE OF DISCRETION THAT RENDERED THE TRIAL UNFAIR AND VIOLATED DUE PROCESS.

Issue Preservation

Defense counsel preserved this issue at trial by objecting to the admission of evidence under MRE 804(b)(6). *Tr II at 57—61.*

Standard of Review

This Court reviews for abuse of discretion a trial court's decision to admit or to exclude evidence. *People v Lukity,* 460 Mich 484, 488. 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington,* 468 Mich 667, 670—71. 664 NW2d 203 (2003). Consequently, there is an "abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *People v Katt,* 468 Mich 272, 278. 662 NW2d 12 (2003).

A due process violation presents a constitutional question, which this Court reviews de novo. *People v Wilder,* 485 Mich 35, 40. 780 NW 2d 265 (2010).

Discussion

All of the substantive evidence in this case came from Charity Burns's out-of-court statements admitted under MRE 804(b)(6). Rule 804(b)(6) provides an exception from the hearsay rule for "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a

witness."[9] *See also* MRE 804, Note to amendment of May 21, 2001 (MRE 804(b)(6) "creates a hearsay exception for prior statements by a witness who has become unavailable due to wrongful acts committed or encouraged by the party against whom the statement is to be introduced"). The trial court erred—as a matter of law—in finding forfeiture by wrongdoing and abused its discretion in admitting evidence under MRE 804(b)(6). The Court of Appeals correctly reversed the trial court's decision in that regard and remanded for a new trial.

A. Forfeiture By Wrongdoing Is A Clearly Defined—And Infrequently Invoked—Exception To The Hearsay Rule

The forfeiture doctrine "has roots in the 1666 decision in Lord Morley's Case, at which judges concluded that a witness's having been detained by the means or procurement of the prisoner provided a basis to read testimony previously given at a coroner's inquest." *Giles v California*, 554 US 353, 359, 128 S Ct 2678, 171 L Ed 2d 488 (2008) (internal citation and quotation marks omitted).

The Supreme Court of the United States first addressed—and affirmed—the doctrine's use in *Reynolds v United States,* 98 US 145, 25 L Ed 244 (1878). In *Reynolds* an accused bigamist objected when the government introduced testimony offered by one of his alleged

[9] The forfeiture by wrongdoing doctrine and, therefore, MRE 804(b)(6), is not only a hearsay exception; it is also an exception to a defendant's constitutional Confrontation right. *See, eg, US v Dinkins*, 691 F3d 358, 382-83 (4th Cir 2012) ("The Confrontation Clause requires that an accused be given the opportunity to confront any witness who gives testimony against him, unless a well-established common law exception would permit the admission of the evidence," and "[t]he common law doctrine of forfeiture by wrongdoing is such an exception, which allows testimonial statements to be admitted when the defendant's own misconduct caused the declarant to be unavailable at trial."), citing *Crawford v Washington*, 541 US 36, 53–54, 124 S Ct 1354, 158 L Ed 2d 177 (2004) (Confrontation right) and *Davis v Washington*, 547 US 813, 833, 126 S Ct 2266, 165 L Ed 2d 224 (2006) ("one who obtains the absence of a witness by wrongdoing ***forfeits*** the constitutional right to confrontation") (emphasis added). Because the forfeiture-by-wrongdoing exception is in derogation of both the general rule precluding hearsay and a defendant's constitutional Confrontation right, it must be narrowly and strictly construed. *See Giles, supra*, 554 US at 375 ("the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair'"); *see also State v Poole*, 232 P 3d 519, 527 (Utah 2010) ("[F]orfeiture by wrongdoing acts to abrogate a significant constitutional protection. We do not believe that it should be easily forfeited").

wives at a previous trial, though the woman was not testifying in the trial at hand. *Id.* at 158—160. In response the government presented evidence that it had been unable to find the woman through due diligence and that the defendant had purposely brought about her unavailability. *Id.* The Court affirmed the admission of the prior statement, noting the doctrine "has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony." *Id.* at 159.

In 1997 the doctrine was codified in the Federal Rules of Evidence through Rule 804(b)(6). In 2001 Michigan followed suit with MRE 804(b)(6). *See* MRE 804, Note to amendment of May 21, 2001 (MRE 804(b)(6) "is almost identical to FRE 804(b)(6), which was added to the federal rules effective December 1, 1997"); *see also Giles, supra,* 554 US at 368 n2 (noting Michigan as one of the several states that have codified the forfeiture by wrongdoing doctrine in a manner that "duplicate[s] the language of the federal forfeiture provision that requires purpose," and further noting that MRE 804(b)(6) merely "substitutes 'engaged in or encouraged'" in place of the federal counterpart, "'engaged or acquiesced in.'"). Codified or not, the doctrine has not received much examination in Michigan's appellate courts; to date only two published opinions address the principle codified in Rule 804(b)(6).

In *People v Bauder,* 269 Mich App 174, 712 NW2d 506 (2005), the Court of Appeals held that Rule 804(b)(6) applied even without a finding that the alleged wrongdoing was specifically intended to procure a witness's unavailability.[10] In *People v Jones,* 270 Mich App 208, 215, 714 NW 2d 362 (2006), the court established that the prosecution must show by a preponderance of the evidence "(1) that the defendant engaged [in or encouraged] wrongdoing,

[10] The U.S. Supreme Court's subsequent holding in *Giles* calls this ruling into question with respect to testimonial statements, 554 US 353.

(2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability." *Id.* at 215—217 (quoting *United States v Scott,* 284 F3d 758, 762 (7th Cir 2002)).

In 2008 the US Supreme Court provided a detailed examination of the doctrine with respect to a defendant's rights under the Confrontation Clause in *Giles v California,* 554 US 353. In *Giles* the state introduced a murder victim's statements to police during a domestic-violence call prior to her murder. *Id.* at 356—357. The California Court of Appeals—and subsequently the state's Supreme Court—found that the defendant had actually murdered the victim, thereby rendering her unavailable by his own wrongdoing and forfeiting his Sixth Amendment right to confront the witness. *Id.* at 357. However, the California Supreme Court's interpretation of the doctrine did not require a finding that the defendant intended to render the witness unavailable to testify through his wrongdoing. *Id.* at 377. The US Supreme Court rejected the state interpretation and held that the intent finding was necessary to create an exception to the Confrontation Clause.[11] *Id.*

The *Giles* court made clear that the forfeiture by wrongdoing doctrine requires that defendant's conduct be "*designed* to prevent the witness from testifying.'" *Id.* at 360-61 (emphasis in original). Indeed, the Supreme Court's decision in *Giles* clarified that the intent element required for the application of the forfeiture by wrongdoing doctrine is a specific intent requirement: the defendant must have specifically intended that his wrongdoing would render the

[11] Courts have recognized that there is no sound reason to apply *Giles* any differently when considering the forfeiture by wrongdoing doctrine as a hearsay exception as opposed to the forfeiture of a defendant's Confrontation right. *See, eg, Proffit v State*, 191 P.3d 963, 967 (Wyo 2008) ("Given that the common law right of confrontation and the common law hearsay rule 'stem from the same roots,' it would be illogical to apply forfeiture by wrongdoing to the constitutional right, while denying its application to the rule of evidence."); *Chavez v State*, 25 So3d 49, 53 (Fla Dist Ct App 2009) (discussing *Giles* and concluding, "even if the common-law exception of forfeiture by wrongdoing was applicable in Florida as a hearsay exception, it would not apply in the present case where there was *no evidence presented* that Appellant acted with the intent to prevent his wife from testifying.") (emphasis added).

witness unavailable *to testify*. *Giles*, 554 US at 359 & 367 ("the requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'"); *see also Crawford v Commonwealth*, 281 Va 84, 111; 704 SE2d 107 (2011) (affirming the court of appeals's decision that, "by not considering [defendant's] intent, the trial court incorrectly applied the forfeiture by wrongdoing doctrine, as it was defined in *Giles*.").

Since *Giles* was decided on June 25, 2008, it has been cited in over 300 cases, and jurisdictions nationwide have uniformly recognized that *Giles* "clarified that the forfeiture by wrongdoing exception only applies where the State has proved by a preponderance of the evidence that the defendant's act of wrongdoing was specifically intended to prevent the witness' testimony." *State v Belone,* 285 P3d 378, 382 (Kan 2012), citing *Giles*, 554 US at 368; *Hammond v Commonwealth,* 366 SW3d 425, 432 n5 (Ky 2012) (*Giles* "clarifies that the burden is on the state to show that the defendant 'engaged in conduct *designed* to prevent the witness from testifying' at trial" and "[s]howing merely that the defendant caused the witness's unavailability is insufficient."). And courts outside of Michigan have interpreted the doctrine with great deference to a defendant's Confrontation rights. For example, Utah courts are bound by the state's rules of evidence when making a forfeiture determination. *Poole, supra*, 232 P 3d at 527 ("[F]orfeiture by wrongdoing acts to abrogate a significant constitutional protection. We do not believe that it should be easily forfeited and thus we require the district courts of this state to apply the rules of evidence . . . when they consider whether a criminal defendant has forfeited the right to confrontation."). And in Illinois, the state's Supreme Court did not find the requisite intent even when a criminal sexual conduct defendant made his alleged victim promise not to tell others what happened:

> We recognize that, according to the record, after respondent assaulted Von he made Von "pinky swear" not to tell anyone what happened in an attempt to keep his crime a secret. However, there is nothing in the record to indicate that when respondent extracted the promise from Von, he did so in contemplation of some future trial. Thus, whether Von's refusal to testify at trial was due to his embarrassment or because of his "pinky swear" to respondent is of no matter. Respondent's confrontation rights may not be abridged unless he acted with the intended purpose of procuring Von's absence from trial.

In re Rolandis G, 232 Ill 2d 13, 42 (2008). Such narrow interpretations of the doctrine accord with the US Supreme Court, which stated that "the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" *Giles*, 554 US at 375.

In Kansas, prior to the Supreme Court's ruling in *Giles*, the forfeiture by wrongdoing doctrine had been applied to require the State only to show by a preponderance of the evidence that the defendant "was responsible for the witness' unavailability[.]" *Belone*, *supra*, 285 P3d at 382, citing *State v Meeks,* 277 Kan 609, 615–16, 88 P3d 789 (2004). But, because of the *Giles* ruling, the Kansas Supreme Court "followed suit" in *State v Jones,* 287 Kan 559, 567–68, 197 P3d 815 (2008), and "refused to apply the forfeiture by wrongdoing exception because the State had failed in its burden to show that [defendant] killed the victim with the intent to prevent the victim's subsequent testimony at trial." *Belone*, 285 P3d at 382 (discussing *Jones*). With that backdrop, the Kansas Supreme Court in *Belone* found that the State had not met its burden for the application of the forfeiture by wrongdoing doctrine because it "did not show that [defendant] killed [witness] for the purpose of preventing her from testifying at trial," and, "[a]t most, the evidence suggested that the killing was motivated by jealousy." *Id* at 382.

Similar to the Kansas approach prior to *Giles*, Minnesota did not require specific intent to procure the witness' unavailability to testify for the forfeiture by wrongdoing doctrine to apply

when the witness had been murdered rather than alive but unavailable. *State v Moua Her,* 750 NW2d 258, 270 (Minn 2008) ("But when a defendant intentionally murders the witness, imposing the additional motive element is inconsistent with the equitable notions underlying the forfeiture-by-wrongdoing doctrine," and noting the distinction "between a witness tampering case, where intent to silence is required, and a murder case, where the additional element of intent to silence is not required when the defendant is responsible for the death of the witness"). On the defendant's petition for writ of certiorari to the Supreme Court of the United States, the Supreme Court granted the petition, vacated the Minnesota Supreme Court's judgment, and remanded the case "to the Supreme Court of Minnesota for further consideration in light of *Giles v California,* 554 US [353], 128 S Ct 2678, 171 L Ed 2d 488 (2008)." *Moua Her v Minnesota,* 555 US 1092, 129 S Ct 929 (2009). Thus, the Supreme Court of the United States essentially telegraphed to the Minnesota Supreme Court that its murder exception to the intent element of the forfeiture by wrongdoing doctrine was not viable after *Giles.*

Similarly, in 2011, the Virginia Supreme Court followed *Giles* in affirming the Virginia Court of Appeals' holding that "'[b]y not considering [defendant's] intent, the trial court incorrectly applied the forfeiture by wrongdoing doctrine, as it was defined in *Giles,*'" and, "'[t]hus, the trial court erred in its analysis for admitting the affidavit on that basis.'" *Crawford, supra,* 281 Va at 111. In 2008, the US Army Court of Criminal Appeals, in reversing the military judge's admission of hearsay evidence under the forfeiture by wrongdoing doctrine codified under Military Rule of Evidence 804(b)(6), recognized the same intent principle, stating, "[i]ndeed, in *Giles* the Supreme Court stated, '[t]he terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying.'" *US v Marchesano,* 67 MJ 535, 544 (Army

2008), quoting *Giles*.[12]

In this case, the meager evidence that Mr. Burns allegedly told his daughter "don't tell" *contemporaneously* with the charged crime and before any arrest, which Mr. Burns disputes, even if true provides no evidence that he had the foresight to tamper with Charity Burns's future possible testimony at a trial. At most it suggests that his statement, if made, would have been motivated by a general desire to conceal the act itself, which is insufficient for "extinguishing" Mr. Burns's constitutional Confrontation right and admitting inadmissible hearsay. *See, eg, In re Rolandis G, supra*, 232 Ill 2d at 42 ("We recognize that, according to the record, after respondent assaulted Von he made Von 'pinky swear' not to tell anyone what happened in an attempt to keep his crime a secret. However, there is nothing in the record to indicate that when respondent extracted the promise from Von, he did so in contemplation of some future trial. . . . Respondent's confrontation rights may not be abridged unless he acted with the intended purpose of procuring Von's absence from trial.")

Further, the transcript of the trial court's decision reflects that the trial court impermissibly based its decision on finding merely that Charity Burns was unavailable while making no finding (because there was no evidence) that Mr. Burns specifically intended for his

[12] *See also State v Byrd*, 198 NJ 319, 340, 967 A2d 285 (NJ 2009) ("The Sixth Amendment, however, requires that the wrongdoer have as his intent 'the particular purpose of making the witness unavailable' to testify at trial."); *Commonwealth v Wholaver*, 605 Pa 325, 355 n12, 989 A2d 883 (Pa 2010) ("In [*Giles*], the United States Supreme Court held a defendant does not forfeit his right to confront a witness simply by committing a wrongful act which renders the witness unavailable to testify at trial, . . . the Court held a defendant only forfeits his confrontation right by wrongdoing where the wrongful act was committed for the purpose of preventing the witness's trial testimony."); *Commonwealth v Szerlong*, 457 Mass 858, 862, 933 NE2d 633 (Mass 2010) ("the Supreme Court in *Giles* held that, under the Sixth Amendment, the forfeiture by wrongdoing doctrine applies only where the defendant acts with the intent to prevent the witness from testifying."); *State v Fry*, 125 Ohio St 3d 163, 180, 926 NE2d 1239 (Ohio 2010) ("*Giles* also states that 'the [forfeiture by wrongdoing] rule' makes plain that unconfronted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying."); *State v Suspanchick*, 245 Or App 651, 661, 263 P3d 378 (Or Ct App 2011) ("Based on that history, the [*Giles*] Court described the forfeiture doctrine—which, as noted, required the wrongful act to have been done with the intent to make the declarant unavailable—as an exception that was established at the time of the founding.").

daughter to be unavailable *to testify*. *See, eg, Crawford, supra*, 281 Va at 111 ("[b]y not considering [defendant's] intent, the trial court incorrectly applied the forfeiture by wrongdoing doctrine, as it was defined in *Giles.*"). The trial court stated that, based upon the "four efforts to get the witness to testify," Charity Burns was indeed unavailable "because, among other things, of her infirmity, her youth, to be able to testify here in court and the fear, frankly, that she has of testifying here in court." *Tr IV at 57*; *127a*. The trial court did not attribute the witness's "fear" of testifying in court to any threat by Mr. Burns specifically intended to procure Charity Burns' unavailability, of which there was no evidence presented by the prosecution. And the Court of Appeals correctly noted that this "fear" to testify was just as likely, if not more, attributable to other factors apparent in the record, such as, "for example, that she was intimidated by the formality of the proceedings and presence of people in the courtroom, as well as by the use of a microphone." *136a*.

The trial court went on to state, erroneously, "if [the witness] is unavailable," which the trial court had already found she was, "her statements would come under" MRE 804(b)(6). *127a*. That statement represented the fundamental flaw that was specifically addressed in *Giles*. *See Hammond, supra*, 366 SW3d at 432 n5 (Ky 2012) (after *Giles*, "[s]howing merely that the defendant caused the witness's unavailability is insufficient."); *see also Wholaver, supra*, 605 Pa at 355 n12 ("a defendant does not forfeit his right to confront a witness simply by committing a wrongful act which renders the witness unavailable to testify at trial, . . . the [*Giles*] Court held a defendant only forfeits his confrontation right by wrongdoing where the wrongful act was committed for the purpose of preventing the witness's trial testimony."). The People concede in their opening brief that "it is true that the court never *expressly* stated it was finding the defendant engaged in the aforementioned wrongdoing with the intent of procuring the child

victim's unavailability."[13] *People's Brief p 21* (emphasis in original). The trial court's limitation of its analysis in this case to whether the witness was merely "unavailable" due to the defendant's wrongful conduct (which Mr. Burns disputes) as opposed to unavailable *because* the defendant specifically intended for the witness to be unavailable to testify was an abuse of discretion. The Court of Appeals correctly found as much, stating it "could not discern from the record any evidence that would lead to the conclusion that the victim refused to testify in court because of any threats issued by defendant against the victim." *136a-137a*, citing *People v Jones,*

[13] The People attempt to downplay the trial court's reversible error in failing to make any intent findings as required for the application of the forfeiture by wrongdoing doctrine. The People assert that such *necessary* specific intent "finding was implicit within the court's ruling." *People's Brief p 21.* Contrary to that suggestion, and as the Court of Appeals correctly found, there can be no reasonable inference or implication of this required intent element in this case because there was not "any evidence" in the record from which any reasonable trier of fact could conclude "that the victim refused to testify in court because of any threats issued by defendant against the victim." *136a-137a.* Again, the statement "don't tell," even if true, having been made contemporaneous with the crime charged before there was even an arrest, does not evince the extraordinary foresightedness on the part of the defendant to prevent the witness's testimony at trial that the People would like to have "implied" with no findings or evidence. Nor is there any merit to the People's straw-man, the-sky-is-falling argument that the Court of Appeals purportedly pronounced an improper, "bright-line" rule allowing molesters to evade MRE 804(b)(6) as long as they engage in the wrongdoing contemporaneously with the charged crime, such as by promising "the child an award if the child does not tell anyone." *People's Brief pp 26-27.* The reality is that it was the *prosecution's burden* to prove intent *by a preponderance of the evidence*, yet it failed to offer any evidence of intent, and the mere statement "don't tell" fell woefully short of its burden. The Court of Appeals did not hold that statements made contemporaneously with the charged crime could never satisfy MRE 804(b)(6)'s intent requirement. And, notably, the People use the example of a "reward," but the prosecution did not present any such evidence. The People's own example demonstrates that there may be some cases in which there is evidence to prove the requisite intent by a preponderance of the evidence even where the statements were allegedly made contemporaneously with the charged crime, but this is not one of those cases.

270 Mich App 208, 218, 714 NW2d 362 (2006).[14]

B. The Trial Court Improperly Found Forfeiture By Wrongdoing

The plain language of Rule 804(b)(6)—bolstered by the doctrinal interpretation in *Jones* and *Giles*—makes clear that the exception requires three distinct findings: that the defendant committed wrongdoing, that the wrongdoing was intended to render the witness unavailable, and that the wrongdoing actually rendered the witness unavailable. The prosecution in this case faltered on all three requirements. And the trial court erred as a matter of law by finding forfeiture based on the prosecution's insufficient showing.

i. The prosecution did not show that Mr. Burns intended to render Charity Burns unavailable to testify.

The trial court announced its ruling on the forfeiture issue with a conclusory statement: "[T]he provisions of 804(b)(6) do apply based upon the facts presented." *Tr IV at 57.* Though the court stated findings as to the alleged wrongdoing and Charity's resulting unavailability—both of which Mr. Burns disputes *Infra*—it made no finding on the intent of the alleged wrongdoing. *Tr IV at 55—58.* Nor could it have, because the prosecution presented no evidence to show intent. The court supported its ruling by citing Charity's responses during her forensic interview: "My daddy says don't tell . . . He told me not to tell . . . I can't tell anybody 'cause I'll get in trouble, but I won't get in trouble . . . He didn't want me to tell anybody." *Tr IV at 56.*

[14] Next, the Court of Appeals correctly concluded that the trial court committed outcome-determinative error by admitting hearsay as substantive evidence under MRE 804(b)(6). After its "examination of the entire cause," the Court of Appeals concluded that it appeared more probable than not that the error was outcome determinative. *138a-139a*, citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26. Indeed, the prosecution had no physical evidence, no third-party eyewitness, and no in-court testimony from the complainant; the proper exclusion of the out-of-court statements would have left the prosecution with no evidence whatsoever. *Tr V at 36—37.* Because there was no admissible substantive evidence before the jury, Mr. Burns's conviction is constitutionally infirm. Due process demands that a conviction be based on evidence. *Thompson v City of Louisville*, 362 US 199, 206, 80 S Ct 624, 4 L Ed 2d 654 (1970).

At best, Charity's responses might support a finding that Mr. Burns made the alleged statements. But they are wholly insufficient to show the intent behind the alleged statements. The court could only find the wrongful intent by assuming Mr. Burns was trying to keep Charity from testifying about the alleged offense. But even clearly wrongful conduct does not create a presumption of intent to render a witness unavailable. *See, e.g.*, *Giles*, 554 US at 377 (holding that trial court must still determine intent despite finding that defendant had killed declarant). Nor should such a presumption exist. A court should apply the doctrine only when intent is reasonably apparent in a defendant's conduct or statements, and the prosecution carries its burden by a preponderance of the evidence.

In a typical forfeiture by wrongdoing case there is some objective evidence of a crime and the issue is the identity of the perpetrator. Thus, in a murder case for example, there is someone who has died as a result of identified wrongdoing. If a witness is threatened then there will arguably be some evidence to support wrongdoing on behalf of the accused to support a forfeiture ruling.

In this case, there was no objective evidence that any crime was committed. The trial court either ignored or improperly presumed Mr. Burns's intent (or, more accurately, lack thereof) to render Charity unavailable. Even if the court simply failed to state its intent finding, any such finding would have been unsupported by the evidence. Charity was the only witness to the alleged statements, and the intent was not discernible from anything Charity said. Because it was impossible to find intent without making improper inferences as to Mr. Burns's guilt, the trial court—as a matter of law—could not admit Charity's statements under Rule 804(b)(6).

The Court of Appeals properly distinguished between statements designed "to prevent the victim from disclosing the criminal acts" and "threats intended to prevent the victim from

testifying at trial." *136a.* Contrary to the prosecution's assertion, the Court of Appeals did not establish a bright-line rule against forfeiture determinations based on contemporaneous threats or coercion. Rather the court determined that, in this particular case, the alleged statements were not the type of conduct Rule 804(b)(6) is designed to protect against. This narrow distinction prevents the forfeiture of a defendant's hearsay protections based on the mere allegation of coercive wrongdoing.[15]

ii. The prosecution failed to show that the alleged wrongdoing actually rendered Charity Burns unavailable.

Even assuming for the sake of argument that the trial court could have reasonably found intent to render Charity unavailable to testify, it lacked a sufficient basis to find the alleged wrongdoing actually rendered her unavailable. During the repeated attempts to have Charity testify, she indicated fear of the jury and of her mother's being in the room, but never—contrary to the prosecution's arguments—a fear of being taken away or otherwise punished for testifying against Mr. Burns. *Tr II at 89—90, 95.* The trial judge indicated that a fear of retribution was not the sole factor that rendered her unavailable: "Charity is unavailable because, among other things, of her infirmity, her youth, to be able to testify here in court." *Tr IV at 57.*

Moreover, Charity's behavior prior to trial suggests no actual fear of retribution. Even if Mr. Burns had told his daughter not to tell anyone about the alleged conduct, the prosecution presented evidence that she told at least four people: Ms. Gonzales, Ms. Krol, Ms. Skornia, and Ms. Gomez. *Tr II at 38—39, 64, 111, Tr IV at 13.* It is improbable that a four-year old would

[15] Two scenarios illustrate the potential concern for criminal defendants. If an armed robber allegedly tells his screaming victim, "Be quiet, or I'll kill you," a prosecutor could use the victim's refusal to testify months later to invoke the forfeiture rule. The result is no better for an innocent defendant. If the innocent defendant allegedly tells his accuser that she will get in trouble for making false accusations, a prosecutor could use the complainant's subsequent refusal to testify to invoke forfeiture. These applications—only permissible if intent can be presumed from alleged wrongdoing—would use an equitable doctrine to produce wholly inequitable outcomes.

distinguish between the consequences for in-court and out-of-court disclosures. At trial Ms. Gomez noted, "She knows her daddy's in trouble. She knows that. And she knows if she says something, you know, she's not going to be able to see her daddy." *Tr III at 40.* These are natural and logical inferences a child could make—without prompting—during a seven-month absence from her father.

Furthermore, Charity indicated during her first statement to authorities that she did not fear retribution. In announcing the decision to admit Ms. Gonzales's testimony, the trial judge indicated his reliance on Charity's statements to Ms. Krol that her father told her not to tell. *Tr IV at 55.* But, during that same interview, Charity told Ms. Krol, "I can tell you but my Dad told me not to tell anybody cause I'll get in trouble ***but I won't get in trouble.***" *FI at 17 (emphasis added).* Though the court apparently gave great weight to Charity's statements that Mr. Burns told her not to tell, it inexplicably ignored her unambiguous statement that she would not get in trouble for telling. And it ignored her multiple statements to authority figures, despite claiming she would get in trouble for telling. Charity's actions are more telling than any stated reluctance that the prosecution attributed to witness tampering.

In reversing the trial court, the Court of Appeals took note of the multiple alleged disclosures Charity made to authority figures before trial and the other reasons she might have refused to testify. *136a.* The prosecution argues that the court has intruded on the province of the trial court's factfinding role in evidentiary decisions. *Prosecution's Application for Leave to Appeal at 22—28; People's Brief pp 35-41.* But the court acted properly in determining that, if the alleged statements did not rise to the level of coercion under Rule 804(b)(6), then there was no other evidence of sufficiently coercive conduct on the record. Even if the Court of Appeals had overstepped its authority in evaluating this prong of the forfeiture analysis, the trial court's

error as to either of the other prongs would have been sufficient to reverse.

iii. The prosecution did not show that Mr. Burns engaged in wrongdoing.

The paradigmatic case of forfeiture by wrongdoing is the murder of the witness who made the out-of-court statement. *See, eg, Giles*, 554 US 353 (2008). Wrongdoing may also consist of direct and indirect threats of violence against the witness. *See, eg, Jones*, 270 Mich App 208 (2006). In this case, Mr. Burns's alleged wrongdoing consisted of telling Charity that she would get in trouble if she told anyone.

When a court determines wrongdoing based entirely on a statement, context matters. A statement to the effect of "Don't tell, or you'll get in trouble" is not—on its own—an act of wrongdoing. Even if Mr. Burns made the alleged statement—which he does not concede—the statement only becomes an act of wrongdoing if the witness actually has something of probative value to "tell" the court.

The trial court determined that Charity's forensic interview sufficed to show the alleged wrongdoing, and it expressly rejected other evidence proffered by the prosecution. *Tr IV at 55—56.* As such, the court could only find wrongdoing by presuming that Mr. Burns had actually committed the offense alleged by Charity.

Finding wrongdoing "on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to dispensing with jury trial because a defendant is obviously guilty." *Giles*, 554 US at 365 citing *Crawford v Washington*, 541 US 36, 62, 124 S Ct 1354, 158 L Ed 2d 177 (2004)) (internal quotation marks omitted). "[I]it is most certainly not the norm that trial rights can be forfeited on the basis of a prior judicial determination of guilt." *Id.* at 375 (internal citation and quotation marks omitted). With no evidence against Mr. Burns other than the disputed statements, it was

impossible for the trial court to find wrongdoing without improperly presuming Mr. Burns's guilt.

The trial court erred in finding forfeiture by wrongdoing, insofar as it was impossible to make the requisite findings without improperly presuming his wrongful intent or his guilt. Moreover, the trial court ignored apparent and unambiguous evidence that Mr. Burns's alleged wrongdoing had not actually rendered Charity unavailable to testify. The Court of Appeals correctly found that the trial court erred in all three facets of the forfeiture determination and its ruling should be affirmed.

II. THE TRIAL COURT'S ADMISSION OF TESTIMONIAL HEARSAY AS SUBSTANTIVE EVIDENCE THROUGH BONNIE SKORNIA AND THE FORENSIC INTERVIEW RECORDING, BASED ON AN IMPROPER DETERMINATION OF FORFEITURE BY WRONGDOING, WAS AN UNFAIRLY PREJUDICIAL VIOLATION OF MR. BURNS'S CONFRONTATION RIGHT.

Issue Preservation[16]

Defense counsel did not raise a Confrontation Clause objection to the admission of testimonial hearsay. *Tr IV at 60—62.* However, the trial record shows that any such objection would have been futile, as the trial judge stated, "In my opinion in any event even if objected to, based upon what I hear now, there would in fact be forfeiture by wrongdoing, and therefore the defendant waived any constitutional argument of his right to confrontation under the Sixth Amendment."[17] *Tr IV at 59.*

Standard of Review

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[16] The Court of Appeals did not need to reach Mr. Burns's Confrontation right because it held that the admitted evidence was not admissible as a hearsay exception under MRE 804(b)(6). Further, this Court's grant of the People's application for leave to appeal to this Court defined two issues unrelated to the Confrontation Clause to "include among the issues to be briefed." Thus, while defendant does not intend to exceed the bounds of this Court's directive regarding briefing, defendant believes that this Court's grant of leave did not limit the issues to only the two issues presented in the order and, further, defendant desires to preserve his position that his Sixth Amendment right to confrontation was violated by the trial court's admission of the statements and the recording at issue in this case. In addition, as discussed, *supra,* Issue I, the Confrontation right is inextricably intertwined with the hearsay at issue, the forfeiture by wrongdoing doctrine, and MRE 804(b)(6), thus making the Sixth Amendment relevant to the briefing on this appeal. Finally, the Confrontation right is relevant because this Court may affirm the Court of Appeals for any reason, even if its reason is different than that of the Court of Appeals. *See, eg, American Alternative Ins Co, Inc v York,* 470 Mich 28, 33; 679 NW2d 306 (2004) ("The trial court and the Court of Appeals applied the wrong legal standards. However, because the Court of Appeals reached the correct result, we affirm the Court of Appeals decision for the reasons stated herein.").

[17] Criminal defendants cannot waive a constitutional right by unknowing acquiescence; they must do so knowingly and intelligently. *Johnson v Zerbst,* 304 US 458, 464, 58 S Ct 1019 (1938); *People v Fackelman,* 489 Mich 515, 802 NW2d 552 (2011) (finding that failure to object did not waive Confrontation right).

This Court reviews de novo a Sixth Amendment challenge as a question of constitutional law. *People v Drohan,* 475 Mich 140, 146, 715 NW2d 778 (2006). A due process violation also presents a constitutional question for de novo review. *People v Wilder,* 485 Mich 35, 40, 780 NW2d 265 (2010).

This Court reviews for abuse of discretion a trial court's decision to admit or to exclude evidence. *People v Lukity,* 460 Mich 484, 488, 596 NW2d 607 (1999). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Washington,* 468 Mich 667, 670—71, 664 NW2d 203 (2003). Consequently, there is an "abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *People v Katt,* 468 Mich 272, 278, 662 NW2d 12 (2003).

Discussion

The trial court committed a prejudicial abuse of discretion when it admitted Charity Burns's out-of-court statements under MRE 804(b)(6). *See supra* Issue I. The court compounded its evidentiary error by permitting two violations of Mr. Burns's right under the Confrontation Clause: the admission of Charity Burns's out-of-court, testimonial statements through Ms. Skornia and the forensic interview recording. *Tr IV at 58—59, 61—62.*

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, amend VI. A defendant's Confrontation right is "[o]ne of the fundamental guaranties of life and liberty" enshrined in the Constitution. *Kirby v United States,* 174 US 47, 55, 19 S Ct 574, 43 L Ed 890 (1899). It encompasses a host of procedural safeguards for the defendant that:

> includes not only a personal examination [of the witness], but also (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Maryland v Craig, 497 US 836, 845—46, 110 S Ct 3157, 111 L Ed 2d 666 (1990) (internal citations and quotation marks omitted).

The Confrontation right "thus is essentially a functional right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v Stincer,* 482 US 730, 737, 107 S Ct 2658, 96 L Ed 2d 631 (1987). Consistent with that truth-finding function, the Confrontation Clause bars out-of-court statements against the defendant by witnesses not appearing at trial—unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v Washington,* 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004). This bar applies to testimonial statements made out of court. *Davis v Washington,* 547 US 813, 126 S Ct 2266, 165 L Ed 2d 224 (2006). A statement is testimonial when made to law-enforcement personnel under circumstances objectively indicating no ongoing emergency and that the primary purpose of the personnel's questioning is to establish or prove past events relevant to criminal prosecution. *Davis*, 547 US 813; *see also People v Spangler,* 285 Mich App 136, 155, 774 NW 2d 702 (2009) (providing indicia that statements to sexual assault nurse examiner and similar personnel are testimonial).

In this case, the trial court acknowledged that Charity's statements—as related by Ms. Skornia and through the forensic interview recording—were testimonial and implicated the Confrontation Clause. *Tr IV at 58—59, 61.* But Mr. Burns received no opportunity to confront the testimony—either at the preliminary examination or at trial. *Tr II at 58, Tr IV at 57.*

The case should have ended there. But the prosecution exploited its own lack of substantive evidence to convince the trial court that Mr. Burns had forfeited his Confrontation right through wrongdoing. *Tr IV at 59, 61*. Because the trial court made an erroneous determination of forfeiture by wrongdoing, *see supra* Issue I, Charity's out-of-court testimonial statements were barred on Confrontation grounds.[18] Mr. Burns could not waive his Confrontation right unknowingly, *People v Fackelman,* 489 Mich 515, 802 NW 2d 552 (2011), and he never made an active waiver of his right on the record. The Court thus deprived Mr. Burns of his Confrontation right on two separate occasions.

To uphold the original judgment, this Court must determine—beyond a reasonable doubt—whether a rational jury would have found Mr. Burns guilty absent the constitutional errors. *People v Shepherd,* 472 Mich 343, 348, 697 NW2d 144 (2005) (noting that harmless-error analysis applies to review of Confrontation errors). This Court should reverse a conviction when "the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *People v Mass,* 464 Mich 615, 640, 628 NW2d 540 (2001) (internal citations omitted).

All of the substantive evidence against Mr. Burns was improperly admitted hearsay. Absent the Confrontation error—which implicates the evidentiary error—there would be no evidence on which a rational jury could base a guilty verdict. Certainly the original judgment cannot be upheld under such a circumstance. *See Thompson v City of Louisville,* 362 US 199, 206, 80 S Ct 624, 4 L Ed 2d 654 (1970) (noting conviction must be based on evidence).

[18] Such an exception requires intent to render the witness unavailable. *Giles v California,* 554 US 353, 366, 128 S Ct 2678, 171 L Ed 2d 488 (2008). By finding forfeiture without any intent determination, the trial court ignored clearly established Supreme Court precedent. *Tr IV at 55—58.*

This Court may also consider, in the alternative, whether the introduction of unconfronted testimonial hearsay would still have rendered the trial unfair had Charity's alleged statements to Ms. Gonzales been admissible.[19] The admission of the forensic interview recording illustrates just how prejudicial the trial court's errors proved to be. Before trial defense counsel actually moved to admit the DVD recording of Charity's forensic interview; however, it did so for the sole purpose of impeaching Charity's in-court testimony. *Defendant's Motion In Limine, March 1, 2011.* In no way would this have waived Mr. Burns's right to confront Charity's statement; quite the opposite. Defense counsel made the motion *because* the Confrontation Clause applied. The procedural safeguard of confrontation would have promoted truth-finding by enabling the introduction of relevant evidence to provide context to in-court testimony.

This contrasts starkly with what actually ensued. Before opening statements, defense counsel moved to admit the forensic interview transcript for the limited purpose of deciding an objection. The prosecution resisted, arguing that "any statements of Charity as of yet are unsworn whereas we have sworn testimony to consider." *Tr II at 49.* Away from the jury and bound by Mr. Burns's Confrontation right, the prosecution impugned the reliability of her statement. Unconstrained by Mr. Burns's fundamental right, the prosecution held the same statement up as a basis to convict him. *Tr V at 33.* The prosecution cannot have it both ways.

Each Confrontation error in this case resulted in the admission of testimonial hearsay as substantive evidence against Mr. Burns. *Tr IV at 58—59, 61—62.* The harm was not merely theoretical. The lack of confrontation had a real and substantial effect on how both parties

[19] Though the prosecution introduced four different theories for admission at trial, it might still have pursued the residual exception provided in MRE 803(23) or MRE 804(b)(7). But neither exception applies. Both require that the evidence have "equivalent circumstantial guarantees of trustworthiness" to the categorical hearsay exceptions. Such guarantees are absent in this case. Charity herself provided conflicting statements as to the veracity of her statement. *FI at 22.* And even the prosecution urged the trial court not to consider the evidence merely for the purpose of deciding an objection. *Tr II at 49.*

conducted their respective cases and made the guilty verdict a foregone conclusion. The constitutional errors—independent of or in concert with—the evidentiary errors in this case subjected Mr. Burns to an unfair trial. The Court of Appeals Opinion granting Mr. Burns a new trial must be affirmed.

III. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THERE WAS A TOTAL LACK OF EVIDENCE IN THE RECORD FROM WHICH THE TRIAL JUDGE COULD DETERMINE THAT THE COMPLAINANT REFUSED TO TESTIFY IN COURT BECAUSE OF ANY THREATS ISSUED BY MR. BURNS AGAINST HER AND ENGAGED IN A PROPER REVIEW OF THE RECORD AND APPLICATION OF THE LAW TO THE EVIDENCE.

Standard of Review

Mr. Burns does not contest the prosecution's standard of review.

Discussion

The Court of Appeals was charged with reviewing de novo both the issues of whether a statute or rule of evidence precludes admissibility of the evidence and whether there has been a due process violation. *Washington, supra*, 468 Mich at 670; Wilder, 485 Mich at 40. Thus, the entire record was available to the Court of Appeals, and, even under the abuse of discretion standard, its conclusion that the trial court's decision to admit hearsay and extinguish Mr. Burns's confrontation right on scant evidence of intent was outside the range of reasonable and principled outcomes was eminently sound.

Moreover, the People concede that the record lacks any findings by the trial court as to the required intent element and, thus, in order to "imply" such findings, as the People urge, a reviewing court necessarily must consider the evidence the trial court had before it and determine whether such an "implication" is warranted. The court of appeals did that here, and concluded it "could not discern from the record any evidence that would lead to the conclusion that the victim refused to testify in court because of any threats issued by defendant against the victim." *136a-137a*. With no intent findings by the trial court, the Court of Appeals was well within its province to consider the record vis-à-vis the prosecution's burden to establish by a

preponderance of the evidence the applicability of the forfeiture by wrongdoing, and determine that there was no such evidence.

In its brief, the People go to great hyperbolic lengths – mostly by quoting large blocks of case law and positing inapplicable hypotheticals – to establish their proposition that only the trial court can evaluate things like "demeanor, mannerisms, and physical responses," which are not apparent from the "cold," "impersonal," "black and white" record or in an "appellate vacuum." *Eg, People's Brief* pp 41, 41. But, conspicuously, the people do not contend that any of these hypothetical, visceral observations, which, in some cases, amount to unfounded accusations against Mr. Burns, actually occurred or played any role in the trial court's decision. *Eg, People's Brief* p 37 ("whether the child looked fearful; whether the child was looking at defendant and, if so, whether it was with fear and/or approval; whether the child was being 'stared down' by defendant").

The record contradicts any such notion that the trial court based its factual findings on some unidentified "physical responses." To the contrary, the trial court did not base its decision on Charity Burns's demeanor at trial. Rather, on page 55 of the April 1 transcript, the trial judge stated that, "most importantly," he regarded the evidence from the forensic interview transcript with Jill Krol, *125a*, to effectively predetermine Mr. Burns's guilt in conjunction with its erroneous evidentiary ruling.

Contrary to the People's unsupported argument, the trial court's ruling was not a conclusion drawn from some sort of unimpeachable, firsthand observation. Instead, the trial court gave context to whatever his observations at trial might have been by relying on the "cold, black and white record" of the forensic interview transcript. The Court of Appeals looked at the

entire record, as it should have, and came away with a definite and firm conviction that the trial court had made an incorrect inference from the record.

There are countless examples in which the appellate courts of this State have permissibly assessed the factual findings of the lower court based upon the record and the law. In *People v Armstrong,* 490 Mich 281, 806 NW2d 676 (2011), after noting the "clear error" standard of review applicable to the trial court's factual findings, this Court reversed the Court of Appeals and trial court's determinations that no prejudice had resulted from the ineffective assistance of counsel defendant received.

In *Dust v Dep't of Transp,* 439 Mich 954, 481 NW2d 343 (1992), this Court noted that the findings of fact made by a trial judge may be set aside if "'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" (quoting *Tuttle v Dep't of State Hwys,* 397 Mich 44, 46, 243 NW2d 244 (1976)). In *Dust,* the Court of Appeals decision had not reflected a careful examination or evaluation of the record, but rather evinced a selective and argumentative statement of the record. 439 Mich at 957. The same cannot be said for the Court of Appeals in this case, which even noted its careful review of the record that failed to yield "any evidence" to support the application of MRE 804(b)(6).

Similarly, in *People v Burrell,* 417 Mich 439, 339 NW2d 403 (1983), the defendants challenged the trial court's ruling at a suppression hearing, arguing the police lacked reasonable suspicion. The ruling was subsequently affirmed by the Court of Appeals. This Court reversed, finding that a specific and reasonable inference of criminal activity could not "possibly" be drawn from the record.

In *People v Johnson,* 466 Mich 491, 647 NW2d 480 (2002), the trial court dismissed certain charges against a police officer on the basis of entrapment. The Court of Appeals affirmed. This Court reversed. Notably, in reversing, this Court explained its decision vis-à-vis the deference due to the lower court factual findings by noting that it was deciding a matter of law, which is directly applicable to the Court of Appeals primary ruling in this case, i.e., that, as a matter of law, the evidence presented by the prosecution and relied upon by the trial court did not constitute "coercion, undue influence, or pressure to silence testimony and impede the truth-finding function." *136a*, citing *Jones*, 270 Mich App 221.

In *McMillian v Vliet,* 422 Mich 570, 374 NW2d 679 (1985), which was a bench trial involving a shooting by a police officer, the trial court made a proximate cause determination that resulted in a verdict for the plaintiff, which was affirmed by the Court of Appeals. This Court reversed, noting, "[w]e are not convinced by the trial court's findings of fact that that court recognized and properly applied the principle that there may be more than one proximate cause of an injury." 422 Mich at 577-78. And, in *Mazur v Blendea,* 413 Mich 540, 321 NW2d 376 (1982), a shareholder suit, the trial court made findings of fact that resulted in dismissal of the suit, which was affirmed by the Court of Appeals. This Court reversed and, in the process, looked closely not only at the evidence supporting the trial court's decision, but also the evidence it apparently overlooked or to which it did not give weight.

In sum, the Court of Appeals was indisputably permitted to look at the entire record. While it is true that trial courts are due deference regarding their factual findings, their findings are not infallible. A reviewing court may always attempt to square the factual findings with the law. As the case law discussed above demonstrates, the Court of Appeals was free to find, and correctly found, that the meager evidence of wrongdoing presented to the trial court could not

reasonably be deemed to satisfy the stringent requirements of MRE 804(b)(6), and the trial court's finding to the contrary and admission of hearsay was therefore an abuse of discretion.

In addition, and perhaps most importantly, the People's argument that the Court of Appeals invaded the trial court's fact-finding province is centered on its argument that the trial court properly determined that there was wrongdoing, but says nothing about the specific intent requirement of MRE 804(b)(6) extensively discussed above, *supra* Issue I.

Regardless of whether the alleged wrongdoing could be or was properly found by the trial court, which Mr. Burns disputes, that still does not relieve the prosecution of its burden to prove, and the trial court of its obligation to find, by a preponderance of the evidence, that the alleged wrongdoing was done *with the specific intent* that Charity Burns be unavailable *to testify*. There was no evidence of intent presented by the prosecution, no finding of intent made by the trial court (which the People concede), and the Court of Appeals was certainly permitted to decipher that lack of evidence and finding from the record in determining that it was error to permit the disputed hearsay under MRE 804(b)(6).[20] *137a* ("the prosecutor failed to prove by a preponderance of the evidence that defendant engaged in wrongdoing, that the wrongdoing was intended to procure the victim's unavailability, and the wrongdoing did procure the victim's unavailability.").

[20] The lack of finding of intent and lack of evidence to support specific intent would be reason alone for this Court to affirm the Court of Appeals even if this Court were to disagree with the Court of Appeals' finding that the record did not contain adequate evidence of wrongdoing. *See York*, *supra*, 470 Mich at 33 ("The trial court and the Court of Appeals applied the wrong legal standards. However, because the Court of Appeals reached the correct result, we affirm the Court of Appeals decision for the reasons stated herein.").

IV. THE MEDICAL TREATMENT EXCEPTION TO HEARSAY UNDER MRE 803(4) DOES NOT APPLY AND, IN ANY EVENT, THE PEOPLE WAIVED THAT ARGUMENT.

Issue Preservation

The prosecution presented this issue for the first time in the Court of Appeals. The failure to present this issue in the trial court waives the issue for appellate review.

Standard of Review

Mr. Burns does not contest the prosecution's standard of review.

Discussion

The prosecution did not argue in the trial court, and the trial court did not decide, whether MRE 803(4) applied and, thus, as the Court of Appeals noted, the People waived that argument on appeal. *137a* (noting the waiver and only reviewing the arguments to the extent the necessary facts were available and the issues were questions of law). More importantly, the People's arguments lack merit.

As an initial matter, the Court of Appeals correctly noted that *People v Meeboer (After Remand),* 439 Mich 310. 484 NW2d 621 (1992), is a seminal case decided by this Court regarding the application of MRE 803(4) in sexual assault cases involving very young children, and that, as the *Meeboer* court explained, "it is *very important* that the understanding to tell the truth to the physician *be established.*" *138a*, (emphasis added) citing *Meeboer*, 439 Mich at 324.

The Court of Appeals concluded that, even if the People had preserved their argument, the prosecution failed, among other things, to address "any of the factors as indicative of the victim's understanding to tell the truth." *138a.* The same was true in *Meeboer*, which was a consolidation of two cases, where this Court held that the statements of six and seven- year-old victims were sufficiently reliable to be admitted under MRE 804(3), but the statements of a four-

year-old (which is the same age as Charity Burns was in this case when she made her statements) did "not adequately establish that this child knew she must speak truthfully to her physician." *Meeboer*, 439 Mich at 336.

The People's brief in this Court conspicuously fails to respond at all to the Court of Appeals' finding that it had failed to address the "very important" matter of whether it had been "established" that Charity Burns understood the need for telling the truth to the SANE nurse. This shortcoming alone warrants affirmance of the Court of Appeals' decision.

Instead of addressing its failure to establish that Charity Burns understood the need to tell the truth, or try to establish it now (which they cannot), the People, in their brief, skip right to the 10 factors discussed in *Meeboer*. The People claim that, although they did not cite *Meeboer* or delineate the factors in any organized manner in their brief to the Court of Appeals (as they have now tried to do in their brief to this Court), all of the information necessary to support their argument was contained somewhere within "the record on appeal and/or in the People's brief on appeal." *People's Brief p 45*. But it is a well-settled principle of appellate practice in this State that "[i]t is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *In re Contempt of Henry*, 282 Mich App 656, 670; 765 NW2d 44 (2009), citing *Wilson v Taylor,* 457 Mich 232, 243, 577 NW2d 100 (1998), quoting *Mitcham v Detroit,* 355 Mich 182, 203, 94 NW2d 388 (1959).

Moreover, several of the factors indicate the *unreliability* and *inadmissibility* of Charity Burns's alleged statements to the SANE nurse. Most obviously, Charity Burns's "infirmity, her youth" (as spoken by the trial judge, *127a*) shows that factor 1 (the age and maturity of the

declarant) militates in favor of unreliability, which was the case in *Meeboer* as well with respect to a victim of the same age as Charity Burns (four years old). The People try to use factor 4 (use of terminology unexpected of a child of similar age) to their benefit by claiming that, in January 2010, Charity Burns "began talking about sex and an imaginary friend, *People's Brief pp* 43-44, yet they provide no link to that alleged unexpected speech and her statements to the SANE nurse in September 2010, and they provide no specifics of the "terminology" allegedly used. For factor 5 (who initiated the examination), the People concede that the police *had already been contacted and a forensic interview already conducted* before Charity Burns "was taken" for a physical examination and an interview by the SANE nurse. *People's Brief p 44*; *see also Meeboer*, 439 Mich at 325 ("prosecutorial initiation of the examination may indicate that the examination was not intended for purposes of medical diagnosis and treatment.").

For factor 6 (the timing of the examination in relation to the assault), which may indicate that "the child is still suffering pain and distress," *Meeboer*, 439 Mich at 325, the People concede that Charity Burns met the SANE nurse on September 7, 2010, which was just six days after the forensic interview on September 1, 2010 and less than three weeks after the alleged abuse of August 19, 2010, shortly after which the police were first contacted. *People's Brief p 44*. The temporal proximity between the alleged abuse, police involvement and forensic interview on the one hand, and the examination by the SANE nurse on the other, indicate unreliability.

Finally, the inconsistencies in Charity Burns's statements indicate unreliability. As discussed, *supra*, Charity Burns at times indicated she was telling the truth and at other times indicated her statements were "a lie" and that she was being "silly". She also stated that she would get introuble if she told but that she would not actually get in trouble. The Court of

Appeals correctly found "the prosecution has failed to establish that her out-of-court statements to the SANE nurse were reliable and, thus, admissible under MRE 803(4).

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant David Barry Burns asks that this Honorable Court affirm the Court of Appeals in its decision to reverse his conviction and remand to the trial court for a new trial.

Respectfully submitted,

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