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### Anderson (Arnold) v. State, 135 Nev. Adv. Op. 37 (Sept. 5, 2019)

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## CRIMINAL LAW

### **Summary**

The Court held that if a trial court determines by a preponderance of the evidence that a witness is unable to testify because the defendant wrongfully procured the witness's unavailability and acted with intent to do so, the forfeiture-by-wrongdoing exception can be applied in order to deny a defendant's rights under the Confrontation Clause of the Sixth Amendment. The Court also held that in determining whether the forfeiture-by-wrongdoing exception applies, the trial court must hear the opposing parties' arguments in the absence of a jury.

### **Background**

Upon shooting Terry Bolden ("Bolden") in the chest, head, and leg outside of a Las Vegas apartment complex, Appellant Arnold Anderson ("Anderson") was charged with attempted murder with use of a deadly weapon, robbery with use of a deadly weapon, and battery with use of a deadly weapon resulting in substantial bodily harm. Anderson's daughter, Arndaejae Anderson ("Arndaejae"), and Bolden's girlfriend, Rhonda Robinson, were witnesses to the criminal act and confirmed, along with Bolden, that Anderson shot Bolden.

In addition to committing a criminal act, Anderson instigated complications during his five-day trial. On the second day of his trial, the Court discovered that Anderson had called his incarcerated daughter to ask that she become untraceable and to abandon her phone. Although Anderson explained that he had not spoken with his daughter but rather someone else, the State presented convincing evidence that the defendant had spoken with her, including the phone call which had been recorded from the jail telephone and evidence of previous use of the phone number to contact his daughter on her birthday. Whether Arndaejae's disappearance was a result of this phone call or not, the State had been unable to locate her and she was therefore absent for Anderson's trial.

The trial court determined that the State had shown, by a preponderance of the evidence, that Anderson had deterred Arndaejae from testifying. For this reason, Mark Raflovich, the Clark County District Attorney Office's investigator, testified on the daughter's behalf under the forfeiture-by-wrongdoing exception. He explained that Arndaejae had not only seen her father shoot the victim but that Anderson had also told her to lie about where he was. The Court found Anderson guilty of attempted murder and battery and sentenced him to 20-50 years in prison. Anderson appealed.

### **Discussion**

*Preponderance of the evidence is the appropriate standard of proof*

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<sup>1</sup> By Alexandra Matloff.

Under the Sixth Amendment’s Confrontation Clause, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>2</sup> However, under the forfeiture-by-wrongdoing exception, the defendant may be denied this right if he or she wrongfully procured the witness’s unavailability and acted with intent to do so.

However, neither the Supreme Court nor the Supreme Court of Nevada had established the burden of proof required to enforce this exception prior to this case. Here, the Court examined whether the clear-and-convincing-evidence standard or the preponderance of the evidence standard would be the appropriate burden of proof to decide whether the forfeiture-by-wrongdoing exception should be applied. Upon examining several cases, the Court concluded that preponderance of the evidence was a more appropriate standard for several reasons. First, because the clear-and-convincing evidence standard is more relevant to decisions based on evidence, the standard would not be appropriate for determining the application of this exception as evidence is not at issue in applying the forfeiture-by-wrongdoing exception. Second, a lower burden of proof as established by the preponderance-of-the-evidence standard would be more appropriate in helping to encourage people to abide by the rules in criminal proceedings. Finally, because the forfeiture-by-wrongdoing exception is narrowly construed, a higher standard would not safeguard a defendant’s rights under the Sixth Amendment’s Confrontation Clause. Therefore, the Court held that the appropriate standard of proof to be used to establish the forfeiture-by-wrongdoing exception would be preponderance of the evidence.

*The trial court did not err in its application of the forfeiture-by-wrongdoing exception to admit Arndaejae’s out-of-court statements*

For the forfeiture-by-wrongdoing exception to apply, the Court must establish by a preponderance of the evidence that the defendant wrongfully procured the witness’s unavailability and acted with intent to do so. Furthermore, the decision must be made by hearing opposing parties’ arguments in the absence of a jury. Additionally, the Court must identify whether a defendant demonstrates passive acquiescence or affirmative action when a witness becomes unavailable to testify in court. The forfeiture-by-wrongdoing exception may only be applied if the defendant exceeds acquiescence in regards to a witness’s unavailability. Additionally, circumstantial evidence is sufficient to establish the connection between the actions of the defendant and the disappearance of the witness.

Here, the forfeiture-by-wrongdoing exception was correctly applied by the trial court because Anderson’s actions exceeded passive acquiescence. More specifically, Anderson’s recorded phone call to his incarcerated daughter established by a preponderance of the evidence that the forfeiture-by-wrongdoing exception must be applied. His request that she abandon her phone to help her become untraceable showed he wrongfully procured the witness’s unavailability from the State and acted with intent to prevent her from testifying. Therefore, the Court affirmed the trial court’s decision to apply the forfeiture-by-wrongdoing exception which would allow Arndaejae’s assertions made outside the courtroom to be admitted into evidence.

## **Conclusion**

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<sup>2</sup> U.S. CONST. amend. VI.

The Court held that the appropriate standard of proof to be used to establish the forfeiture-by-wrongdoing exception would be preponderance of the evidence because this exception would not be determined based on evidence and a lower burden of proof would be more applicable. Additionally, the trial court was correct to apply the forfeiture-by-wrongdoing exception because Anderson's actions exceeded passive acquiescence when his daughter became unavailable to testify at his trial. Therefore, this Court affirmed the trial court's decision.