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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,)
)
 Appellant-Plaintiff,)
)
 vs.) No. 49A05-1010-CR-698
)
 DANNY LEFLORE,)
)
 Appellee-Defendant.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Clark H. Rogers, Judge
Cause No. 49G17-1006-FD-47677

March 3, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

The State of Indiana appeals from the trial court's denial of its motion to use pre-trial statements of witnesses who had been excluded. The State presents one issue for our review: Did the trial court abuse its discretion in excluding witnesses' pre-trial statements where the unavailability of the witnesses may have been procured by Danny LeFlore (the accused)?

We reverse and remand.

On June 16, 2010, the State charged LeFlore with Count I, battery on a child (S.T.) as a class D felony, Count II, battery on an adult (Bessie Bland) as a class A misdemeanor, and Count III, criminal recklessness as a class B misdemeanor. At the initial hearing, the trial court set the omnibus date for August 20, 2010. On August 20, 2010, LeFlore moved to exclude S.T. and Bland as witnesses due to their failure to appear for depositions (scheduled for August 4, 2010) and taped statements (scheduled for August 18, 2010). For the reasons asserted, the trial court granted LeFlore's motion on August 24, 2010.

On August 24, 2010, the State, in light of the court's exclusion of witnesses, filed a written request to use out-of-court statements of S.T. and Bland, arguing that LeFlore forfeited his right to confrontation through his efforts to keep S.T. and Bland from testifying. Specifically, the State maintained it had discovered that LeFlore (by indirect contact) had violated the no-contact order in place for both of the victims when he engaged in telephone conversations with Rochelle Tolden, S.T.'s mother and Bland's daughter, about how to keep S.T. and Bland from attending court proceedings. The State supplemented its request on August 26, 2010 and included transcripts of some of the telephone conversations between LeFlore and Tolden.

In an order dated August 26, 2010, the trial court denied the State's request to use out-of-court statements, finding that the State's motion was untimely because it was filed after the omnibus date. The court also addressed the merits of the State's motion and ruled "it doesn't matter the reason the person isn't able to testify, that according to *Crawford v. Washington*, 124 S.Ct. 1354 (U.S. Sup. Ct. 2004) [LeFlore] has the absolute right to confront witnesses. The Court finds that the State's motion would violate [LeFlore]'s right of confrontation." *Appellant's Appendix* at 45.

During a hearing on August 27, 2010, the State made an oral motion for the court to reconsider its ruling. At the conclusion of the hearing, the court denied the State's motion to reconsider. The parties returned for a hearing on September 14, 2010 so the State could make an offer to prove. In its offer to prove, the State submitted again that LeFlore had forfeited his right of confrontation as to S.T. and Bland through his efforts to keep both of them from attending court proceedings, which in turn resulted in their being excluded as witnesses and therefore unavailable for cross-examination. On that same day, the State also filed a motion to correct error, which the trial court immediately denied.¹ The State now appeals.

The State argues that the trial court erred in basing its ruling on the fact that the State filed its motion to use out-of-court statements after the omnibus date, and therefore, that the request was untimely. The purpose of the omnibus date is to establish various deadlines as

¹ After the trial court denied the State's motion to correct error, the State moved to dismiss the charges against LeFlore, which motion the trial court granted.

provided by statute. *See* Ind. Code Ann. § 35-36-8-1(b) (West, Westlaw through 2010 2nd Regular Sess.). The omnibus date does not set a deadline for the filing of a motion to use out-of-court statements in lieu of testimony. Moreover, it would not make sense for the omnibus date to set a deadline for such a motion because often a party will not know that a witness is unavailable until the day of trial when the witness does not show. Here, the State's motion was not necessary until after the trial court ruled on August 24 (four days after the omnibus date) to exclude the witnesses from trial. The State's motion to use out-of-court statements was not untimely simply because it was filed after the omnibus date. LeFlore concedes this point and rightfully so.

The State also argues that the trial court erred in denying its motion to use the out-of-court statements on grounds that such would violate LeFlore's constitutional right of confrontation. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause of the Sixth Amendment to the Federal Constitution prohibits admission in a criminal trial of testimonial statements by a person who is absent from trial, unless the person is unavailable and the defendant had a prior opportunity to cross-examine the person. *See also Fowler v. State*, 829 N.E.2d 459 (Ind. 2005), *cert. denied*, 547 U.S. 1193 (2006). The Supreme Court noted, however, that the right to confrontation is not absolute because a defendant can forfeit the right. *Crawford v. Washington*, 541 U.S. 36. The Indiana Supreme Court has adopted this notion, stating that a party who has rendered a witness unavailable for cross-examination through a criminal act, e.g., homicide, may not object to the introduction of hearsay statements by the witness on Confrontation Clause grounds. *Fowler v. State*, 829 N.E.2d 459 (citing *Untied States v. Emery*, 186 F.3d 921 (8th

Cir. 1999)). The rule of forfeiture by wrongdoing “extinguishes confrontation claims on essentially equitable grounds. . . .” *Crawford v. Washington*, 541 U.S. at 62. Our Supreme Court has agreed and stated that it has “long been recognized that the defendant can forfeit the right to confrontation.” *Fowler v. State*, 829 N.E.2d at 467.

Here, the two witnesses were unavailable for trial because the trial court excluded them as witnesses after they failed to appear for depositions. LeFlore, therefore, did not have the opportunity for cross-examination. The trial court, finding that LeFlore has an “absolute right to confront witnesses,” denied the State’s request to use out-of-court statements of the excluded witnesses. *Appellant’s Appendix* at 45. The court’s belief that the right of confrontation is absolute served as the basis for its denial. The court simply refused to consider the State’s argument with regard to whether LeFlore may have forfeited his right of confrontation finding that the reason for the unavailability “doesn’t matter.” *Id.* Even after the State submitted its offer to prove outlining its evidence in support of its argument that the unavailability of the witnesses was procured by LeFlore’s own conduct, the trial court refused to reconsider its ruling and immediately denied the State’s motion to correct error.

Having reviewed the record before us, we find that the trial court erred by failing to consider the State’s argument regarding forfeiture of the right of confrontation. We therefore reverse the ruling of the trial court and remand with instructions that the trial court hear the State’s evidence and make a determination as to whether LeFlore’s conduct rendered the witnesses unavailable for cross-examination and thus, whether LeFlore forfeited his right to confrontation.

Judgment reversed and remanded.

MAY, J., and MATHIAS, J., concur.