69707-2

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NO. 69707-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL PEREZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **The State's flawed analysis does not prove the statements from the alleged victim were nontestimonial.**

a. An objective, de novo review of the circumstances shows Mr. Hindal's statements came after the emergency had passed based on questioning intended to further an investigation.

The parties agree that this Court reviews the following factors to determine whether statements by a non-testifying witness are testimonial:

> (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant.
>
> (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency.
>
> (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial.

> (4) What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009) (adopting test from and citing *Davis v. Washington*, 547 U.S. 813, 827, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)) (footnote omitted); *id.* at 417 (review is de novo); *Michigan v. Bryant*, __ U.S. __, 131 S. Ct. 1143, 1156, 179 L. Ed. 2d 93 (2011) (objective inquiry); *see* Resp. Br. at 7-8. The State misapplies this criteria, however, to arrive at the faulty conclusion that Mr. Hindal's unsworn and untested statements to officers and medical responders after an emergency had passed and the investigation begun were nontestimonial and admissible against Mr. Perez without cross-examination.

The State's flawed analysis commences with an erroneous shorthand of the first factor. The *Koslowski* test looks to whether the speaker was "speaking about current events as they were actually occurring, requiring police assistance, or was [the speaker] describing past events?" *Koslowski*, 166 Wn.2d at 418. While the amount of time that has elapsed since the event is relevant to this inquiry, it is not the crux of the inquiry. The timing of the related information in comparison to the event must be considered along with whether the

information conveyed indicates a concluded event. The State glosses over this critical inquiry when comparing *Koslowski*, *State v. Ohlson*, 162 Wn.2d 1, 15, 168 P.3d 1273 (2007), and the facts of McCottry set forth in *Davis*. Resp. Br. at 9-10. The facts of Mr. Hindal's statements more closely mirror *Kowlowski* than *Ohlson* or *State v. Reed* when examined under the accurate criteria. *Compare Koslowski*, 166 Wn.2d at 422, 424 (describing past event although robbers were still at large and only a short amount of time had passed, where robbers had left scene without indication they might return); *with State v. Reed*, 168 Wn. App. 553, 565-66, 278 P.3d 203 (2012) (first factor weighs in favor of finding of nontestimonality where speaker indicated the perpetrator was threatening her at that moment, had assaulted her within minutes of placing the call, and the conversation focused on the speaker's location in order to provide assistance for an ongoing emergency); *Ohlson*, 162 Wn.2d at 5-6, (first factor indicates nontestimoniality where provided in close proximity to incident in which perpetrator had twice returned to scene to harass speakers and had not been located or identified).

Moreover, in regard to this first factor, the State provides misleading information about the amount of time that passed between

the alleged incident and Mr. Hindal's statements. Resp. Br. at 10-11 (indicating "officers contacted Hindal within 5 to 10 seconds of being alerted"). Mr. Perez was apparently in the laundry room for six minutes—no evidence shows when within that time the alleged incident occurred. Vol. II Insert RP 46-48; Exhibit 3 at 10:34:47 to 10:40:42. Further, Mr. Hindal did not emerge until more than 30 seconds after Mr. Perez left. Exhibit 4 at 10:41:21. It took the officers at least another minute to notice Mr. Hindal and enter the dayroom. Exhibit 4 at 10:42:26 to 10:43:00. The questioning then lasted several minutes. *E.g.*, Exhibit 4 at 10:42:26 to 10:45:47 (when video ends, responders were still questioning Hindal). Thus, at least minutes, not seconds, had transpired since the alleged incident. This factor weighs in favor of the statements being testimonial.

Contrary to the State's argument, the second factor also shows Mr. Hindal's statements were testimonial. A reasonable listener would conclude that the danger had passed, not that Mr. Hindal was facing an ongoing emergency requiring assistance. Mr. Hindal was physically separated from Mr. Perez. Mr. Perez was in a secure facility with physical barriers, under the control of prison officials. Unlike in *Ohlson*, the alleged perpetrator no longer posed an active threat of

harm. 162 Wn.2d at 15; *see Davis*, 547 U.S. at 817-18, 827 (bona fide physical threat remained where speaker indicated "He's here jumpin' on me again. . . . He's usin' his fists."). The State indicates that the potential ongoing threat from an unsecured weapon is relevant. Resp. Br. at 12, 14. But the cloth bed sheet purportedly used in the attack remained in the dayroom with Mr. Hindal, not with Mr. Perez. Vol. II RP 61; Vol. II Insert RP 90-92; Exhibit 3 at 10:42:49, 10:43:58. Moreover, the State does not proffer why "the exchange between Hindal and the officers indicated Hindal was seeking aid from the assault." Resp. Br. at 14. Rather, as Sergeant Walters testified, "we were no longer dealing with a medical emergency; we were dealing with an assault. It kind of ups [our inquiry.] We've got evidence; we've got a crime scene; we've got video." Vol. II RP 48. Sergeant Wlaters was investigating, not resolving an ongoing emergency. Further, Mr. Hindal's statements were of no import to the medical responders. Vol. II RP 80. A reasonable listener would conclude Mr. Hindal was no longer facing an ongoing emergency requiring immediate aid, but recounting a past event for evidentiary purposes.

The State's analysis of the third factor, which looks at what was asked and answered, at best shows the statement "Perez" and possibly

"he tried to kill me" were nontestimonial, but the State's argument does not support the same conclusion for the extensive remainder of Mr. Hindal's statements. *See* Resp. Br. at 15-17. The interrogation of Mr. Hindal continued well beyond these initial questions and responses and well after any threat had ended. Mr. Hindal had calmed down and taken a seat at one of the tables. Vol. II RP 40-41, 57-58; Exhibit 4 at 10:42:26 to 10:42:42. At least eight medical responders and officers surrounded and loomed over the seated Mr. Hindal, interviewing him and collecting evidence. Exhibit 4 at 10:43:28 to 10:45:47. In response to unspecified questioning that Sergeant Walters called "an investigation," Mr. Hindal provided an extensive narrative: he was reading a book while performing his laundry porter duties, when he was attacked from behind; it felt like a dream; once the rope went around his neck he tried to grab it so he could breathe; then he was able to turn around and saw Mr. Perez; at which time, he began hitting Mr. Perez. Vol. II RP 61-63; Vol. II RP 112-13. Mr. Hindal "was rambling on a lot of stuff, there was just a lot of stuff he was saying." Vol. II Insert RP 90. This third factor also points to testimonial statements.

Finally, the "interrogation" was formal in light of Sergeant Walters looming over Mr. Hindal, pacing and shifting his weight; the

number of personnel surrounding Mr. Hindal; the simultaneous gathering of evidence; and the subsequent request that Mr. Hindal reduce the same statement to written form. *Compare* Exhibit 4 at 10:43:00 to 10:45:47; Exhibit 3 at 10:43:29 to 10:45:48; Vol. II RP 63, 92; Vol. II Insert RP 90-92 *with* Resp. Br. at 17-18.

The State claims that Mr. Hindal's statements were not testimonial because there was more than one explanation for Mr. Hindal's injuries that the officers needed to resolve. Resp. Br. at 19. But the State blurs the line between resolving an ongoing emergency and an investigation. The officers at the prison knew Mr. Hindal was removed from whatever the initial threat was and the prison was on lockdown. Within seconds they learned Mr. Perez was the alleged perpetrator, and officers were sent to ensure he was secured. *E.g.*, Vol. II RP 60-61. The remaining questions and answers were, in Sergeant Walters own words, "an investigation." Vol. II RP 63. The emergency had ended and investigation and evidence gathering had begun. *E.g.*, Vol. II RP 48, 80. The admission deprived Mr. Perez of his constitutional right to confront the witness against him. He had no opportunity to cross-examine Mr. Hindal. The result was that the State was allowed to present a one-sided, untested account of the alleged

attempted murder. The constitution demands greater protection of the accused.

b. <u>The State offers no argument that the admission was harmless.</u>

As set forth in Mr. Perez's opening brief, the State appropriately conceded at trial that the admission of Mr. Hindal's statements was critical to its case. Op. Br. at 26-28 (citing Vol. I RP 95-96). Thus it is not surprising that the State also provides no argument in its response brief that any error in the admission of Mr. Hindal's statements was harmless beyond a reasonable doubt. *See Koslowski*, 166 Wn.2d at 431; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967). This Court should accept the State's concession. *See* Op. Br. at 26-28 (demonstrating why State cannot demonstrate admission was harmless beyond a reasonable doubt); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (issue conceded where no argument set forth in response).

2. **Admission of Mr. Hindal's statements was also an abuse of the trial court's discretion because they do not fall under the narrow exception for excited utterances.**

Even if Mr. Hindal's statements were nontestimonial, they were hearsay that were improperly admitted under the excited utterances

exception. To meet that narrow exception, the proponent of hearsay under this exception must satisfy three closely-connected requirements: "that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition." ER 801(c), 802, 803(a)(2); *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007) (citation omitted). Mr. Hindal's statements to the officers and responding medical personnel came at least minutes after the alleged startling event; the testifying officers recognized Mr. Hindal had calmed down when he provided the statements; and his statements came in the form of a lengthy, composed narrative. Exhibit 3 at 10:40:42; Exhibit 4 at 10:41:21-10:45:47; Vol. II RP 40-42, 47, 57-58, 61-62.

Nonetheless, the State argues Mr. Hindal's untested statements constitute an excited utterance. The State incorrectly asserts that Mr. "Hindal was staggering around the dayroom, unable to speak for a time." Resp. Br. at 22, 24. The video exhibits and the officers' testimony show that this activity occurred <u>before</u> the officers arrived and <u>before</u> the statements were made. Within six seconds of their arrival, Mr. Hindal was calm, seated at a table, and able to speak

normally. Vol. II RP 42, 47, 61-62; Exhibit 4 at 10:41:21-10:45:47. Mr. Hindal's state at the time he made the statements is critical to determining whether they are admissible as a hearsay exception.

Moreover, the State claims Mr. Hindal "spontaneously" stated "he tried to kill me," yet recognizes in that same sentence that Mr. Hindal's statements were made in response to the officers' questioning. Resp. at 25. This fact also weighs against a finding of reliability.

The evidence also does not support the State's proffered basis for Mr. Hindal's "repeatedly put[ting] his head down and rais[ing] it" again. Resp. Br. at 25. Nothing about that action inherently supports a theory that Mr. Hindal remained under the excitement of a startling event such that he could not fabricate; in fact, the gesture more likely suggests Mr. Hindal's frustration with the officers' interrogation.

Finally, it is notable that, here too, the State fails to rebut the argument that admission of Mr. Hindal's statements was prejudicial. Again, the Court should accept the State's concession and reverse the conviction because it rested on the erroneous admission of hearsay. Op. Br. at 33-34 (citing Vol. I RP 95-96); *Ward*, 125 Wn. App. at 144.

3. **Where Mr. Perez was not charged with second-degree murder, it was misleading and confusing and diluted the burden of proof on the offense charged to provide the jury with a to-convict instruction regarding second-degree murder.**

The jury instructions were misleading, fostered confusion, and diluted the burden of proof because an additional to-convict instruction was included for an uncharged act—second degree murder. Op. Br. at 34-40; CP 126. Contrary to the State's argument, Mr. Perez does not allege that the error prevented him from arguing his theory of the case. *See* Resp. Br. at 28. But that is not the only standard by which jury instructions are measured. *See, e.g.*, *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007) (instruction erroneous if it misstates or dilutes burden); *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005) (instructions cannot mislead jury); *State v. LeFaber*, 128 Wn.2d 469, 473, 932 P.2d 1237 (1997) (instructions must be manifestly apparent to average juror). Mr. Perez challenges the instruction as misleading, confusing and diminishing the State's burden.

The jury must presume each instruction has meaning. *State v. Hutchinson*, 135 Wn.2d 863, 884, 959 P.2d 1061 (1998). Here, the court provided three to-convict instructions complete with language instructing the jury to find each element beyond a reasonable doubt and

how to return a verdict. Yet, the court intended that the jury only follow those instructions for the assault and attempted murder counts—not for the second-degree murder instruction. That dissimilitude would not be manifestly apparent to the average lay person. *LeFaber*, 128 Wn.2d at 473.

Moreover, Mr. Perez does not contend he was convicted of the incorrect crime. Resp. Br. at 30. Rather, the error likely caused the jury to convict him of the charged offense under an improper standard—ignoring the requirement that each element be proved beyond a reasonable doubt, misunderstanding that the unanimity requirement applied to both a guilty and not guilty verdict, or miscomprehending the elements of second degree murder.

As set forth in the opening brief, the instructional error was not harmless beyond a reasonable doubt. Op. Br. at 27-28, 38-40. Accordingly, the Court should reverse Mr. Perez's conviction and remand for a fair trial.

4. **The judgment and sentence should be cleansed of all reference to the merged assault count.**

Mr. Perez relies primarily on the argument in his opening brief that the judgment and sentence should be cleansed of all reference to the merged assault count. Op. Br. at 40-42. Under *State v. Turner*, the

trial court "'should enter a judgment on the greater offense only and sentence [Mr. Perez] on that charge <u>without reference to the verdict</u> on the lesser offense.'" 169 Wn.2d 448, 463, 238 P.3d 461 (2010). The State relies on *State v. Fuller* to oppose Mr. Perez's request that the judgment contain no reference to the merged assault charge. Resp. Br. at 36 (citing *State v. Fuller*, 169 Wn. App. 797, 282 P.3d 26 (2012)). But in *Fuller*, the judgment and sentence did not reflect the merged count. The lower court "entered a written judgment and sentence/stating that Fuller Was convicted of one count of first degree murder." *Fuller*, 169 Wn. App. at 835. Thus, that appellant was not seeking the relief sought here—a new judgment and sentence that lacks reference to the merged count. In fact, in its reasoning, *Fuller* supports Mr. Perez's reading of *Turner*. *Id.* at 832-35 (no double jeopardy violation where judgment references <u>only</u> the greater count). *Turner* and *Fuller* support Mr. Perez's requested relief; the Court should remand with directions to enter a corrected judgment and sentence.

B. <u>CONCLUSION</u>

As set forth above and in Mr. Perez's opening brief, Mr. Perez's conviction should be reversed because objective, de novo review shows the admission of the alleged victim's statements to multiple officers

and other responders after the emergency had passed violated Mr. Perez's constitutional right to confront a witness against him. Alternatively, admission of the same statements under the excited utterance exception to the hearsay prohibition is a separately sufficient ground to reverse. Finally, the conviction should be reversed because providing a to-convict instruction on the uncharged and unproved act of murder was prejudicial error.

Even if the conviction is not reversed, the judgment and sentence should be remanded to remove reference to the vacated assault conviction.

DATED this 4th day of November, 2013.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

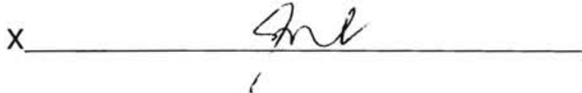
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 69707-2-I
	)	
	)	
DANIEL PEREZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	MARY KATHLEEN WEBBER, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________
[X]	DANIEL PEREZ 888274 MONROE CORRECTIONAL COMPLEX PO BOX 514 MONROE, WA 98272-0514	(X) ( ) ( )	U.S. MAIL HAND DELIVERY __________

SIGNED IN SEATTLE, WASHINGTON, THIS 4TH DAY OF NOVEMBER, 2013.

X 

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