73740-6

COA No. 73740-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON GARCIA,

Appellant.

FILED
Jun 22, 2016
Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George F. Appel

REPLY BRIEF

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2. Testimonial. As a matter of law, the 911 conversation was testimonial (violating confrontation) because there was no ongoing emergency and the declarant, although speaking on the telephone with 911 authorities, was doing so at 911's request, he was answering questions similar to making a narrative statement, and the trial court found that Losey understood he was "snitching" – circumstances that show a person would reasonably understand his statements would be used prosecutorially.

B. REPLY ARGUMENT

1. Hearsay - Although the recording of the 911 call is pertinent because it shows declarant Bret Losey's complete lack of agitation, the question presented is a matter of law based on the trial court's own oral findings.

A trial judge must act within the discretion accorded by the applicable evidence rule, and the appellate courts will review the

interpretation of an evidentiary rule *de novo* as a question of law. State v. Gunderson, 181 Wn. 2d 916, 921-22, 337 P.3d 1090 (2014).

The initial question presented is whether, as a matter of law, Bret Losey made an "excited utterance" when, *after* the motel clerk called 911 and described Losey's claim of a robbery in a guestroom, the operator asked to speak with Losey, and then began asking him questions about the alleged incident.

Mr. Garcia has provided the 911 recording itself, but the legal argument at hand is whether the trial court's findings are incompatible with deeming the recording an excited utterance. The recording of Mr. Bret Losey's answers to the 911 operator, however, does show him to be extremely calm, if not laconic. AOB, at pp. 10-12; Unredacted CD.

The Respondent urges that this is immaterial because "people's stress response . . . varies widely from person to person." BOR, at p. 16. But the excited utterance rule requires that a person must indeed be under excitement or agitation, as a result of the event. Whether a person is, or is not excited or agitated, is fundamentally pertinent, including by assessing their actual oral statement, which in this case is recorded and available for listening

by this Court in exactly the same form as the trial court listened to it. Unredacted CD; 5/4/15RP at 12-17. The declarant's state of upset, or lack thereof, is material. State v. Strauss, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992) (trial courts should consider the declarant's observable level of emotional stress when making the statement); State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (issue is whether excitement from the event existed so as to still the declarant's reflective faculties); see also State v. Dixon, infra.

Here, the central question in the present appeal is whether, as a matter of law and considering all the undisputed facts, the court's finding that Mr. Losey commenced the 911 conversation in a "fairly measured" state, and then (in the court's reasoning) developed the agitation necessary for the excited utterance exception when he began contemplating that he might face consequences for "snitching," was error as a matter of law. The trial courts' only other basis for finding an excited utterance was the purely chronological time *proximity* of the described event that the defendant was answering questions about, which in itself, is not determinative, and in this case is entitled to no weight, because the court made clear it was relying on the short passage of time alone,

not on the issue whether any excitement of the event (none was shown) endured over that time. AOB, at p. 15.

To begin with, Mr. Losey did not cry out excitedly, that is, he did not make any spontaneous utterance whatsoever. *Mr. Losey did not call 911*. The motel room clerk telephoned 911. The 911 operator, after talking with the clerk for a period of time, then asked to speak with Mr. Losey. The Respondent cites no case in which someone else has reported the crime to the listener, and then the declarant spoke with the listener at the listener's request, by answering questions posed, in which the statement has been deemed an excited utterance.

The Respondent is correct that the case of State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984), involved a *written* statement requested by the police (deemed inadmissible), rather than an *oral* statement as here. BOR, at p. 15 (citing AOB, at p. 16). However, as argued, that case's discussion of the rationale of ER 803(a)(2), by this Division of the Court of Appeals, sets forth the rule that the requirement of excitement must be applied properly, i.e., restrictively enough that reliability is ensured by showing "stressful circumstances [which] operate to temporarily overcome the ability to reflect and consciously fabricate." State v. Dixon, 37

Wn. App. 867, 872-73, 684 P.2d 725, 728 (1984); AOB, at pp. 16-17.

As a matter of law, the court's findings in the present case compel only one reasonable determination – just like the declarant in Dixon who was requested to make a written statement, Mr. Losey, when he was requested to come to the telephone by the operator in order to answer questions, was not spontaneously putting forth an utterance whose making was the product of the excitement of the event itself, rather, he was giving a narrative report of an incident, in response to being asked to do so by authorities. See Dixon, 37 Wn. App. at 872-74. The trial court abused its discretion.

2. Confrontation clause – the statement was testimonial.

As Mr. Garcia argued, his case is unlike State v. Ohlson, 162 Wn.2d 1, 5-6, 18-19, 168 P.3d 1273 (2007) (defendant tried to run over the victim at 45 miles per hour, and he then repeatedly drove back and forth past the person, yelling general racial slurs). AOB, at pp. 25-26.

There, there was deemed to be an ongoing emergency even though assailant had briefly fled scene because he had repeatedly been coming and leaving the area where he threatened victim.

Pursuant to analysis under Ohlson, in the present case, (1) the timing of the statement was, concededly, temporally soon after the incident (although the trial court found that the agitation arose later), (2) there was no threat of harm to anyone, (3) there was no need to resolve a present emergency, and (4) the formality of the interrogation showed a reasonable person would understand their statements could be used prosecutorially. Ohlson, supra, 162 Wn.2d at 12. See also State v. Williams, 136 Wn. App. 486, 503, 150 P.3d 111 (2007) (911 call was proved non-testimonial including because caller stated they were in actual danger, and gang assailants roved neighborhood); State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (911 call was non-testimonial because caller called needing medical help moments after assault by husband, who was walking outside the apartment).

The Respondent appears to be contending that anytime a person reports a crime and the alleged perpetrator is no longer at the scene, this is an ongoing emergency. This is contrary to case law. AOB, at pp. 20-21; see, e.g., Davis v. Washington, 547 U.S. 813, 822, 830, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (when a questioner seeks to determine from the person, not what is

happening, “but rather what happened,” the statements are testimonial).

As with the hearsay issue, the Respondent significantly underplays the fact that the motel clerk made the call to 911, and thereafter, Mr. Losey is summoned to the telephone, where he is asked to describe the events and the perpetrators. There were no injuries, something that was confirmed twice during the call. Unredacted 911 CD. Instead of calling for help, Losey demonstrates his reflection on the matter, including his calculation that his description of the perpetrator will be successful to apprehend him, telling the operator, “So, he’s uh duh, definitely you can get him.” Unredacted 911 CD, at time point 3:38-42.

Ultimately, Losey affirmatively shows is aware that he is “snitching” – i.e., bearing witness against a person. Unredacted 911 CD, at time point 3:28 to 3:30. Losey is making a series of statements to the 911 operator that demonstrate his knowledge that they will result in the alleged suspect being apprehended, and prosecuted on criminal charges. Objectively viewed, a listener could only conclude that Mr. Losey was making statements that he “would reasonably expect to be used prosecutorially.” Crawford v.

Washington, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Additionally, as argued, the case of Michigan v. Bryant makes clear that the objective reasonable understanding of the parties to the incident determines whether a statement carried a purpose to either meet an ongoing emergency, or make a report or statement about the recent event. AOB, at pp. 20, 26. In Bryant, it appeared to the police that the declarant, as he lay on the ground bleeding, was describing the actions of someone who had just shot him for no reason, and then departed, armed. Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 1150, 1158, 179 L.Ed.2d 93 (2011). As the Court stated when contrasting earlier cases,

> [b]ecause Davis and Hammon were domestic violence cases, we focused only on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat to *them*. [emphasis in Bryant] 547 U.S., at 827, 829–830, 126 S.Ct. 2266. Domestic violence cases like Davis and Hammon often have a narrower zone of potential victims than cases involving threats to public safety. An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.

Michigan v. Bryant, 562 U.S. at 363 (citing Davis and Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)). In contrast, the present case is a robbery, allegedly committed by one (or two, depending on which story one believes) fellow acquaintance drug user(s), that the caller Mr. Losey actually knew, who then fled the area by car after attempting to get Losey and his girlfriend to wait so he (or they) could escape undetected. There were no circumstances, stated by the declarant Losey, or assessed by the 911 operator, that reasonably showed the ongoing emergency of looming harm to others or the public that the Bryant Court emphasized when it ruled the bleeding man's statements admissible without offending confrontation.

The ongoing emergency in Davis, which the trial court below relied on, was different from this case. It involved a 911 call made while there was an immediate threat and emergency situation in the form of the defendant's presence in the home, and an apparent risk of assault to the caller who needed help, now. The primary purpose of the caller was to seek help from the police to meet that threat. Davis, 547 U.S. at 828. The trial court's ruling on the testimoniality issue, reviewed *de novo* as the Respondent agrees, was error.

c. <u>The errors were not harmless.</u>

Respondent contends that any error, whether evidentiary or constitutional, was harmless. Respondent does not answer Mr. Garcia's arguments that the 911 call was the State's sole piece of meaningfully credible evidence that was not subject to the witness contradictions and impeachment of everything they said that came later, i.e. identifications, of others, which were alternatively retracted and re-made and retracted. Respondent does not explain why this Court should ignore that during closing argument, the deputy prosecuting attorney urged the jury to rely on the 911 recording. Faced with Losey's and Morcom's recantations and the other inconsistencies in the case, the State told the jury to find Mr. Garcia guilty based on the 911 call in which Losey had told the operator that the robber or one of the robbers was J.T., a person Losey knew, who had *long brown hair* like Mr. Garcia. 5/7/15RP at 394-99 (State's closing argument). The prosecutor also urged the jury that Losey's naming of J.T. Garcia in the 911 call could be relied on to convict, because it was made just after the robbery. 5/7/15RP at 425-27 (State's rebuttal closing argument). The Respondent understandably does not attempt to characterize the evidence as overwhelming, and also does not answer the argument

that the testifying complainant was able to explain, in court, her assertion that Mr. Garcia was absolutely not the "J.T." that was involved. The evidence was far from overwhelming, nor, with this muddled state of the evidence, can it be said within reasonable probabilities that the result would be the same. Reversal is required, under a constitutional, or non-constitutional, standard.

C. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Garcia respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 22nd day of June, 2016.

Respectfully submitted,

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DIVISION I

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	)	NO. 73740-6-I
	)	
	)	
JASON GARCIA,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JUNE, 2016, 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]	ANDREW ALSDORF, DPA [aalsdorf@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON, THIS 22ND DAY OF JUNE, 2016.

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