

NO. 43203-0-II

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

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STATE OF WASHINGTON, Respondent

v.

MARK ALLEN MARKUSSEN, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01901-4

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT DID NOT ERR IN DECLINING TO ADMIT THE CAD LOG INTO EVIDENCE.
- II. THE TRIAL COURT WAS NOT ASKED TO RULE ON WHETHER THE CAD LOG WAS ADMISSIBLE AS AN EXCITED UTTERANCE. EVEN SO, THE STATEMENTS IN THE CAD LOG WERE NOT ADMISSIBLE UNDER THE EXCITED UTTERANCE EXCEPTION BECAUSE NO WITNESS ATTRIBUTED THE STATEMENTS TO MS. COX.

B. STATEMENT OF THE CASE

Terrie Cox is married and has lived in Clark County for thirty years. RP 450. She works as a realtor and is a small business owner. RP 450. On August 17, 2010 Terrie woke up as usual and let her dog outside to go to the bathroom. RP 451. She often walks her dog with her neighbors, Bruce and Barbara Brown, who also have a dog. RP 452. On this morning, however, Barbara offered to walk both dogs. RP 452. Terri's garage door was open and she decided to clip some hydrangeas. RP 453. After clipping a few flowers Terri went back into her house and as she was washing her hands, she heard the security chime on her door. RP 453. She assumed it was Barbara coming back with the dog. RP 453. She turned and saw a man standing in her hallway. RP 453. She was so shocked and surprised that at first she thought it must be a joke. RP 453. She knew there was construction going on down the street and thought maybe he

was in the wrong house. RP 454. He was wearing a stocking cap and a puffy jacket on that hot August morning. RP 454. All of a sudden the man raised a gun at her. RP 454.

The man asked her if anyone else was in the house and she said "yes," her husband was in the house. RP 455. She began screaming "call the cops!" RP 455. Her husband was actually at work, but she thought he might believe the lie and leave. RP 456. He ordinarily left for work around five in the morning. RP 456. He ordered her to turn around and when she did he came up behind her and put one hand on the back of her hair and used the other to put the gun against her neck. RP 457. He forced her into her home office and pushed her against her desk. RP 457. He backed up to look down the hall and as he did that, Terrie bolted for the door. RP 458. Terrie made it out her front door and headed through her gate. RP 458. Unfortunately the man caught her at the garage and shoved the gun in her face and forced her back into the house. RP 458. The man took her back to her office and what Terrie described as a "wrestling match" ensued. RP 459. Terrie did "all the things by the book," such as kick him in the groin and elbow him. RP 459-60. But the man began to win the fight and eventually pinned her down on the floor and placed her in a choke hold. RP 460. The choke hold caused her pain and she felt as though she couldn't breathe. Id. He then took a rubber glove out of his pocket and put

it on. Id. At that point Terrie panicked and bit the man's hand, shredding his glove. RP 461. Terrie said "he didn't like that" and reached into his pocket for another glove. Id. She then reached up and pulled off his knit cap and "he didn't like that." Id. The man loosened his grip and she began talking to him, asking if he was going to kill her. RP 462. He told her "somebody wants you dead and I'm not leaving until I kill you." Id.

As he spoke, she realized she recognized his voice. RP 462. She could also smell a strong odor of cigarettes. RP 461-63. The man claimed that if he didn't kill her, someone would kill his kids. RP 464. She talked him into getting off her by promising she wouldn't look at him. Id. As soon as she got up she bolted for the door and got away. RP 464. Terrie saw the man's gun and said it looked black and kind of square. Id. When asked if it looked like the investigating detective's gun she said yes, "it looked like that." RP 464. She ran to Bruce and Barbara's house and told them there was a man at her house with a gun. RP 465. Bruce and Barbara called 911. RP 465. When the police arrived Terrie noticed that she had blood on her hand. RP 467. The officers took a swab of the blood for DNA. RP 467.

Terrie was sure that she recognized the man's voice and recalled his voice in combination with his smell and his physical build. RP 465. She recalled that she had hired a contractor five years ago and asked him

not to smoke in her house, and she thought that was the man but could not recall his name. RP 465-66. The reason she recalled this particular contractor was because he had done a poor job and she fired him. RP 474. She began looking in her basement for copies of checks she had written over the years and knew she was looking for two checks, one for \$450 and one for \$850. RP 474. She found the checks she was looking for and the name was Mark Markussen, a handyman. RP 477. She relayed that information to the detectives two weeks after the assault. RP 477-78. On September 14, 2010 Terrie had an appointment to meet a client at a restaurant named Tommy O's. RP 480. Her neighbors Bruce and Barbara were also there. Id. As she began making her way toward her client at the end of the bar, she began feeling panic. RP 480-81. She began smelling that same strong smell and her heart began "beating out" of her chest. RP 481. She looked over and saw a man about "the right size" sitting at the bar talking on the phone. RP 481. She went over to her friend and told her she had been attacked and she believed that was the man who did it. Id. She asked her friend to make conversation with the man and get his name while she left the bar. Id. The man gave her friend a card and the card had the name Mark on it with a cell phone number. Id. She called 911 but the officers were taking too long to get there so she went back inside and asked the manager to get his license plate number when he left. RP 482.

She then went back to her office to prepare a letter to Detective McShea, telling him what happened and begging him to get a sample for DNA testing from Mark Markussen. RP 484-85.

Three days later Detective McShea did obtain a DNA sample from Markussen. RP 553. Terrie was right all along: The blood left on her hand after the attack came from Mark Markussen. RP 657-60. Terrie also identified Mr. Markussen as the man who attacked her. RP 506-07. Mr. Markussen was convicted of kidnapping in the first degree, burglary in the first degree and two counts of assault in the second degree. CP 270-73. The jury found that he committed each offense while armed with a deadly weapon. CP 274-77. This timely appeal followed.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DECLINING TO ADMIT THE CAD LOG INTO EVIDENCE.

The trial court did not err in declining to admit the computer aided dispatch (CAD) log. A CAD log is a log containing notes from a call for service to law enforcement. RP 833-34. Both a dispatcher and an officer (who has a CAD screen on his mobile data terminal (MDT)) can make notes in a CAD log. A CAD log is not the equivalent of a 911 call, which is to say it doesn't contain direct statements from a reporting party (RP). Rather, it contains a summarization by the dispatcher or officer about the



information they are receiving from the reporting party (who may or may not be the victim). In this case, the CAD log contained information to the effect that Ms. Cox reported that she had been threatened with a “fake plastic gun.” RP 835. Defense counsel sought to have the CAD log admitted as a business record, believing that if it met the definition of a business record then the contents of the CAD log could be relied upon by the jury for their truth. 436-41, RP 829-30.

During an offer of proof, Lori Brenner, the dispatcher who took the call, reviewed the CAD log and testified she remembered getting the call. RP 837. However, she had no recollection of Ms. Cox describing a “fake plastic gun.” RP 837. She could only testify that she put that information into the CAD log, not that Ms. Cox actually said it. RP 839. Ms. Brenner testified that she spoke to Bruce Brown on the call that day as well. RP 836. Bruce Brown, for his part, testified that he never heard Ms. Cox say that the gun was a fake gun. RP 308. Defense counsel argued that the CAD log should be admitted as a business record (he did not address the double hearsay aspect of it) and that in the alternative, it should be admitted to impeach Ms. Cox as a prior inconsistent statement (that no one could testify she made). The court indicated that it did not meet the standard for admissibility as a business record because it did not bear indicia of reliability, and because just because something is made by

someone else in the normal course of his or her business does not make every document he or she creates a business record:

For example, if I send you a letter, Mr. Foister, and you keep that letter, it's a business record now. You write a letter and say, hey, I received this from Judge Melnick and it says the following. That's my normal habit. I create it in the course of my regular business, I keep it. That doesn't make it admissible. That's not what the business record exception was made for. Otherwise, we would just do this all by hearsay.

RP 829-30. The court analogized the CAD log to a police report, noting that police reports are not admissible despite clearly meeting the definition of business record. RP 442. The court also declined to admit the CAD log as a prior inconsistent statement, noting that “[a]t this point [the dispatcher] doesn't remember what the witness said, it's not this witness's statements, it's somebody else's, so you can't impeach with this witness's statement.” RP 841. The trial court's ruling as to the CAD log's admissibility as a business record was correct, and Markussen does not assign error in this appeal to the trial court's ruling about the use of the CAD log as a prior inconsistent statement. That issue is waived.

The decision whether to admit evidence lies within the discretion of the trial court. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999). A trial court abuses its discretion only when its decision is manifestly

unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Absent an abuse of discretion, a reviewing court will not disturb on appeal a trial court's rulings on the admissibility of evidence. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 666, 880 P.2d 988 (1994).

Markussen does not demonstrate an abuse of discretion. He relies entirely on *State v. Bradley*, 17 Wn.App. 916, 567 P.2d 650 (1977) in support of his claim that CAD logs are admissible as business records. But his argument overlooks the discretionary nature of RCW 5.45.020. RCW 5.45.020 provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Here, the trial court expressly held that in the opinion of the court, the sources of information and manner of preparation did not justify the admission of the CAD log. This ruling was not an abuse of discretion. Bruce Brown testified that he never heard Ms. Cox say the gun was a fake gun. Ms. Cox testified that the item the defendant threatened her with was a gun. Further, her actions that morning support the inference that she

believed she was being threatened with a real gun. Finally, Lori Brennan, the dispatcher, had no independent recollection of what statements Ms. Cox made to her during the phone call, and she acknowledged that she also spoke with Bruce Brown.

Markussen's reliance on *Bradley*, supra, is misplaced. In *Bradley*, an alibi witness testified that during the time the defendant supposedly robbed a jewelry store, she saw the defendant at a separate police call involving a purse snatching at a different location. *Bradley* at 917-18. To rebut this testimony the State sought admission, as a business record, "a computer printout of all phone calls for police assistance that day to demonstrate that the only police investigation for a purse snatching occurred 3 hours after the jewelry store robbery." *Id.* As the Court of Appeals noted in *State v. Ross*, 42 Wn.App. 806, 808-09, 714 P.2d 703 (1986), the statements of the caller in *Bradley* were not admitted to prove the truth of the matter asserted--as Markussen sought to do in this case.

The trial court correctly analogized the CAD log in this case to a police report. Police reports are not admissible despite their status as business records. As the Court of Appeals noted in *State v. Hines*, 87 Wn.App. 98, 100, 941 P.2d 9 (1997) (internal citations omitted):

It is the summary of an investigation by a police officer. And while it may be routine, it is nonetheless an investigation by the State. This report included the officer's

observations--Ms. Hines crossed the center line and she and her children were not wearing seat belts. It includes statements which tend to cast Ms. Hines in an unfavorable light, i.e., she gave an alias when first approached by the patrolman. The report, on its face, gave the patrolman the right to detain Ms. Hines. Cross-examination would permit Ms. Hines to test the accuracy of the patrolman's observations and the accuracy attributed to her statements. There is also no prima facie showing of the genuineness of this record simply because it is an official record. The report is a summary of an investigation by the patrolman and as such should be subject to cross-examination by the accused.

The CAD log in this case shares these same problematic characteristics: It is a summary by someone other than the declarant. It includes subjective interpretations. Moreover, Markussen cross examined Ms. Cox and she was adamant that the item she was threatened with was a gun, not a fake gun. The trial court did not err in denying admission of the CAD log.

Even if the trial court erred, the error was harmless. Ms. Cox's actions lead to the inescapable inference that she believed the gun was real. Ms. Cox was not a woman to go down without a fight. The jury could have reasonably concluded that a woman such as Ms. Cox would not have allowed herself to be forced back into her home after briefly escaping had she not believed that the gun pointed at her face was a real one. There was no error and if there was, it was harmless.

II. THE TRIAL COURT WAS NOT ASKED TO RULE ON WHETHER THE CAD LOG WAS ADMISSIBLE AS AN

EXCITED UTTERANCE. EVEN SO, THE STATEMENTS IN THE CAD LOG WERE NOT ADMISSIBLE UNDER THE EXCITED UTTERANCE EXCEPTION BECAUSE NO WITNESS ATTRIBUTED THE STATEMENTS TO MS. COX.

Markussen complains that the trial court erred in holding that the CAD log was inadmissible as an excited utterance. But the trial court was not asked to rule on whether the statements in the CAD log were admissible as excited utterances. Below, Markussen argued only that the CAD log was admissible as a business record or, alternatively, that it could be used to impeach Ms. Cox as a prior inconsistent statement (an argument, again, that Markussen does not raise in this appeal). The trial court did not err because the trial court did not make this ruling. This argument is waived on appeal as it was not preserved below. See RAP 2.5 (a).

Even if this argument were not waived, the trial court did not err in denying admission of the CAD log. As noted above, no person attributed this alleged statement about a fake plastic gun to Ms. Cox. As the prosecutor noted, there was likely a misunderstanding on the part of the dispatcher. Perhaps Ms. Cox had mentioned that the gun looked plastic and the dispatcher interpreted that remark as “fake plastic.” Perhaps Ms. Cox was telling the dispatcher what she told the jury--that she initially thought the defendant standing in her hallway was a joke of some kind.

Speculation aside, statements have to be attributed to a particular declarant before they can be deemed excited utterances. The trial court did not err.


D. CONCLUSION

The trial court did not err in declining to admit the CAD log and the defendant's convictions and deadly weapon enhancements should be affirmed.

DATED this 25<sup>th</sup> day of March, 2013.

Respectfully submitted:

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## March 25, 2013 - 10:40 AM

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