

No. 44212-4-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

IRA LYNNY FOREMAN,

Appellant.

---

On Appeal from the Pierce County Superior Court  
Cause No. 11-1-02688-6  
The Honorable Frederick Flemming, Judge

---

OPENING BRIEF OF APPELLANT

---

STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

## TABLE OF CONTENTS

<b>I.</b>	<b>ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>II.</b>	<b>ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>III.</b>	<b>STATEMENT OF THE CASE .....</b>	<b>1</b>
	A. PROCEDURAL HISTORY.....	1
	B. SUBSTANTIVE FACTS .....	2
<b>IV.</b>	<b>ARGUMENT &amp; AUTHORITIES .....</b>	<b>5</b>
	A. THERE WAS INSUFFICIENT CORROBORATING EVIDENCE THAT A STARTLING EVENT OR CONDITION OCCURRED.....	7
	B. THE STATE FAILED TO ESTABLISH THAT THE DECLARANTS' UTTERANCES WERE MADE WHILE UNDER THE STRESS OF EXCITEMENT OF A STARTLING EVENT OR CONDITION.....	8
	C. THE ERROR IN ADMITTING THE HEARSAY EVIDENCE IS NOT HARMLESS. ....	9
<b>V.</b>	<b>CONCLUSION.....</b>	<b>10</b>

## TABLE OF AUTHORITIES

### CASES

<u>State v. Briscoeray</u> , 95 Wn. App. 167, 974 P.2d 912 (1999).....	9
<u>State v. Brown</u> , 127 Wn.2d 749, 903 P.2d 459 (1995).....	6
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992).....	7
<u>State v. Lawrence</u> , 108 Wn. App. 226, 31 P.3d 1198 (2001) .....	9
<u>State v. Ohlson</u> , 162 Wn.2d 1, 168 P.3d 1273 (2007).....	8
<u>State v. Strauss</u> , 119 Wn.2d 401, 832 P.2d 78 (1992).....	6
<u>State v. Woods</u> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	7
<u>State v. Young</u> , 160 Wn.2d 799, 161 P.3d 967 (2007).....	6, 7, 8

### OTHER AUTHORITIES

ER 801 .....	5
ER 803 .....	5
56 F.R.D. 183, ADVISORY COMMITTEE'S NOTE (1975) .....	6

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it allowed the uncorroborated statements of non-testifying and unidentified citizens to be presented to the jury under the “excited utterance” hearsay exception.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the trial court err when it allowed statements to be presented to the jury under the “excited utterance” hearsay exception, where the corroborating evidence was insufficient to establish that a “startling event” occurred? (Assignment of Error 1)
2. Did the trial court err when it allowed statements to be presented to the jury under the “excited utterance” hearsay exception where there was no evidence to establish that the declarants were still under the stress of excitement from the “startling event”? (Assignment of Error 1)

## **III. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

The State charged Ira Lynny Foreman by Amended Information with one count of unlawful possession of a firearm (RCW 9.41.040(1)(a)). (CP 3) Before trial, Foreman moved *in*

*limine* to preclude the State from presenting the hearsay statements of several unidentified and non-testifying witnesses. (CP 4-5) Following a hearing, the trial court ruled that the statements were admissible under the “excited utterance” exception to the hearsay rules. (RP1 7-25; CP 9-12)<sup>1</sup>

A jury convicted Foreman as charged. (RP3 60; CP 18) The trial court imposed a standard range sentence of 89 months of confinement. (RP3 68, 74; CP 60, 63) This appeal timely follows. (CP 69)

B. SUBSTANTIVE FACTS

At about 1:00 in the morning on July 3, 2011, Pierce County Sheriff’s Deputy Scott Mock was in his patrol vehicle at a drive-through coffee stand, when he saw two cars race through the surrounding parking lot. (RP2 30, 31, 32, 33) The first car stopped abruptly in front of Deputy Mock’s vehicle, and the three passengers inside yelled that a passenger in the second car had pointed a gun at them. (RP2 33, 36) Deputy Mock testified that the occupants seemed very excited. (RP2 37)

Deputy Mock saw the second car drive past him in the

---

<sup>1</sup> The transcripts, labeled Volumes I through III, will be referred to by their volume number (“RP#”).

parking lot, then come to a stop. (RP2 37) As Deputy Mock approached the car in his patrol vehicle, he saw the passenger step out of the car holding what Deputy Mock believed was a handgun. (RP2 38) As the passenger walked away, the car sped away. (RP 39) Deputy Mock followed the passenger on foot, and saw the passenger toss the handgun into some nearby bushes. (RP2 39)

Deputy Mock yelled at the passenger to stop, but he kept running. (RP2 39, 41) Deputy Mock caught the passenger after a 50 yard chase, and took him into custody. (RP2 41, 42) Deputy Mock subsequently returned to the parking lot and found a handgun in the nearby bushes. (RP2 42-43) The first car and its three passengers had left the scene and were never identified. (RP2 47, 58-59)

Deputy Mock also ran a record check and discovered that the passenger, Ira Foreman, had a prior conviction that prevented him from legally possessing a firearm. (RP2 39, 46; RP3 39-40; Exh. P7)

The Sheriff's forensic technician was unable to lift any identifiable finger prints from the handgun or magazine found by Deputy Mock. (RP2 18, 22-23) However, the handgun was tested and determined to be operable. (RP2 81, 83)

Foreman's wife, Stephanie Foreman, testified that she had found the gun earlier in the day in an abandoned backpack, and had placed it in the trunk of her car without her husband's knowledge. (RP3 11-12) She and Foreman both testified that Foreman did not handle the gun and had no knowledge of its presence in the car. (RP3 20, 29)

The Foremans testified that Ira went bowling earlier in the evening, and that he had consumed a significant amount of alcohol before Stephanie came to pick him up at the bowling alley. (RP3 7-8, 25, 26) As Ira stood outside waiting for Stephanie, a man approached him and shoved him. (RP3 8-9, 27) Ira responded by trying to punch the man, and a fight broke out between Ira and several of the other man's friends. (RP3 9, 27)

Stephanie saw the men beating up her husband, and heard the other men using racial slurs. (RP 9-10) She was afraid for his safety so she yelled at them to stop. (RP 10) When that did not work, she remembered the handgun in her trunk. (RP3 10-11) She retrieved the handgun and held it in the air as she walked towards the fight. (RP3 13) The men scattered, and Stephanie helped her husband off the ground and into their car. (RP3 14, 27-28) As they prepared to leave, a white Chevy Blazer passed by, and the

passengers yelled racial slurs and threats at the Foremans. (RP3 15, 28)

As Stephanie drove away from the bowling alley, she put the handgun on her lap. (RP3 15) Soon, however, the Foremans noticed that a car with its headlights off seemed to be following them. (RP3 16, 28) The Foremans were scared and felt panicked. (RP3 17, 28) Ira told Stephanie to go get help, and then he jumped out of the car in an effort to divert the other car's occupants away from Stephanie. (RP3 17, 29) Before she drove away, Stephanie threw the gun out of the car. (RP3 17)

#### **IV. ARGUMENT & AUTHORITIES**

Although ER 801(c) generally excludes out-of-court statements offered to prove the truth of the matter asserted, ER 803(a)(2) excepts “[a] statement relating to a startling event or condition made while . . . under the stress of excitement caused by the event or condition.” In this case, the trial court admitted the hearsay statements of the unidentified occupants of the first car under this “excited utterance” exception. (RP1 24-25; CP 10-11) Deputy Mock was allowed to testify that the occupants of the car told him that the passenger in the second car pointed a gun at them. (RP2 33) A trial court's decision to admit a hearsay



statement under the excited utterance exception is reviewed for abuse of discretion. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

According to the advisory committee that promulgated Federal Rule of Evidence 803(2), on which Washington's ER 803(a)(2) was modeled, the underlying theory "is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."<sup>2</sup>

Accordingly, "the 'key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (alteration in original) (quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

The proponent of excited utterance evidence must satisfy three "closely connected requirements": (1) a startling event or condition occurred, (2) the declarant made the statement while

---

<sup>2</sup> 56 F.R.D. 183, ADVISORY COMMITTEE'S NOTE at 304 (1975); accord, State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995).

under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

**Words alone, the content of the declarant's statement, can establish only the third element of the excited utterance test—that the utterance relates to the event causing the declarant's excitement.** The first and second elements (that a startling event or condition occurred and that the declarant made the statement while under the stress thereof) must therefore be established by evidence extrinsic to the declarant's bare words. Extrinsic evidence can include circumstantial evidence, such as the declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made.

Young, 160 Wn.2d at 809-10 (emphasis added). In this case, the State failed to proffer sufficient proof to satisfy the first and the second requirements.

A. THERE WAS INSUFFICIENT CORROBORATING EVIDENCE THAT A STARTLING EVENT OR CONDITION OCCURRED

“[A] declarant's statement alone is insufficient to corroborate the occurrence of a startling event[.]” Young, 160 Wn.2d at 816-17. For example, in Young, the Court found corroborating evidence of a startling event even though the child victim recanted her allegations of that event—sexual abuse—at trial, where three witnesses

testified at a pretrial hearing about the victim's condition while making the allegations, and others testified at trial about the defendant's incriminating statements and actions afterward. Young, 160 Wn.2d at 818-19.

Similarly, in State v. Ohlson, the Court held that "the evidence amply supports a finding that [declarant] perceived a startling event" where two other eyewitnesses to the event testified at trial and corroborated the non-testifying declarant's utterances. 162 Wn.2d 1, 9, 168 P.3d 1273 (2007).

Unlike in Young and Ohlson, there is insufficient corroborating evidence in this case to establish that the startling event, i.e. Foreman pointing a gun at the occupants of the first car, actually occurred. No other witnesses saw this supposed event, and Deputy Mock only observed the two cars driving through the parking lot at a high speed. (RP2 33, 58) Without corroborating evidence of the "startling event," the hearsay statements of these unknown persons lack the necessary indicia of reliability and should not have been admitted as excited utterances.

**B. THE STATE FAILED TO ESTABLISH THAT THE DECLARANTS' UTTERANCES WERE MADE WHILE UNDER THE STRESS OF EXCITEMENT OF A STARTLING EVENT OR CONDITION**

"The second element 'constitutes the essence of the rule'

and "[t]he key to the second element is spontaneity. ” State v. Lawrence, 108 Wn. App. 226, 234, 31 P.3d 1198 (2001) (quoting Chapin, 118 Wn.2d at 687-88). To determine whether a statement is sufficiently spontaneous, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it. State v. Briscoeray, 95 Wn. App. 167, 173-74, 974 P.2d 912 (1999) (citing Chapin, 118 Wn.2d at 88).

In this case, even if this Court does find sufficient corroborating evidence that Foreman pointed a gun at the occupants of the first car, there was no evidence indicating when that event occurred. The occupants appeared to be “excited” but there is nothing in the record that would show that the excitement was the result of a recent startling event rather than the result of fabrication.

C. THE ERROR IN ADMITTING THE HEARSAY EVIDENCE IS NOT HARMLESS

The error in admitting the hearsay statements was not harmless, even though Foreman was not charged in connection with the allegation that he pointed a gun at the occupants of the first

vehicle. The prosecutor used the occupants' statements to bolster the credibility of its primary witness, Deputy Mock, and relied on their statements as proof that Foreman possessed the gun. (RP3 44-45) The State argued to the jury that "we have three civilians who saw the defendant with a gun that day." (RP3 467, 54) Because the jury had to weigh the credibility of the Foremans against the credibility and memory of the Deputy in order to determine whether the State had proved its case beyond a reasonable doubt, it cannot be said that this additional evidence did not impact the jury's decision.

#### **V. CONCLUSION**

The trial court erred when it allowed the statements of non-testifying and unidentified citizens to be presented to the jury under the "excited utterance" hearsay exception, because there was insufficient corroboration that the "startling event" occurred or that the declarants were still under the stress of excitement of the "startling event" when they made the statements. Accordingly, Foreman's conviction should be reversed, and his case remanded for a new trial.

DATED: April 12, 2013

*Stephanie Cunningham*

---

STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Appellant Ira L. Foreman

**CERTIFICATE OF MAILING**

I certify that on 04/12/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ira L. Foreman, DOC# 841559, Monroe Correctional Complex – TRU, Post Office Box 888, Monroe, WA 98272-0888.

*Stephanie Cunningham*

---

STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**April 12, 2013 - 2:03 PM**

## Transmittal Letter

Document Uploaded: 442124-Appellant's Brief.pdf

Case Name: State v. Ira Lynny Foreman

Court of Appeals Case Number: 44212-4

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: S C Cunningham - Email: [sccattorney@yahoo.com](mailto:sccattorney@yahoo.com)

A copy of this document has been emailed to the following addresses:  
[pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us)