69707-2

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NO. 69707-2-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

DANIEL J. PEREZ,

Appellant

BRIEF OF RESPONDENT

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1. A victim of an attempted murder made statements to corrections officers within minutes of an attack upon him.

a. Were those statements non-testimonial so that admission of those statements at trial against the defendant did not violate his right to confrontation?

b. Were those statements admissible as an excited utterance?

2. The trial court instructed the jury on the elements of attempted second degree murder. It also used the standard elements instruction to instruct the jury on the elements of second degree murder.

a. Was it error to use the standard instruction for second degree murder?

b. If it was error, was the error harmless?

3. At sentencing the State conceded that the charge of second degree assault merged with the charge of attempted second degree murder. Was the defendant's right to be free of double jeopardy violated when the trial court did not address the second degree assault conviction at sentencing except to line out

reference that count on the judgment and sentence and include a notation that it "merged."?

II. STATEMENT OF THE CASE

A. THE ATTEMPTED MURDER.

In August 2009 David Hindal was an inmate at the Monroe Reformatory. On August 14 Hindal was working as a laundry porter in the laundry room adjacent to dayroom 2. About 10:30 a.m. he was reading a book while in the laundry room. The defendant, Daniel Perez, was the only other inmate in dayroom 2 with Hindal. 2 Insert RP 32, 41-47, 85-86[1].

Corrections Officer Walker called recall around 10:30 a.m. Recall is a time when offenders return to their cells for daily counting. He observed the defendant walking out of the dayroom toward his cell. The defendant appeared "normal, nonchalant, nothing out of the ordinary." Shortly after the defendant left the dayroom Hindal came out of the laundry room. He had some kind of cloth wrapped around his neck and shoulders. He was flapping his arms, staggering and walking around in circles, and trying to get Officer Walker's attention. Hindal was gasping for air and his face

[1] The State adopts the defendant's method of referencing the report of proceedings.

was red. Officer Walker called an emergency code to stop all movement on that unit. 2 Insert RP 47-50, 69-70, 87-88.

Sergeant Walters and Officer Misiano went to the dayroom to determine what was going on with Hindal. Officer Misiano had seen Hindal about 20 minutes before the emergency had been called. Then Hindal did not appear to be in distress, and he had no injuries. When they next saw him, Hindal's face was bright red, and his eyes were blood shot. Hindal had a ligature mark around his entire neck, as well as injuries to his fingers. Sergeant Walters took a 2'-3' foot strip of cloth from around Hindal's neck and shoulders. Sergeant Walters asked Hindal "what's going on?" Hindal pointed to the defendant's tier. Hindal could not talk at first but eventually said "Perez, he tried to kill me." Hindal said that Perez had attacked him from behind. Hindal said he first tried to fight, but then acted like he was dead, and that Perez should have checked his pulse. 2 Insert RP 50, 67- 70, 88-91.

Sergeant Walkers directed other officers to obtain the video surveillance footage of the dayroom during the time Perez and Hindal were there. Surveillance footage showed Perez pacing in the dayroom for a period of time. He then put a cup on a table and withdrew a length of cloth from his waistband. Perez then went into

the laundry room for approximately six minutes. After Perez left Hindal came out of the laundry room, waving his arms and walking around the dayroom. It then shows corrections officers rushing in the dayroom, Hindal sitting down, several officers leaving, and then some medical personnel and other officers entering the dayroom. While sitting Hindal raised and lowered his head several times. Ex. 3, 4 at 10:30 a.m. to 10.40:37 a.m.[2]

B. TRIAL PROCEDURE.

The defendant was charged with one count of attempted second degree murder and one count of second degree assault. 1 CP 176-177. Shortly before trial Hindal indicated that he "was not interested in testifying." As a result the trial court held a hearing outside the presence of the jury. At that hearing Hindal stated that he was currently housed in the King County jail pending trial on a burglary charge. He had discussed with his attorney the possibility that he could obtain some consideration on that case in exchange for his testimony against the defendant, but the prosecutor did not extend him any offer for a deal. When asked if he would answer

[2] The defendant has designated exhibits 3 and 4 for the Court. As the defendant notes, playing the exhibits can be difficult and requires special instructions. The trial court provided the jury instructions on how to play the exhibits on a computer. Those instructions have been designated for the court.

questions under oath the defendant said "probably not." The prosecutor asked Hindal what he meant by that. Hindal responded "Okay, not." 1 RP 12-14, 71-72.

Hindal then went on to state that Mr. Perez was "not guilty as far as I'm concerned. I don't consider myself a victim. I mean, the State can go forward with it, but I mean, isn't it kind of presumptuous for..." At that point the trial judge stopped the proceedings to have an attorney appointed for Hindal. After counsel was appointed Hindal reiterated that he would not testify, even if ordered to do so by the court. Hindal claimed that he believed some unseen entity would harm his family if he testified. The court found Hindal was a necessary witness, and held him in contempt. 1 RP 72-73, 80, 82-85, 96.

Because Hindal refused to testify, the court held a hearing outside the presence of the jury to determine whether any statements he made to corrections officers would be admitted. Officer Walker testified that after Perez left the day room he saw Hindal come out of the laundry room, and faced the control booth flapping his hands trying to get Walker's attention. Hindal had

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3 CP __ (sub. 74). In the experience of the trial deputy it is sometimes easier to play exhibits 3 and 4 on a computer that is not hooked up to the internet.

some kind of string or cord around his neck and was gasping for air. At that point Sgt. Walters and Officer Misiano went to the day room. They arrived within about 5 seconds. Hindal was staggering. His eyes and face were red, and he had a red mark on his neck. Officers found a 1' to 2' piece of sheet draped around his shoulders. Hindal had trouble breathing and was in distress. At first he pointed toward tier two and tried to talk, but no words came out. Sgt. Walters asked him "what happened?" but at first Hindal could not respond. Eventually he said "Perez" had tried to kill him. Officers got Hindal to sit down. Once seated he said "should have checked my pulse." Hindal explained that he tried to pull the "rope" off his neck, and he turned and saw it was Perez. He struggled, but eventually gave up and pretended he was asleep. Perez lived on the second tier. Officer Misiano went to Perez's cell where he found Perez sitting on his bunk. 2 RP 5-7, 20-23, 39-43.

At the conclusion of the hearing the court found Hindal's statements qualified as excited utterances. The court reviewed several factors, and concluded that the statements Hindal made to corrections officers in the first few minutes after he was contacted by them were made in response to a need to deal with an emergency, and therefore were not testimonial. As a result of its

findings the court permitted evidence of Hindal's initial statements to corrections officers within the first few minutes after the assault. It excluded evidence of Hindal's statements made after he had been escorted to another room where he gave a written statement. 2 Insert RP 18-27.

III. ARGUMENT

A. THE DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED WHEN THE COURT PERMITTED EVIDENCE OF THE VICTIM'S STATEMENTS TO CORRECTIONS OFFICERS MADE RIGHT AFTER THE ATTEMTPED MURDER.

The defendant first argues that his right to confrontation under the Sixth Amendment was violated when the court allowed testimony about what Hindal said right after he was first contacted by corrections officers. BOA at 14-26. Because the evidence at issue did not constitute testimonial statements, his confrontation rights were not violated.

The Confrontation Clause of the Sixth Amendment states "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with witnesses against him." This constitutional provision prohibits admission of out of court statements that are "testimonial" unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford v. Washington, 541 U.S. 36, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d

177 (2004). In contrast, that provision does not prohibit introduction of non-testimonial hearsay. Id. at 68.

Statements are not testimonial when they are made during the course of police questioning under circumstances that objectively viewed demonstrate that the primary purpose is to enable police assistance in meeting an ongoing emergency. Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). In Davis the Court considered four factors to determine whether the declarant's statements qualified as non-testimonial under this standard. The Court first considered the timing of the statements in relation to the events described. Second, the Court looked at whether the speaker was facing an ongoing emergency. Third the Court considered whether, viewed objectively, the questions asked and answered were necessary to be able to resolve the present emergency, rather than learn what had happened in the past. Fourth, the Court looked at whether the interview was formal or informal. Id. at 827. These factors are considered objectively, in light of all of the circumstances in which the encounter occurs, and the statements and actions of the parties. Michigan v. Bryant, __ U..S. __, 131 S.Ct. 1143, 1156, 179 L.Ed.2d 93 (2011). A review of those four factors shows that the

trial court correctly concluded that Hindal's initial statements to corrections officers were not testimonial.

1. The Statements Were Made Within Minutes Of The Offense.

The temporal relationship between the event described and the statements describing those events indicate the statements are non-testimonial when they are made at the same time as events described or with or in close proximity to it. In Davis the court admitted the victim, McCottry's, statements to the 911 operator that Davis had assaulted her. Davis, 547 U.S. at 817. The Court held the statements were not testimonial in part because the victim was describing events "*as they were actually happening*" rather than describing past events. Id. at 827.

The Washington Supreme Court ruled this first Davis factor did not require that the events and statements must occur simultaneously in State v. Ohlson, 162 Wn.2d 1, 168 P.3d 1273 (2007). There the defendant was charged with assault by trying to run over two juveniles with his car. One of the juveniles did not testify at trial, but his statement to the police about what happened was introduced in evidence. Id. At 4-5. The Court reasoned that in applying Davis to these facts the victim's statements were made in close proximity to the assault; the officer had arrived within 5

minutes of the 911 call when the victim related what occurred. Thus the timing of the statements was similar to those made by McCottry to the 911 operator because they were made contemporaneously with the events described. Id. At 17.

In contrast the Court found the first Davis factor did not show the statements at issue were not testimonial under the circumstances in State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009). There police responded to a 911 call reporting robbery. The victim described unloading groceries from her car when a car stopped and three men got out. The men forced her into her home and tied her up. The men then stole items from her home before leaving. The victim was able to untie herself and call 911. Id. at 414-15. The record in that case was limited because it was made before Crawford and Davis had been decided. Given that limited record the Court concluded that the victim was describing past events. The Court reasoned that neither the victim's statements nor the circumstances suggested that the robbers were a continuing threat in that they were likely to come back. Id. at 422.

Here the record was more fully developed than that in Koslowski. The record showed that the custody officers contacted Hindal within 5 to 10 seconds of being alerted that he was in

distress. 2 RP 20. Hindal was still in distress when officers contacted him; initially he could not even speak in response to questions. Like Ohlson the statements came within a short time after the event Hindal described. Officers asked Hindal what happened because they did not know the extent of the danger involved. Thus, Hindal's statements were nearly contemporaneous with the assault on him, and occurred at the time officers were facing an ongoing emergency. The first factor favors finding Hindal's statements were not testimonial.

2. Corrections Officers Were Facing An On Going Emergency When Hindal Identified Perez As His Assailant.

The timing of the statements is closely related to the question of whether the officers faced an ongoing emergency. Thus, statements that describe an event in the recent past may still be non-testimonial if they are made during an ongoing emergency.

In Bryant the police responded to a gas station on a report that a man had been shot. There they found the victim, Covington, who was lying on the ground in pain with a gunshot wound to his abdomen. Police asked him what happened. Covington told them that "Rick" shot him about 25 minutes earlier. Covington stated he had been talking with Bryant at Bryant's home. When Covington

went to leave Bryant shot him in the back. Covington drove to the gas station where police found him. Bryant, 131 S.Ct. at 1150.

In assessing whether the statements were made in the face of an ongoing emergency the Court recognized unlike the circumstances in Davis, this case did not involve domestic violence. Thus, it involved a greater number of potential victims than would be at risk in a typical domestic violence case. In that circumstance police cannot focus solely on whether the threat to the victim had been neutralized because the potential threat to first responders and the public may continue. Id. at 1158. The Court also stated that the kind of weapon involved and the nature of the victim's injuries were factors in assessing whether an ongoing threat existed. Id. at 1159. As applied to the facts in that case Covington did not give police any indication whether this was a private dispute or that the threat from Bryant had ended. Because a gun had been used the potential for threat was greater than in those cases where the assault was accomplished by fists. In addition, no one knew where Bryant was at the time. These factors led the Court to conclude that there was an ongoing emergency which favored finding Covington's statements were not testimonial. Id. at 1163-64.

Similarly, this Court found that statements made by a victim during two 911 calls and her initial spontaneous statements to the responding police officer demonstrated that they were made in order to meet an ongoing emergency in State v. Reed, 168 Wn. App. 553, 278 P.3d 203, review denied, 176 Wn.2d 1009 (2012). Although the victim was not being assaulted at the time she made the statements, the statements to the 911 operators were within minutes of the assaults. The nature of the questions and answers indicated that the primary purpose of the interrogation was to provide emergency assistance. Following the Court's reasoning in Bryant this Court rejected the argument that Reed's departure from the scene neutralized the threat to the victim. Reed had driven away moments before the second 911 call, and therefore presented the risk that he might come back at any time. Id. at 567.

Similarly, the Supreme Court found a victim's 911 call was not testimonial in State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009). There the victim, Bridgette Pugh called 911 to report that her husband had beaten her up. She told the operator that he was walking away, but was unwilling to look for him outside for fear that he would beat her again. Ms. Pugh stated there was a restraining order, and Pugh was drinking. Id. at 829. Applying the Davis

factors the Court found these statements were not testimonial even though Pugh was no longer at the home. The Court explained that taking all of her statements in context, Ms. Pugh was seeking aid and was concerned the defendant would return. Id. at 833.

Here the context of the exchange between Hindal and the corrections officers indicate that the statements were made in order to resolve an ongoing emergency. Corrections officers did not know whether Hindal had been assaulted, or whether Hindal had tried to injure himself. If he had been assaulted Corrections officers were concerned that other inmates could be involved and still present a danger to other inmates and guards. Like Bryant the defendant used a weapon to commit the assault. The assault occurred just before recall, when doors were opened for inmates to return to their cells. 2 RP 10. Thus the defendant's temporary separation from Hindal did not mean the threat he presented was neutralized. The ligature appeared to be fashioned from a sheet; a common object from which the defendant could fashion a second ligature. Additionally, the exchange between Hindal and the officers indicated Hindal was seeking aid from the assault. 2 RP 5, 10, 21-23, 40-44. Because statements were made during an

ongoing emergency, the second factor favored finding Hindal's initial statements were not testimonial.

3. The Questions And Answers Were Necessary To Address An Ongoing Emergency.

The Court has found this factor indicates statements are not testimonial when an officer speaking to a witness has little knowledge about what happened and needs to learn more to determine whether an ongoing emergency exists. Responses to questions designed to determine "what happened" are exactly the type that indicate statements were not meant to convey an historical fact, but instead were designed to meet an ongoing emergency. Bryant, 131 S.Ct. at 1165-66.

In Ohlson the responding officer only had a 911 report of a speeding vehicle trying to hit some juveniles. Here initial questions were directed at determining whether the situation presented an ongoing threat to the juveniles or anyone else. Ohlson, 162 Wn.2d at 18.

In Reed this Court found the 911 operator's questions to the victim to ascertain the victim's location, her need for medical assistance, and whether Reed was still in the area were designed to determine if there was an ongoing emergency. Reed, 166 Wn.

App. at 566-67. In contrast, on the limited record available, the Court found no ongoing emergency existed to justify finding the victims' statements were non-testimonial in Koslowski, 166 Wn.2d at 427-28.

Here the record shows that the officers knew Hindal was unharmed one minute and severely injured and gasping for breath the next minute. Given the nature of the unit within the prison system they did not know if they were dealing with an assault or some other kind of medical emergency. 2 RP 6-7, 43-48.

Sergeant Walter's first questions to Hindal was "what's going on, what's wrong?" When Hindal responded "he tried to kill me" Walters asked "who?" Walters stated that when Hindal responded "Perez" that "changed the whole dynamic." Walters explained that they did not know the extent of what they were dealing with. The information Hindal gave them helped assess what needed to be done, eventually causing them to secure the various areas within the facility and then take action to secure the Perez. 2 RP 6-7, 20-23, 40-48, 57. Under these circumstances the questions and answers were clearly designed to deal with the emergency at hand.

The defense contends that no emergency existed at the time Hindal made the initial statements. He points to his physical

separation from Hindal and the number of corrections officers present. However when Sergeant Walters first talked to Hindal prison officials did not know how Hindal was injured or who cause his injures. They did not know whether Hindal alone was at risk, or whether other offenders and corrections officers were at risk also. Without this critical information they faced an ongoing emergency. Hindal's initial statements that were introduced into evidence were made during that ongoing emergency.

4. The Interview With Hindal Was Informal.

Circumstances which determine whether the interview was formal or informal include whether there was a degree of confusion during the interview, whether the interview was structured, and where the interview was conducted. Bryant, 131 S.Ct. at 1166, Reed, 168 Wn App. 213. In Davis the Court distinguished between a frantic 911 call from a victim, and the structured interrogation taking place in a police station where police recorded the interview and took notes that was conducted in Crawford. Davis, 547 U.S. at 827. The frantic 911 call was completely informal, whereas the interview in Crawford was very formal. Id. The Court followed this reasoning when it found the officer's initial interview with a juvenile who had nearly been run over by a vehicle was informal, as it was

"conducted in an unsecured situation that 'was not tranquil, or even...safe.'" Ohlson, 162 Wn.3d at 18, quoting Davis, 547 U.S. at 2277.

Here as the trial court noted Hindal had made a distress call and several officers and other personnel responded. Several people were running around, others were asking questions, and no one was taking notes or asking Hindal to make a statement. Ex. 3, 4 at 10:41 a.m. to 10:45 a.m. The trial court distinguished the interrogation that took place later when Hindal was removed to another room to make a written statement, which was clearly more formal. Similar to the situation in Bryant, Davis, and Ohlson, the initial interview with Hindal was an informal attempt at trying to find out what happened in order to meet an ongoing emergency.

5. On Balance Hindal's Statements Were Not Testimonial.

Weighing all of the factors together the initial statements Hindal made to corrections officers were designed to meet an ongoing emergency. Hindal's information helped corrections officers determine the nature of the emergency and the necessary steps needed to secure the facility and ensure the safety of other inmates and guards. The trial court correctly found those initial statements were not testimonial. Pursuant to the reasoning in

Davis, admission of those statements did not violate the defendant's right to confrontation.

The defendant challenges the trial court's conclusion that Hindal's initial statements were not testimonial, largely relying on Koslowski. That case is different from the one here because the record in Koslowski had been developed before Crawford and Davis had been decided. Thus the level of detail relevant for an analysis pursuant to those cases was lacking. Koslowski, 166 Wn.2d at 421-22. Given the limited record the Court was constrained to find the victim's statements there were testimonial, and not designed to meet an ongoing emergency. Id.

The defendant argues that once Hindal stated his name there was no longer an ongoing emergency. He contends that since the prison was locked down, and the defendant could no longer reach Hindal, there was no longer an emergency to address. Thus all of Hindal's statements were testimonial.

The defendant's argument fails to account for the record that demonstrates that there was more than one possible explanation for Hindal's injuries that were not resolved simply by naming the defendant. Nor does it account for the evidence showing that others besides Hindal were potentially at risk, and that the

information Hindal initially gave describing what happened was important for corrections officers to assess the risk and determine what security measure were required. The defendant's characterization of the interview with Hindal as "formal" is at odds with the chaotic atmosphere in the first two to six minutes officers and medical staff met with Hindal to assess the situation. The defendant confuses the later interview with Hindal wherein he gave a written statement which was not admitted into evidence, with the initial statements which the trial court found were not testimonial. On balance, when considering the circumstances and Hindal and the officer's actions, Hindal's statements were made to meet an ongoing emergency, and were not testimonial account of what happened.

B. HINDAL'S STATEMENTS QUALIFIED AS AN EXCITED UTTERANCE.

While Hindal's statements were not testimonial, they were still hearsay. Hearsay is a statement, other than made by the declarant at trial, which is offered to prove the truth of the matter. ER 801(C). Hearsay is not admissible, unless permitted by court rule. ER 802. Hearsay may be admitted into evidence if it qualifies as an excited utterance. ER 803(2). An excited utterance is "a

statement relating to a startling event or condition made while the declarant is under the stress of excitement cause by the event or condition." Id.

A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event. State v. Magers, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). "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) quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 1914 (1969).

The trial court also concluded that Hindal's statements were admissible as an excited utterance. 2 Insert RP 18-22. That decision is reviewed for an abuse of discretion. Id. at 187-88. A court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. State v. Williams, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). The appellant bears the burden to show the trial court abused its discretion. Id.

The first element of the test may be satisfied by circumstantial evidence, independent from the statements themselves. State v. Young, 160 Wn.2d 799, 809, 161 P.3d 967 (2007). That may include "the declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made." Id. at 810.

Here the evidence showed Hindal was staggering around the dayroom, unable to speak for a time, with injuries to his throat and hands. Those facts suggested that he had just been strangled. Hindal's statements identifying the defendant and explaining that the defendant had tried to kill him related to the attempt to strangle him. Thus the first and third elements have been met.

Hindal was also still under the stress of the attempted murder when he made the statements at issue. When considering whether this element has been met the Court looks at what the declarant's mental and emotional state was at the time he or she made the statements at issue.

The passage of time does not preclude finding the statements were made under the stress of the startling event. State v. Thomas, 150 Wn.2d 821, 855, 83 P.3d 970 (2004). Statements made more than seven hours after a rape qualified as

an excited utterance in State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985). In Flett the rape victim was shaking and crying at the time she made the statements at issue. The court found the evidence demonstrated that she had been under the continual stress caused by the rape during that entire seven hour period, which justified finding the statements qualified as an excited utterance. Id. at 279, 287. Similarly, evidence that the declarant was visibly shaken and appeared scared when he made a statement implicating the defendant in a murder showed the declarant was still under the stress of that event even though one and one-half hours had transpired between the murder and the statements. Thomas, 150 Wn.2d at 855.

Statements made in response to questions may also qualify as excited utterances. State v. Woods, 143 Wn.2d 561, 598, 23 P.3d 1046, cert denied, 534 U.S. 964 (2001). In Woods the victim of a rape, robbery, and assault died after she was taken to the hospital. Woods, 143 Wn.2d at 569-72. On the way to the hospital the paramedic asked the victim "what happened?" and "who did it?" Id at 596. The victim replied that she was hit "with a baseball bat" and that "a man named Dwayne" did it. Id. The statements were made about 45 minutes after the defendant fled the scene. Id. at

599. The Court found these statements were properly admitted as an excited utterance. The Court found they were "made in a spontaneous manner, on the heels of a clearly startling event." In addition, the victim was emotional, and in pain.

The trial court relied on both the testimony and video evidence showing Hindal within moments after the assault when it concluded Hindal's statements in the dayroom qualified as an excited utterance. It distinguished those statements from the statements he made a short time later when Hindal was moved to another room where he was questioned more formally and made a written statement. 2 Insert RP 19-23. The record supports the trial court's conclusion that Hindal was still under the stress of the attempted murder at the time he made those initial statements.

Officer Walker first noticed Hindal when he was walking around the dayroom flapping his arms, panicking and gasping for air. When Officer Misiano and Sergeant Walters entered the dayroom Hindal was staggering, and swaying. He had difficulty breathing, and was initially unable to talk, despite attempts to do so. When Hindal said "Perez" he was standing, still trying to catch his breath. Although officers urged him to calm down, and got him to sit down, he did not calm down. Instead he continued to try to

catch his breath. Like the victim in Woods, Hindal spontaneously said "he tried to kill me" in response to Walter's question "what happened?" The DVD shows that while sitting Hindal repeatedly put his head down and raised it. Those actions show he was still under the stress of nearly being killed. 2 RP 6, 21-22, 39-43, 57, Ex. 3 and 4.

The defendant argues that Hindal was no longer under the stress of the event when he made the statements, stating that Hindal was seated and calm within the first six seconds of the officer's entry into the dayroom. Thus only what he may have stated during the initial six seconds qualified as an excited utterance. Therefore the trial court abused its discretion when it concluded his statements qualified as an excited utterance. BOA at 32.

The defendant's argument ignores the evidence presented at the hearing and reasonable inferences that could be drawn from that evidence. Given the nature of the assault, the short time frame between the assault and Hindal's statements, his initial inability to even speak, and his actions after the assault while in the dayroom where officers initially spoke with him, the trial court was justified in finding Hindal was still under the stress of the assault when he

made the initial statements to corrections officers. Merely sitting down was not an act sufficient to "calm" Hindal to the point that his statements could be the result of "fabrication, intervening actions, or the exercise of choice or judgment." The trial court did not abuse it's discretion when it concluded Hindal's first statements, before he was escorted into another room for a more formal interview and written statement, were the product of an excited utterance.

C. THE JURY WAS CORRECTLY INSTRUCTED REGARDING THE OFFENSE OF ATTEMPTED SECOND DEGREE MURDER.

The State proposed a set of jury instructions which included WPIC 100.02 defining the elements of attempted second degree murder and WPIC 27.02 defining the elements of second degree murder. 2 CP 193, 195. The defense suggested that the instruction defining the elements of second degree murder might be confusing to the jury, although the defense did not have "a strong objection" to that. 3 RP 39. Later the defense argued that the final two paragraphs in the proposed instruction setting out the elements of second degree murder from the standard instruction could be confusing as to whether the jury was to convict the defendant of second degree murder or attempted second degree murder. Instead the defense proposed an alternative instruction that

modified WPIC 27.02 which omitted the last two paragraphs. 3 RP 44-45, 1 CP 138.

The court gave the State's proposed instruction defining the elements of second degree murder. The court reasoned that it was recommended that instruction be given in the comments to the WPIC. It did not believe that there would be any undue confusion because the verdict form stated the crime was attempted second degree murder, and there was evidence Hindal survived the attack. The court also reasoned that the parties would be able to argue in a manner that would eliminate any confusion. 3 RP 44-45.

The defendant now argues the trial court erred when it gave WPIC 27.07 without modifying it to eliminate the last two paragraphs as he had advocated for at trial. Jury instructions are sufficient if they permit each party to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact on the applicable law. In re Wright, 138 Wn. App. 582, 586, 155 P.3d 945 (2007), review denied, 162 Wn.2d 1017 (2008).

The instructions here, taken as a whole, correctly informed the jury regarding the elements of attempted second degree murder. They were not misleading because they accurately stated

the elements of both the attempted offense, and the underlying offense.

The specific portion of the instruction that the defendant now challenges reads:

> To convict the defendant of the crime of murder in the second degree each of the following elements of the crime must be proved beyond a reasonable doubt...
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

1 CP 126.

The additional language in Instruction number 10 defining the elements of second degree murder did not preclude the defense from arguing its theory of the case. The defense was that the evidence produced was insufficient to prove the defendant tried to kill Hindal. Counsel pointed to the lack of injuries on the defendant after the incident, and the lack of evidence of a struggle in the laundry room. Counsel posited the alternative theory that at best the defendant was a co-conspirator in Hindal's plan to commit suicide. 3 RP 78-103. Nothing in the introduction or concluding

two paragraphs directing what was necessary to convict the defendant of the completed crime prevented the defendant from arguing that theory of his case.

Despite that the defendant argues that the instruction as given amounted to an instruction on an uncharged and unproved offense. BOA at 36. "When the jury is instructed on an uncharged crime, a new trial is appropriate when it is possible that the defendant was mistakenly convicted of an uncharged crime." State v. Kirwin, 166 Wn. App. 659, 569, 271 P.3d 310 (2012). Here there is no possibility that the jury would have mistakenly convicted the defendant of the completed crime of second degree murder.

The jury was accurately instructed that in order to convict the defendant of attempted second degree murder it must find that the defendant did an act that was a substantial step toward the commission of second degree murder, and that it was done with the intent to commit second degree murder. 1 CP 124. It was also instructed what "substantial step" and "intent" meant. 1 CP 125, 130. While completed offense required evidence that Hindal died, the attempted offense did not. Compare 1 CP 124 and 1 CP 126. There was no evidence Hindal died as a result of the defendant's acts. As the trial court observed, Exhibit 42, the transcript of

Hindal's pre-trial testimony, clearly showed he was not dead. 3 RP 45. The parties repeatedly referred to this crime as an attempted murder, not a completed murder, in closing arguments. 3 RP 77, 79, 86, 89, 91-92, 105. In addition, the verdict clearly stated the crime the jury was to consider was attempted second degree murder. 1 CP 113. In an analogous situation, where the jury was otherwise correctly instructed on the attempted offense, but verdict form incorrectly stated the completed offense, this Court found the only offense the jury could have convicted of was the attempted offense. State v. Imhoff, 78 Wn. App. 349, 898P.2d 852 (1995). Similarly, the only crime the defendant could have been convicted of here was attempted second degree murder. Thus, even if it were error to include the additional language in the instruction defining the elements of second degree murder, it would not entitled the defendant to a new trial.

The defendant also argues that the instruction relieved the State of its burden of proof. BOA at 39. The trial court is required to instruct the jury on every essential element of the crime beyond a reasonable doubt. State v. Gerdts, 136 Wn App. 720, 727, 150 P.3d 627 (2007). Here between the "to convict" instruction for attempted second degree murder and the instruction setting out the

elements of second degree murder the jury was informed of every essential element of the offense. The additional language in the second degree murder instruction did not diminish what the State was required to prove. If anything the added language increased the State's burden of proof.

Not every omission or misstatement in a "to convict" instruction relieves the State of its burden of proof. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). In that case the error is subject to a harmless error analysis. Id. Where an element of the offense is alleged to be misstated or omitted the error is harmless when the Court concludes beyond a reasonable doubt that the verdict would have been the same absent the error. Id. at 341.

Here the added language did not omit or misstate an element of the charge. Nevertheless, even under the constitutional harmless error analysis employed in Brown, the alleged error in Instruction 10 was harmless. As discussed above, the evidence only proved the defendant was guilty of the attempted offense, because Hindal did not die. Thus the defendant could only be convicted of the charged offense, attempted second degree murder. He was in no jeopardy of being convicted of that completed crime.

The defendant argues that the trial court compounded the error when the jury sent a question asking the court for the definition of murder in the second degree, and the court referred jurors back to instruction 10. 1 CP 133. He argues that when a jury question indicated an erroneous understanding of the law, the trial court was required to provide a corrective instruction. He relies on this Court's decision wherein a jury queried whether it was required to be unanimous in order to answer "no" on a special verdict form in State v. Campbell, 163 Wn. App. 394, 260 P.3d 235 (2011), review granted and remanded, 175 Wn.2d 1021 (2012). This Court concluded that the jury question pointed out an ambiguity in the jury instruction. That ambiguity led to what at the time had been held to be an erroneous instruction that the jury did need to be unanimous to answer "no" as determined in State v. Bashaw, 162 Wn.2d 133, 234 P.3d 195 (2010), overruled, State v. Nunez, 174 Wn.2d 727, 285 P.3d 21 (2012). Under that circumstance this Court found the trial court should have clarified the law for the jury.

Unlike the question at issue in Campbell the question here did not indicate that the jury was confused about what was required to answer guilty or not guilty on the verdict form. It was a request

for a definition of a term used in the "to convict" instruction for attempted second degree murder. That definition was already provided in the elements of Instruction number 10. The challenged language in that instruction had no bearing on that definition. The trial court appropriately referred jurors back to the specific instruction that covered their specific question.

The defendant draws a comparison between the alleged error in the instructions here and errors in self-defense instructions. When considering the sufficiency of self-defense instruction the court has stated that they "must more than adequately convey the law of self-defense." State v. Le Faber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), abrogated on other grounds, State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). The defendant does not make clear why this standard should apply to any other kind of instruction, rather than the general rules that apply when considering the sufficiency of jury instructions. Without citation to authority or any reasoned analysis, this court should decline to apply this standard which appears to have been reserved for self-defense instructions.

D. THE JUDGEMENT AND SENTENCE DOES NOT REQUIRE CORRECTION.

The State conceded at sentencing that count II, second degree assault, merged with count I, attempted second degree murder. 1 RP 25-26. The judgment and sentences was a partially pre-printed form. Paragraph 2.1 set out the current offenses, listing counts I and II. Paragraphs 2.3 set out the sentencing data, and again included counts I and II. Count II in each paragraph was deleted by lining it out, with an added notation "merged." In addition paragraph 2.1 contained a pre-printed check box for the court to find counts constituted same criminal conduct. The box was checked, with the same criminal conduct language lined out, and a notation that counts I and II "merge." The defendant contends that the judgment and sentence violated his right to be free of double jeopardy. He argues the case should be remanded to the trial court to remove any mention of count II from the judgment and sentence.

Both Washington constitution article 1, §9 and the Fifth Amendment to the United States constitutions protect persons from twice being put in jeopardy for the same offense. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). Those provisions

prevent multiple punishments for the same offense. Id. Whether a double jeopardy violation occurred is reviewed de novo. Id.

A double jeopardy violation occurs where multiple convictions that have merged are reduced to judgment even though no corresponding sentence is imposed on merged counts. State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007). An order conditionally vacating a merged count while directing that it remains valid also violates double jeopardy. Turner, 169 Wn.2d at 464.

Here the court neither reduced the second degree assault conviction to judgment nor did it conditionally vacate it and indicate that it would remain valid for some purpose. Instead it was lined out, indicating that it had been vacated and had no effect. The manner in which it was dealt with here is similar to correcting a scrivener's error. Had the State amended the Information before trial to charge only the attempted second degree murder count, but the second degree assault count was nonetheless included on the judgment and sentence, scratching out the reference to second degree assault would not convey that the defendant had been convicted of that charge. Instead it would convey that someone made a mistake, and that mistake was corrected by crossing out the reference to that charge.

The defendant argues that crossing out the reference to second degree assault was insufficient. He argues that there may be no reference to the charge at all. He relies on Turner which stated in part "no reference should be made to the vacated conviction at sentencing." Turner, 169 Wn.2d at 465. BOA at 42.

In Turner the Court was confronted with an actual order conditionally vacating the merged counts. It was not concerned with whether lining out merged counts with the notation "merged" also violated double jeopardy. Turner's requirement that no mention be made at sentencing was respected in this case. Once the State conceded that the two counts merged, the trial court sentenced the defendant solely on attempted second degree murder, making no reference at all to the second degree assault count. 3 RP 150-152.

The Court addressed nearly the same argument the defendant make here in State v. Fuller, 169 Wn. App. 797, 282 P.3d 26 (2012), review denied, 176 Wn.2d 1006 (2013). There the defendant was convicted of first degree felony murder and first degree premeditated murder. The trial court merged the two convictions and entered a judgment and sentence only on first degree murder. Relying on Turner the defendant argued the trial

court should have dismissed one of the two murder convictions. The Court disagreed finding that the order merging the two counts into one did not violate double jeopardy as contemplated in Turner. Id at 835. Further, even if it did not effectively merge both convictions, it did not violate double jeopardy under either Turner or Womac because the court entered a judgment and sentence that referenced only one first degree murder count. Id.

Similar to Fuller the court entered judgment on one count here. It did not enter any other orders referencing the second degree assault charge. It effectively deleted that charge by lining it out. Thus the defendant's right to be free of double jeopardy was not violated.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the conviction and judgment entered in this case.

Respectfully submitted on October 3, 2013.

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