NO. 44998-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TYRONE EAGLESPEAKER,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Reference to evidence of Ms. Ricciardi's prior false rape allegation was not improper.

The State asks this Court to disregard reference to the complaining witness's prior false allegation of rape in the Opening Brief. Resp. Br. at 16-18. As Mr. Eaglespeaker made clear in his opening brief, this information was not presented to the trial court or jury and is not a basis for determining the merits of this direct appeal. Op. Br. at 1 n.1, 22 n.7. Mr. Eaglespeaker did not, and does not, ask the Court to do so. *Id.* Counsel for Mr. Eaglespeaker did not include the information for the sole purpose of embarrassing the complaining witness; thus the State's suggestion of alternative relief should be denied.[1]

a. Factual background.

In a joint motion for stay filed in this Court, the State and Mr. Eaglespeaker stipulated to the following facts:

[1] The State included its request to "disregard" in its response brief, relying on a case that allows requests to remove documents designated in the appellate court record but not necessary to the issues on appeal to be addressed in a responsive pleading. Resp. Br. at 16 (citing *Engstrom v. Goodman*, 166 Wn. App. 905, 909 n.2, 271 P.3d 959 (2012)). Because the State does not appear to seek specific relief and because RAP 17.4(d) requires all non-dispositive motions be set forth in a separate pleading, Mr. Eaglespeaker understands the State's request is not a motion to strike but simply an argument asking the Court that it not refer to the recited information when it reaches its decision on the merits.

> After trial and sentencing, the Prosecuting Attorney discovered and disclosed extrinsic evidence relating to the complaining witness's credibility. These materials include police reports from a foreign jurisdiction wherein the complaining witness made reports alleging misconduct by a third party similar to that which the complaining witness alleged against Mr. Eaglespeaker. The officers reported the physical evidence found within the complaining witness's residence did not corroborate her complaints of being assaulted and raped. The disclosed reports show the complaining witness later admitted she had fabricated those accusations. The foreign jurisdiction closed the case as unfounded.

Joint Motion to Stay at 2 (Feb. 24, 2014).[2]

In two footnotes in the Opening Brief, Mr. Eaglespeaker referenced this new information, making clear that this "[a]dditional evidence was produced by the State after sentencing" and that "the jury was unaware of the prior false allegation evidence" due to the timing of the disclosure. Op. Br. at 1 n.1, 22 n.7. Mr. Eaglespeaker cited only to the stipulated recitation of the relevant background in this Joint Motion to Stay filed on February 24, 2014.

The State asks now that "All references to and arguments based upon documents or facts not contained in the appellate court record

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[2] The Joint Motion to Stay Direct Appeal is signed on behalf of the State by the former Chief Criminal Deputy Prosecuting Attorney for Skamania County, Yarden Weidenfeld. Joint Motion to Stay at 6; *see* Motion for Extension of Time to File Respondent's Brief at 2 (Jul. 18, 2014) (indicating Mr. Weidenfeld "recently took a job with another agency").

must be disregarded by this Court." Resp. Br. at 16 (citing RAP 9.1(a)).

b. Mr. Eaglespeaker did not refer to the stipulated evidence for purposes of weighing the merits.

Mr. Eaglespeaker agrees with the State that matters stipulated to by the parties in the appellate court but not included in the record before the trial court cannot be relied on by this Court in deciding the merits of Mr. Eaglespeaker's direct appeal. Mr. Eaglespeaker presented no misstatements about what was contained in the parties' stipulation. *Compare* Joint Motion to Stay at 2 *with* Op. Br. at 1 n.1, 22 n.7. He referred to the information as "prior false allegations" because, as the parties agreed, "[t]he disclosed [police] reports show the complaining witness later admitted she had fabricated those [prior] accusations" of being "raped." Op. Br. at 1 n.1; Joint Motion to Stay at 2.

Mr. Eaglespeaker was candid with this Court that the information was not provided to the jury and that it was produced by the State after sentencing. Op. Br. at 1 n.1, 22 n.7; *see* Joint Motion to Stay at 2. Mr. Eaglespeaker sought to be entirely transparent by citing only to the parties' joint Motion to Stay in this Court. *Id.* Finally, Mr.

Eaglespeaker did not ask this Court to grant any relief based on these stipulated facts. *See* Op. Br. at 1 n.1, 22 n.7.

In its Response Brief, the State claims Mr. Eaglespeaker "repeatedly makes reference to a 'false rape allegation' purportedly made by the victim prior to the instant rape" "[i]n the statement of the case and throughout the brief." Resp. Br. at 17. The State's claim does not match up to Mr. Eaglespeaker's briefing. The two cited footnotes, neither of which appears in the statement of the case, are the only two references in the Opening Brief to the information from the agreed motion to stay. Moreover, the State stipulated in the Joint Motion to Stay that these prior allegations were fabricated and that the complaining witness's admission that they were fabricated is contained in police reports from a foreign jurisdiction. Thus, the prior false rape allegation is not something that Mr. Eaglespeaker "purports," rather it is a fact to which the State has stipulated.

c. <u>The reference to the stipulated evidence is germane and relevant to procedural background and the context of this case.</u>

Mr. Eaglespeaker finds no basis for this Court to "disregard" these footnotes; they are part of the agreed background of this case. The information recited is in the appellate court file on this case and

relevant to the context of Mr. Eaglespeaker's appeal. However, Mr. Eaglespeaker agrees the Court ought not rely on the stipulated facts in deciding the merits of Mr. Eaglespeaker's appeal.

The State argues "the defendant unfairly attempts to undermine the victim's credibility with an extra-record irrelevant claim." Resp. Br. at 17. However, as discussed, Mr. Eaglespeaker makes no claim for relief based upon the stipulated facts presented in the parties' joint motion. Moreover, in its February 24 joint motion, the State stipulated that the post-trial "disclosed reports show the complaining witness later admitted she had fabricated those [prior] accusations." Joint Motion to Stay at 2 (Feb. 24, 2014). Thus, while the trial court record may not contain evidence of the falsity of the complaining witness's prior rape allegation, evidence of the falsity of that prior allegation has been agreed to by the parties before this Court.

The presentation of these facts disclosed by the State and to which the State stipulated in this Court are not solely, or in any part, directed at embarrassing or burdening the complaining witness. Thus, the State's suggestion that Mr. Eaglespeaker's attorney "write a letter of apology to the victim" is without basis. Resp. Br. at 17-18.

The parties agree that this Court should not rely on factual information contained only in a stipulated appellate court motion in deciding Mr. Eaglespeaker's direct appeal. However, there is no basis to "disregard" the two footnotes in Mr. Eaglespeaker's opening brief, which merely point to information contained in the appellate record, and stipulated to by the parties, as a matter of context.

2. Because the evidence the State points to is inapposite and no other affirmative evidence was presented, the trial court erred in instructing the jury on rape in the second degree.

A lesser offense instruction should not be provided where, to find that only the lesser offense occurred, the jury must disbelieve a portion of the evidence. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). Here there was evidence of forcible compulsion after felonious entry (from Julie Ricciardi's testimony) as well as evidence of consensual sex (from Mr. Eaglespeaker's statements). But there was no affirmative evidence that Mr. Eaglespeaker raped Ms. Ricciardi without entering her home uninvited. Put otherwise, to find Mr. Eaglespeaker guilty of second degree rape, the jury had to disbelieve selective portions of the evidence, i.e., that Mr. Eaglespeaker entered the home uninvited. Because the factual prong of the lesser offense test requires the requesting party to show

"something more than the possibility that the jury could disbelieve some of the . . . evidence[,]" the trial court erred in giving a lesser offense instruction here. *State v. Brown*, 127 Wn.2d 749, 755, 903 P.2d 459 (1995). The conviction for second degree rape must be reversed. *Id.* at 756.

The State agrees with this recitation of the law. Resp. Br. at 18-19. The State tries to argue, however, that affirmative evidence supported an inference that only the rape occurred. Resp. Br. at 20-22. The State argues that the jury could have inferred Mr. Eaglespeaker was invited into Ms. Ricciardi's home when he asked her to let him know if he wanted her to come over and she never did so. The argument is illogical.

At trial, the State admitted a series of text messages purportedly between Mr. Eaglespeaker and Ms. Ricciardi. Exhibits 12-35; 5/14/14 RP 32-33. As Ms. Ricciardi testified, Mr. Eaglespeaker texted "I need to shower, wbu [what about you]" and she replied, "Yea but i always wait til my kids are asleep." 5/14/14 RP 40; Exhibit 21. Mr. Eaglespeaker then texted "Okay well if u want me to come over than let me know." 5/14/14 RP 40-41; Exhibit 21. In a series of texts that followed, Mr. Eaglespeaker apparently offended Ms. Ricciardi by

telling her he was attracted to her and Ms. Ricciardi was upset with him in her responses. 5/14/14 41-46; Exhibits 21-32. After a "time gap," Mr. Eaglespeaker allegedly texted "U up still" and Ms. Ricciardi responded "Yup kids just fell asleep." Exhibit 32; 5/14/14 RP 44-45. Mr. Eaglespeaker then apologized for his previous offensive texting. *Id.* The rape was alleged to take place thereafter. 5/14/14 RP 46-48.

Based on this evidence, the State argues it had affirmative evidence that Mr. Eaglespeaker was invited into Ms. Ricciardi's home. Resp. Br. at 20-22. But at no point did Ms. Ricciardi let Mr. Eaglespeaker know that he could come over, as he had requested. *See* Exhibits 21-32. Rather, Ms. Ricciardi affirmatively testified that she did not know he was coming over that night, she did not give him permission to enter, and Mr. Eaglespeaker did not have general permission to enter her house. 5/14/14 RP 48. Thus, not only does the State's argument rely on inapposite evidence but it would also require the jury to selectively believe Ms. Ricciardi—that is, to believe her testimony that he forcibly raped her but to disbelieve her testimony that she did not authorize his entry into her home. This is precisely the type of selective impeachment, or disbelief, that is insufficient to justify a

lesser offense instruction. *Fernandez-Medina*, 141 Wn.2d at 456; *Brown*, 127 Wn.2d at 754-56.

The trial court erred in providing the State's requested lesser offense instruction, requiring reversal of the second degree rape conviction. *See Brown*, 127 Wn.2d at 756.

3. Ms. Ricciardi's statements to the 9-1-1 operator and then to police should not have been admitted as excited utterances where they were made a couple days after the alleged incident and after Ms. Ricciardi had resumed everyday tasks and shown an ability to fabricate and act in her self-interest.

To admit as excited utterances Julie Ricciardi's out-of-court statements to the 9-1-1 operator "a couple days" after the alleged incident and to police officers thereafter, the State had to show that Ms. Ricciardi remained continuously under the influence of the startling event to which the statement relates at the time the statement was made. Ex. 41 at 00:34-38; ER 104(a); *State v. Chapin*, 118 Wn.2d 681, 687, 826 P.2d 194 (1992); *State v. Ramires*, 109 Wn. App. 749, 757, 37 P.3d 343 (2002). Spontaneity and a lack of opportunity to fabricate are essential to any admitted statements under this exception. *Chapin*, 118 Wn.2d at 687-88; *State v. Briscoeray*, 95 Wn. App. 167, 174, 974 P.2d 912 (1999). "[T]he 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.'" *Brown*, 127 Wn.2d at 758 (quoting *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)). The excited utterances exception must be applied restrictively. *State v. Dixon*, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

The trial court abused its discretion by finding the 9-1-1 call and subsequent statements to law enforcement admissible after listening to only the first 20 seconds of the call. 4/15/13 RP 6-7. An out-of-court statement is not admissible as an excited utterance simply because the declarant was upset when making the statement. *Dixon*, 37 Wn. App. at 873-74. Moreover, the State did not show that Ms. Ricciardi remained continuously under the stress of the alleged rape during the "couple days" between it and the 9-1-1 call. Ex. 41 at 00:34-38. Rather, the evidence at trial showed Ms. Ricciardi had gone about her life caring for her children in the intervening days. 5/14/13 RP 58-67, 75.

Additionally, Ms. Ricciardi testified that she fabricated lies to Mr. Eaglespeaker during this intervening couple day period. 5/14/13

RP 67-70, 88, 90. Ms. Ricciardi told Mr. Eaglespeaker that she needed baby formula, asking him to bring it to her, when another friend had already brought it to her. 5/14/13 RP 67-70 (Ricciardi told Eaglespeaker she needed formula from him immediately, but truth was that a friend had already brought it to her); Exhibit 33 (telling Eaglespeaker by text that she needs the formula "now"). The State argues her motivation of "self-preservation" renders these statements not a lie. Resp. Br. at 31. But Ms. Ricciardi's motivation for lying is not relevant under the excited utterances analysis. What is critical is that Ms. Ricciardi was able to make an expression based on reflection, self-interest or "the exercise of choice or judgment"; she was no longer so under the shock of the startling event that her reflective faculties remained stilled. *Chapin*, 118 Wn.2d at 686; *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969). The fact that she did make up falsehoods shows that the later-in-time admitted statements could be "the result of fabrication, intervening actions, or the exercise of choice or judgment." *Brown*, 127 Wn.2d at 758. The evidence did not prove by a preponderance that Ms. Ricciardi's statements were "'a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock', rather than an

expression based on reflection or self interest." *Chapin*, 118 Wn.2d at 686 (quoting 6 J. Wigmore, Evidence § 1747 at 195).

The State supports the trial court ruling admitting the statements made almost two days after the alleged startling event by arguing "Washington courts have allowed statements made hours after the startling event." Resp. Br. at 26 & n.1, 27 (emphasis added). Of course, here Ms. Ricciardi's statements were made "a couple of days" after the alleged event, not just a couple of hours later. Ex. 41 at 00:34-38 (emphasis added). The more time that has passed between the startling event and the statement, the more important the "proof that the declarant did not actually engage in reflective thought." *Chapin*, 118 Wn.2d at 688. As the time between the event and the statement lengthens, "the opportunity for reflective thought arises and the danger of fabrication increases." *Id.* Therefore, it is quite relevant that in the cases cited by the State, at most hours had passed between the startling event and the out-of-court statement.

Moreover, the cases on which the State relies not only presented a significantly shorter intervening period but those courts also found proof that the declarant remained continuously under the stress of the startling event and that he or she did not have the wherewithal to

fabricate or make a reasoned attempt to improve his or her position. *E.g.*, *Johnston*, 76 Wn.2d at 406 (four-year-old child did not have wherewithal to fabricate statements made in hospital emergency room an hour after recovering from serious facial lacerations); *State v. Fleming*, 27 Wn. App. 952, 955-56, 621 P.2d 779 (1980) (court relied on evidence of continuous state of stress where, for instance, victim was unable to sleep during seven hours between event and statement because she was "constantly in fear").

Unlike the cases relied upon by the State, Ms. Ricciardi's 36-48 hour delayed statements did not satisfy the restrictive excited utterance exception. Admitting the statements was an abuse of discretion and cannot be considered harmless. *See* Op. Br. at 22-25.

B. CONCLUSION

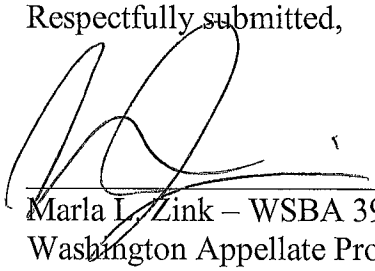
As set forth above and in the opening brief, Mr. Eaglespeaker's conviction should be reversed because the trial court should not have provided a lesser offense instruction, because the complaining witness's 9-1-1 call and subsequent statements to police, made a couple days later and after the declarant demonstrated an opportunity to fabricate or act in self-interest, were not excited utterances, and because statements elicited after the police continued to question Mr.

Eaglespeaker in violation of his constitutional right to silence should have been excluded.

Even if the conviction is not reversed, the court should strike the discretionary costs imposed as part of Mr. Eaglespeaker's sentence.

DATED this 1st day of October, 2014.

Respectfully submitted,



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	)	
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	)	NO. 44998-6-II
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	)	
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	)	
Appellant.	)	

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