

61941-1

61941-1

No. 61941-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES ARTIS CASON,

Appellant.

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

APPELLANT'S SUPPLEMENTAL BRIEF
ADDRESSING STATE V. PUGH

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

2006 FEB 22 PM 4:41

FILED
COURT OF APPEALS
DIVISION ONE
KING COUNTY

TABLE OF CONTENTS

A. SUPPLEMENTAL ARGUMENT..... 1

FRAZIER'S HEARSAY STATEMENTS TO OFFICER JANES
WERE INADMISSIBLE UNDER ARTICLE 1, SECTION 22,
BECAUSE THEY WERE A NARRATION OF A PAST,
COMPLETED AFFAIR..... 1

1. Article I, section 22 must be interpreted independently of the
Sixth Amendment 1

2. The admission of excited utterances under article I, section
22, depends upon the historical treatment of such
statements..... 2

3. The admission of Ms. Frazier's hearsay statements to Officer
Janes violated article I, section 22, where the statements
were a narration of a past, completed affair 7

B. CONCLUSION..... 10

TABLE OF AUTHORITIES

Constitutional Provisions

Article I, section 22.....	1, 2, 6, 7, 9
----------------------------	---------------

Washington Supreme Court

<u>Beck v. Dye</u> , 200 Wash. 1, 92 P.2d 1113 (1939)	3, 4, 5, 6, 9
<u>Heg v. Mullen</u> , 115 Wash. 252, 197 P. 51 (1921).....	3, 9
<u>State v. Aldrick</u> , 97 Wash. 593, 166 P. 1130 (1917).....	3
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	1
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986)	1
<u>State v. Pugh</u> , No. 80850-3, 2009 WL 5155364 (Wash. Dec. 31, 2009).....	1, 2, 3, 4, 5, 6, 7, 9
<u>State v. Shafer</u> , 156 Wn.2d 381, 128 P.3d 87 (2006).....	1
<u>Walters v. Spokane Int'l Ry. Co.</u> , 58 Wash. 293, 108 P. 593 (1910)	5

Other Authorities

1 Francis Wharton & O.N. Hilton, <u>A Treatise on the Law of Evidence in Criminal Issues</u> (10th ed.1912).....	3
1 Simon Greenleaf, <u>A Treatise on the Law of Evidence</u> (14th ed. 1883).....	4

A. SUPPLEMENTAL ARGUMENT

FRAZIER'S HEARSAY STATEMENTS TO OFFICER JANES WERE INADMISSIBLE UNDER ARTICLE 1, SECTION 22, BECAUSE THEY WERE A NARRATION OF A PAST, COMPLETED AFFAIR

1. Article I, section 22 must be interpreted independently of the Sixth Amendment. In State v. Pugh, the Washington Supreme Court unequivocally affirmed that Washington's Confrontation Clause must be interpreted independently of the Sixth Amendment. State v. Pugh, No. 80850-3, 2009 WL 5155364, at *4 (Wash. Dec. 31, 2009) (citing State v. Foster, 135 Wn.2d 441, 473, 481, 957 P.2d 712 (1998) (Alexander, J., concurring and dissenting; Johnson, J., dissenting)). Article I, section 22 is subject to an independent analysis with regard to both the scope of the confrontation right as well as the manner in which confrontation occurs. Pugh, 2009 WL 5155364, at *4 (citing State v. Shafer, 156 Wn.2d 381, 391, 128 P.3d 87 (2006) (citing Foster, 135 Wn.2d at 470) (Guy, J., lead opinion), 471 (Alexander, J., concurring and dissenting), 481 (C. Johnson, J., dissenting)). Therefore, a Gunwall¹ analysis is no longer necessary. Pugh, 2009 WL 5155364, at *4.

¹ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Where a criminal defendant challenges the admission of hearsay statements under article I, section 22, the question is whether the state constitution, as independently applied, precludes the admission of the statements. Pugh, 2009 WL 5155364, at *5.

2. The admission of excited utterances under article I, section 22, depends upon the historical treatment of such statements. In determining whether an uncross-examined hearsay statement admissible as an excited utterance may be admitted under article I, section 22, the court focuses on the historical treatment of such statements. Pugh, 2009 WL 5155364, at *6. At the time our state constitution was adopted, uncross-examined hearsay statements that now qualify as excited utterances were frequently admitted under the "res gestae" doctrine, notwithstanding the state constitution's confrontation clause. Id. The modern "excited utterance" exception arose out of the traditional "res gestae" doctrine. Id.

The "res gestae" doctrine recognizes that, "under certain circumstances, a declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event." Id. (citing Beck v. Dye, 200 Wash. 1, 10-11, 92 P.2d

1113 (1939) (summarizing numerous earlier cases)). The theory underlying admissibility of such statements was that

"[w]hat is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted."

Pugh, 2009 WL 5155364, at *6 (quoting State v. Aldrick, 97 Wash. 593, 596, 166 P. 1130 (1917) (quoting 1 Francis Wharton & O.N. Hilton, A Treatise on the Law of Evidence in Criminal Issues § 262 (10th ed.1912))). "Res gestae statements 'raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design.'" Pugh, 2009 WL 5155364, at *6 (quoting Heg v. Mullen, 115 Wash. 252, 256, 197 P. 51 (1921) (internal quotations omitted)). Therefore, cross-examination is unnecessary, as the action "speaks for itself." Pugh, 2009 WL 5155364, at *6.

In determining whether a hearsay statement would have been admissible under the res gestae doctrine as traditionally understood, the question is "whether the circumstances and declarations offered in proof were contemporaneous with the main

fact under consideration, and whether they were so connected with it as to illustrate its character." Pugh, 2009 WL 5155364, at *6 (quoting 1 Simon Greenleaf, A Treatise on the Law of Evidence § 108, at 144-45 (14th ed. 1883)).

Pugh adopted the multi-factor test set forth in Beck v. Dye for determining whether hearsay statements would have been admissible under the res gestae doctrine as historically understood.

Pugh, 2009 WL 5155364, at *7 (citing Beck, 200 Wash. at 9-10).

For a statement to be admissible under the res gestae doctrine, the following requirements must be met:

"(1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made."

Pugh, 2009 WL 5155364, at *7 (quoting Beck, 200 Wash. at 9-10). Exact concurrence of the statements and the principal act is not required, but the statements must arise naturally from the event, without evidence of premeditation. Pugh, 2009 WL 5155364, at *7 (quoting Walters v. Spokane Int'l Ry. Co., 58 Wash. 293, 297-98, 108 P. 593 (1910)).

In Pugh, the court concluded Bridgette Pugh's hearsay statements to the 911 operator would have been admissible under the res gestae doctrine as it existed when our state constitution was adopted. Pugh, 2009 WL 5155364, at *9 (citing Beck, 200 Wash. at 9-10). Ms. Pugh called 911 and reported, "My husband was beating me up really bad." Pugh, 2009 WL 5155364, at *1. When asked if he was still there, she said, "No he's walking away," and "He's just outside." Id. She again reported being beaten but this time stated it in the present tense, "He's beating me up (unintelligible)." Id. When the operator asked if she could see Mr. Pugh, she responded that "he's outside of the house" but she could not see him. Id. The call terminated when police officers arrived. Id. The officers soon arrested Mr. Pugh in the parking lot outside the apartment where Ms. Pugh was. Id.

Applying the Beck factors, the court concluded Ms. Pugh's statements "were natural statements growing out of the assault on her, not merely a narrative of what had happened, and they explained events that had occurred within minutes as well as present and continuing circumstances." Pugh, 2009 WL 5155364, at *9. Further, the statements were statements of fact, not opinion.

Id. In addition,

[t]hey were spontaneous utterances dominated and evoked by the events themselves without premeditation or reflection. They were made at a time and under circumstances that exclude any presumption, based on passage of time, that they were the result of deliberation.

Id. Finally, the statements were made by a participant in the transactions described. Id. Therefore, in sum, Ms. Pugh's statements were "of a type that simply do not implicate the right to confrontation under article I, section 22." Id.

Although res gestae statements, as delineated early in our state history, do not come within the protection of the state confrontation clause, Pugh also made clear that not all hearsay statements admissible under ER 803 as excited utterances are, necessarily, admissible under article I, section 22. Id. at *10. The court acknowledged that the modern excited utterance exception to the hearsay rule has expanded, in some instances, beyond its

historical antecedents. Id. The admission of such statements that would not qualify as res gestae under the res gestae doctrine as traditionally understood, could violate article I, section 22, if the defendant had no opportunity to cross-examine the witness. Id.

3. The admission of Ms. Frazier's hearsay statements to Officer Janes violated article I, section 22, where the statements were a narration of a past, completed affair. In Pugh, the court emphasized that Ms. Pugh's statements to the 911 operator qualified as part of the res gestae, where the statements were "not merely a narrative of what had happened, and they explained events that had occurred within minutes as well as present and continuing circumstances." Pugh, 2009 WL 5155364, at *9. Ms. Pugh described the assault in past and present tense, and related the current whereabouts of Mr. Pugh, who was "just outside" the apartment. Id. at *1. She told the operator she was afraid to go outside because she thought he might beat her again. Id. Thus, the statements were part of an ongoing event and "not a mere narrative of a past, completed affair." Id. at *7 (quoting Beck, 200 Wash. at 9-10). The statements therefore "were made at a time and under circumstances that exclude any presumption, based on passage of time, that they were the result of deliberation." Pugh,

2009 WL 5155364, at *9. In this case, by contrast, Ms. Frazier's hearsay statements to Officer Janes were a narrative of a past, completed affair. The passage of time between the alleged event and the statements describing it, as well as the circumstances surrounding the making of the statements, do not exclude the presumption that the statements were the result of deliberation.

Officer Janes responded to the apartment complex at 3:48 a.m. 5/07/08RP 69, 113. He sat in his patrol car in front of the building and waited for backup. 5/07/08RP 69. While sitting in his car, Officer Janes observed Ms. Frazier emerge from the front door of the building. 5/07/08RP 70. Officer Janes contacted Ms. Frazier, who told him James Cason had hit her with a liquor bottle. 5/07/08RP 100, 107-08. She said she did not know where Cason was, but she did not think he was still inside the apartment. 5/07/08RP 70, 85, 108; Exhibit 25. When backup arrived, the officers searched the apartment and confirmed that Cason was not present. 5/07/08RP 72.

Officer Janes had turned on the video camera attached to his car when he first arrived at the apartment building. 5/07/08RP 103-06; Exhibit 25. According to the time display on the video recording, his interview with Ms. Frazier began at around 03:52:00.

Exhibit 25. The video recorded from the camera in the hallway on the third floor of the apartment building shows a man coming out of the apartment at around 3:40 a.m., 12 minutes earlier. 5/07/08RP 46, 150-51; Exhibit 1.

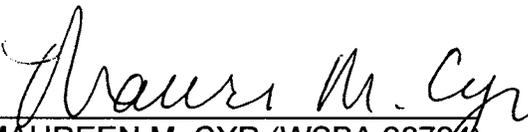
Thus, the evidence shows that the event as alleged had terminated at least 12 minutes before Ms. Frazier made her statements to Officer Janes describing the event. Moreover, Ms. Frazier was not describing continuing circumstances, as Mr. Cason had left the scene. Due to the passage of time and the circumstances surrounding the statements, they were not "a natural declaration or statement growing out of the event," but were instead "a mere narrative of a past, completed affair." Pugh, 2009 WL 5155364, at *7 (quoting Beck, 200 Wash. at 9-10). The timing and circumstances do not "raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design." Pugh, 2009 WL 5155364, at *6 (quoting Heg, 115 Wash. at 256). Thus, the statements do not fall under the *res gestae* doctrine as traditionally understood. Admission of the statements,

without an opportunity for cross-examination, therefore violated article I, section 22.

B. CONCLUSION

For the reasons set forth above and in the opening brief, admission of Ms. Frazier's hearsay statements to Officer Janes violated Mr. Cason's state constitutional right to be confronted by the witnesses against him.

Respectfully submitted this 22nd day of February 2010.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project 91052
Attorneys for Appellant