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NO. 64328-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TRAMAINE ISABELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the victim's 911 call was properly admitted because it was a call for help, not a testimonial statement.

2. Whether the trial court acted within its discretion in admitting the victim's 911 call under the hearsay rules.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Tramaine Isabell, with domestic violence residential burglary for breaking into the apartment of his former girlfriend, Shayla Poree, in the early morning hours on February 1, 2009. CP 1-4. A jury trial was held in September 2009 before the Honorable Jeffrey Ramsdell.

Shayla Poree did not testify at trial. Accordingly, the State moved to admit a recording of Poree's 911 call, which was made immediately after she fled from her apartment on the morning in question. Ex. 2; Supp. CP ____ (Sub no. 28). After listening to the recording and hearing argument from both parties, the trial court ruled that the 911 call was admissible under both the Confrontation Clause and under the hearsay exceptions for excited utterances

and present sense impressions. RP (9/1/09) 76-110. In ruling on the hearsay issue, the trial court explained,

Based on the way [Poree] was presenting in that tape, I'm confident that it would qualify as an excited utterance even though she's kind of understated. But in the background you hear that -- and I don't know how to describe it other than the hesitancy that she has when she's answering questions. She's clearly shook up. But she's not crying hysterically or begging and pleading for them to hurry up. But it's evident to me that she's upset. That's the best way I can put it. I think anybody listening to the tape would hear that in her voice. So I do think the statements qualify as excited utterances.

To the extent that some of [the statements] are describing contemporaneous events like knocking on the door, those would also qualify as present sense impressions.

RP (9/1/09) 108.

At the conclusion of the trial, the jury convicted Isabell of residential burglary as charged. CP 56. Isabell received a standard-range sentence. CP 69-76. He now appeals. CP 77-85.

2. SUBSTANTIVE FACTS

At 3:30 a.m. on February 1, 2009, Shayla Poree and her male companion, Shawn Campbell, awoke to find an intruder in Poree's bedroom. RP (9/9/09) 109. Poree ran downstairs, grabbed her young daughter, ran outside, and called 911. Ex. 2. Campbell

got dressed and left; he was concerned that the intruder had a weapon. RP (9/9/09) 110.

Poree called 911 after fleeing from her apartment, and she reported to 911 that the intruder was her ex-boyfriend, Tramaine Isabell. Ex. 2. She also reported that Isabell said he had a gun, although she did not see it. Ex. 2. Poree made the call as she was standing in the alley behind her apartment building; she reported that she believed that Isabell was still in the apartment. Ex. 2.

Seattle Police Officers Mitch Choi and Dave Foley responded to Poree's 911 call. RP (9/9/09) 69; RP (9/10/09) 10-11. When the officers went into Poree's apartment, Isabell was gone and the apartment was trashed. The sofa was overturned, lotion had been sprayed all over the bedroom, and the contents of the dresser drawers had been strewn about. RP (9/9/09) 72. There was graffiti on the wall that read, "you are a hoe (sic)," and "fuckn (sic) herpes-havin (sic) hoe (sic)." RP (9/10/09) 17.

Poree and her daughter were hiding in a neighbor's apartment when the police arrived. RP (9/9/09) 71. After checking out Poree's trashed apartment, Officer Choi took a statement from

Poree.¹ RP (9/9/09) 74. Poree explained that she and Isabell had dated for approximately 3 years, but they had broken up about 2 months prior to this incident. RP (9/9/09) 83. Poree reported that she and Shawn Crawford were in bed, asleep, when Isabell came into the bedroom and slapped Poree on the back of her head. RP (9/9/09) 75. Poree stated that the damage to her apartment had been done after she fled with her daughter. RP (9/9/09) 96. Poree was "nervous" and "shaken up," and said that she was afraid of Isabell. RP (9/9/09) 75.

While Officer Choi was taking Poree's statement, Poree received a call on her cell phone. Poree told Officer Choi that Isabell was the caller. Choi asked Poree to give him the phone so that he could speak with Isabell, and Poree complied. RP (9/9/09) 79. Choi told the caller that he was the investigating officer and asked for the caller to provide his location. RP (9/9/09) 79-80. The male on the other end of the line did not respond to Choi's request for his location; however, the caller stated that "they wouldn't let

¹ Poree's statements to the police were admitted as prior consistent statements for impeachment purposes, not for the truth of the matters asserted. RP (9/9/09) 74.

him into the apartment," and that "[h]e was punched in the face."

Then the caller hung up. RP (9/9/09) 80.

Detective Michelle Barker was assigned to the case, and she took a telephonic statement from Poree.² In this statement, Poree reiterated what she had told Officer Choi. She also stated that Isabell had threatened to kill her and Crawford during the incident. RP (9/10/09) 44-47. Poree also described stalking behavior by Isabell that had occurred after the burglary; she said that Isabell had showed up at her workplace and her apartment, and that he had been following her. RP (9/10/09) 48-50.

On April 1, 2009, Poree left a message on Detective Barker's voice mail stating that she did not want to proceed with the case, and that she and Isabell had gotten back together. RP (9/10/09) 52-53; 77. A few days later, Poree sent a notarized statement to Isabell's public defense agency via fax. In this statement, Poree recanted much of what she had originally reported to the police. More specifically, Poree stated that Isabell had permission to be in her apartment, and that Isabell had not assaulted or threatened her. Poree said she had called the police because she was cheating on

² Poree's statements to Detective Barker were also admitted for impeachment, and not for the truth of the matters asserted. RP (9/10/09) 47, 49.

Isabell with another man (Crawford) and she was embarrassed.

RP (9/10/09) 25-29.

C. **ARGUMENT**

1. **THE VICTIM'S 911 CALL WAS A CALL FOR HELP IN AN ONGOING EMERGENCY, AND THUS, HER STATEMENTS WERE NOT TESTIMONIAL.**

Isabell first claims that his Sixth Amendment right to confront witnesses was violated when the trial court ruled that Shayla Poree's 911 call was admissible in the absence of an opportunity for cross examination. Brief of Appellant, at 9-20. This claim should be rejected. The trial court correctly concluded that Poree's statements were made for the purpose of enabling a response from police to assist with an ongoing emergency. Accordingly, the statements made during the call were not testimonial, and this Court should affirm.

The United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), fundamentally changed the focus of Confrontation Clause analysis. Whereas prior case law had focused on the reliability of out-of-court statements to determine admissibility, Crawford shifted the focus to the question of whether such statements are "testimonial" in nature. Accordingly, under Crawford, a witness's

"testimonial" out-of-court statements are not admissible unless the defendant has been given an opportunity to cross-examine that witness. However, Crawford "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.'" Id. at 68.

Some further guidance was provided by the Court's later decision in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In Davis, the Court ruled that a 911 caller's statements were not testimonial because they were made to assist the police in responding to an emergency, not to assist in a later court proceeding:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Accordingly, non-testimonial statements made during an ongoing emergency fall outside the scope of the Confrontation Clause entirely. Id.

The Washington Supreme Court then applied these principles from Davis in State v. Ohlson, 162 Wn.2d 1, 168 P.3d

1273 (2007). In further defining the test for determining whether the primary purpose of an interrogation is to meet an ongoing emergency or not, the Ohlson court identified four factors that courts should consider: 1) the timing of the statements; 2) the level of harm threatened; 3) the level of need for the information; and 4) the formality of the questioning. Ohlson, 162 Wn.2d at 15. Based on these factors, the court concluded that statements that the victim had made to the first officer on the scene following a serious assault with racial overtones were not testimonial; thus, they were admissible as excited utterances despite the victim's failure to testify at trial. Id. at 16-19. In so holding, the court found it significant that the assailant was still at large when the statements were made, and therefore, the threat posed was great. Id.

More recently, the Washington Supreme Court again attempted to clarify what constitutes a testimonial statement for purposes of the federal Confrontation Clause in State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009). In Koslowski, the victim of a home-invasion robbery made statements to the police officers who responded to her home in response to her 911 call after the crime. She made some statements initially to the first officer who arrived, and then made more detailed statements several minutes later

when a second officer arrived. Koslowski, 166 Wn.2d at 414-15.

The victim died prior to trial, so the issue was whether her statements were testimonial such that they were admitted in violation of the Confrontation Clause in the absence of cross-examination.

In considering the issue, the Koslowski court expanded on the factors from Davis, as utilized in Ohlson, that courts should consider in distinguishing testimonial statements from statements made for the purpose of enabling a response to an ongoing emergency:

(1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant. (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency. (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate that the elicited statements were nontestimonial. (4) What was the level of formality of the interrogation? The greater the formality, the more

likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?

Koslowski, 166 Wn.2d at 418-19 (footnote and citation omitted). In other words, the timing of the statements, the nature of the questions and answers, the formality of the questioning (or lack thereof), and whether an objective listener would interpret the statements as requests for immediate assistance are all relevant in determining whether statements are testimonial under Crawford and Davis. In Koslowski, the court ultimately determined that the victim's statements were testimonial, because they were made after the danger had passed and there was no longer an ongoing emergency or a need for immediate assistance. Koslowski, 166 Wn.2d at 421-22.

Even more recently, the Washington Supreme Court considered whether a recording of a 911 call was admissible under both the federal and state confrontation clauses in State v. Pugh, 167 Wn.2d 825, 255 P.3d 892 (2009). In Pugh, the victim called 911 to report that the defendant had just assaulted her, that he was no longer in the house, and, in response to the operator's questions, she provided a description of the defendant. Pugh, 167 Wn.2d at 829. After a brief analysis of the "ongoing emergency"

analysis from Davis, the Pugh court concluded that the 911 call was clearly not testimonial because it was a request for immediate assistance, and thus, that the call was properly admitted under the federal Confrontation Clause. Pugh, 167 Wn.2d at 831-34.

In addition, the Pugh court considered whether the victim's 911 call was admissible under article I, section 22 of the Washington Constitution. In conducting this analysis, the court discussed the historical underpinnings of the "res gestae" exception to the requirement for cross-examination, which existed when the state constitution was ratified, and held that the admission of "res gestae" statements without cross-examination or a showing that the declarant was unavailable did not violate the state Confrontation Clause.³ Id. at 834-43.

As the court explained, "res gestae" statements relate to the main event at issue, are natural declarations growing out of the event, are statements of fact rather than opinion, are spontaneous or instinctive rather than premeditated, and are made by a

³ Other than a single citation to article I, section 22 in his brief, Isabell does not argue that his state confrontation rights were violated and provides no analysis under Pugh. See Brief of Appellant, at 9-20. The State provides this analysis only to demonstrate that Poree's 911 call was admissible under any applicable standard.

participant or witness to the event. Id. at 839 (citing Beck v. Dye, 200 Wn. 1, 9-10, 92 P.2d 1113 (1939)). As such, the "res gestae" doctrine "evolved into several present day hearsay exceptions," including present sense impressions and excited utterances. Pugh, 167 Wn.2d at 839. Ultimately, the court held that the victim's 911 call was properly admitted against the defendant at trial because it consisted of traditional res gestae statements. Id. at 843.

Based on any of the standards as set forth above, the statements at issue in this case were properly admitted against Isabell.

In this case, Shayla Poree called 911 after she fled from her apartment with her young daughter at 3:30 in the morning to report that Isabell had broken in and said that had a gun. Ex. 2. She reported that Isabell had broken in only about two minutes prior to her call, and that she believed he was still in the apartment. Ex. 2. In response to the 911 operator's questions, Poree provided Isabell's race, age, and name (although she misspelled it), and she provided the address of her apartment. Ex. 2.

All of Poree's statements were necessary to enable an appropriate police response to an ongoing emergency. First, as to the timing of the statements, Poree was describing ongoing events;

Isabell had broken into Poree's apartment only two minutes prior to the call, and Poree believed that he was still inside the apartment during the call. Second, any reasonable listener would recognize that Poree needed help immediately. She had fled from her own apartment in her pajamas and bare feet with her young daughter because Isabell had broken in at 3:30 in the morning and said that he had a gun. Third, the questions from the 911 operator were asked for the purpose of obtaining basic information necessary for an immediate police response, not for a later court proceeding. The location of the incident, basic information about the perpetrator, and the fact that the perpetrator claimed to have a weapon are all vital pieces of information for the responding officers. Fourth, there was no formality whatsoever to the questioning by the operator. The operator was trying to obtain necessary information for the first responders while Poree was outside in her pajamas and bare feet knocking on her neighbor's door at 3:30 in the morning.

Based on the four factors from Ohlson and Koslowski, Shayla Poree's 911 call plainly meets the "ongoing emergency" test from Davis v. Washington. Thus, the statements that Poree made during the call are not testimonial and do not implicate the federal Confrontation Clause. In addition, the statements at issue here are

nearly identical to those at issue in Pugh. Accordingly, Poree's statements fit within the "res gestae" doctrine as well. Therefore, Poree's statements are admissible under any applicable legal analysis.

Nonetheless, Isabell suggests that Poree's statements in this case are like the statements made in Koslowski because they described past events at a time when the victim was "safe" and the emergency had ended. Brief of Appellant, at 15-16. This argument is without merit. In Koslowski, the statements in question were made to police officers who had already responded to the victim's 911 call and had already ensured her safety. Koslowski, 166 Wn.2d at 414-15. Here, by contrast, no officers had yet responded and the emergency conditions still existed. Moreover, Poree was not safe when she made the call. Rather, she made the call as she fled her own apartment at 3:30 in the morning with her young daughter and was walking in an alley and knocking on her neighbor's door. In addition, unlike the victim in Koslowski, Poree reasonably believed that Isabell was still in her apartment when she made her call. Ex. 2. The circumstances presented in this case are much more like those presented in Davis, Ohlson, and Pugh because an emergency still existed when the 911 call was made.

In sum, the trial court ruled correctly that Shayla Poree's statements to the 911 operator were not testimonial, and that the admission of the recording of this call did not violate Isabell's rights under the Confrontation Clause. Accordingly, this Court should affirm.

2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING THE 911 CALL UNDER THE HEARSAY RULES.

Isabell also claims that the trial court erred in ruling that Shayla Poree's 911 call was admissible under the hearsay exceptions for excited utterances and present sense impressions. Brief of Appellant, at 20-26. This claim should also be rejected. Poree called 911 approximately 2 minutes after Isabell had broken into her apartment, and immediately after she had fled from the apartment. She was still under the stress of this startling event when she made the call. Moreover, her statements were contemporaneous with the relevant events. The trial court was within its discretion in making these evidentiary rulings, and this Court should affirm.

Evidentiary rulings are addressed to the sound discretion of the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). A trial court abuses its discretion only when its

decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court will find an abuse of discretion only if it finds that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

An excited utterance is a statement made while the declarant is still under the influence of a traumatic event such that the statement is not the product of reflection or deliberation. ER 803(a)(2); State v. Woods, 143 Wn.2d 561, 600, 23 P.3d 1046 (2001). Spontaneity, the passage of time, and the declarant's state of mind are factors that courts consider to determine whether a statement is an excited utterance or not, i.e., whether it is the product of reflex or instinct, or of deliberation. State v. Palomo, 113 Wn.2d 789, 791, 783 P.2d 575 (1989). Accordingly, a statement is admissible as an excited utterance if the following requirements are met: 1) a startling event occurred; 2) the statement was made while the declarant was still under the stress of the startling event; and 3) the statement relates to the startling event. State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was

perceiving the event or condition, *or immediately thereafter.*" ER 803(a)(1) (emphasis supplied). This exception is interpreted "in a sufficiently restrictive manner" such that it does not apply where there are insufficient guarantees of trustworthiness. State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), *overruled on other grounds*, 107 Wn.2d 97, 727 P.2d 239 (1986). The trustworthiness of a present sense impression "is based upon the assumption that its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant." Id. Accordingly, "[t]he time limit [for present sense impressions] is considerably shorter than the time limit associated with the exception for excited utterances." 5A K. Tegland, Wash. Prac., Evidence § 803.4, at 417 (4th ed., 1999).

Based on the standards set forth above, the trial court acted well within its discretion in ruling that Poree's statements to the 911 operator qualified as both excited utterances and present sense impressions. First, as noted above, Poree called 911 only about two minutes after Isabell broke into her apartment and immediately after she had fled the apartment with her daughter. At the time of the call, Poree reasonably believed that Isabell was still in the apartment. Ex. 2. Thus, the temporal requirements of both

hearsay exceptions is met – including the more restrictive temporal requirement for present sense impressions – because Poree was describing events either contemporaneously or immediately after they occurred. Second, Poree's statements meet the requirements for excited utterances because they concerned a startling event (i.e., her home being burglarized and being threatened with a gun at 3:30 a.m.), and were made while Poree was under the influence of the startling event. In short, the statements were admissible under both rules.

Nonetheless, Isabell argues that the statements were not excited utterances because Poree "was not crying, frantic or hysterical." Brief of Appellant, at 24. As the trial court noted, although Poree was not hysterical while on the phone with the 911 operator, the signs of stress are still apparent in her voice. Poree spoke quietly, but it is worth noting that 1) it was 3:30 in the morning, 2) she was with her very young daughter, and 3) she was still near her apartment, and obviously did not want Isabell to follow and find her. Ex. 2. Nonetheless, anxiety is apparent in Poree's voice, which trembles, and in the content of the statements themselves. For instance, when asked what Isabell was wearing, Poree immediately responded that she did not see his clothes

because she "just ran out." Ex. 2. Poree is also unable to spell Isabell's name correctly, even though she had been dating him for three years. Ex. 2. In short, although Poree was not hysterical when she called 911, the record establishes that she was nonetheless under the stress of a startling event when she called 911.

Also, Isabell argues that Poree's statements are not present sense impressions because she "was reporting an event that had ended." Brief of Appellant, at 25. But as noted above, Poree called 911 when she had reasonable grounds to believe that Isabell was still in her apartment. Indeed, the evidence corroborates the fact that Isabell was still there when Poree made the call because Isabell did all of the damage inside the apartment after Poree had fled. The fact that Isabell was gone by the time the officers went into the apartment does not mean that Poree's statements to 911 were not contemporaneous or very nearly so as required.

In sum, given the content and the context of Shayla Poree's 911 call, the trial court acted within its discretion in ruling that the recording was admissible under ER 803(a)(1) and ER 803(a)(2). Because Isabell has not shown an abuse of discretion, his claim fails.

D. CONCLUSION

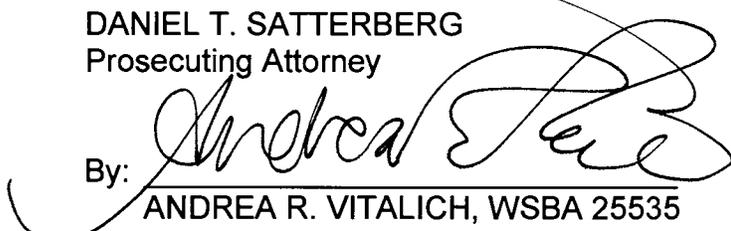
The victim's 911 call was admissible under the Confrontation Clause and the hearsay rules. For all of the reasons set forth above, this Court should affirm Isabell's conviction for domestic violence residential burglary.

DATED this 28th day of June, 2010.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jared Steed and Eric Broman, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. TRAMAINE ISABELL, Cause No. 64328-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

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