

65039-4

65039-4

NO. 65039-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALBERT JAY HOLDRIDGE,

Appellant.

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COURT OF APPEALS
CLERK OF COURT
JENNIFER L. DUNN

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

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I. ISSUES RAISED ON APPEAL

Whether the trial court abused its discretion when it admitted the hearsay statements of the victim, Tamara Adams, when there was sufficient proof that Tamara Adams was under the stress and excitement of a startling event when she made the statements and that the statements were related to the startling event?

II. STATEMENT OF FACTS

Tamara Adams was born April 28, 1922, in Harbin, Manchuria and is of Russian descent. She emigrated to Canada with her mother, Anna Hitsenko, and eventually settled in Seattle. She married James Adams and had two children, Nicholas (Nick) and Barbara. James died in 1986 leaving Tamara with a pension, investments, and a home in Ballard. Anna Hitsenko established a trust in 1999 (the Hitsenko trust) with assets left by her deceased husband and named Barbara Adams and Nick Adams co-trustees. The trust was meant to provide for Anna and Tamara during their lifetimes. Anna Hitsenko died in 2002. After Nick Adams died in 2004 his son James became co-trustee with Barbara. Jill Tokarczyk-Adams, Nick Adams' wife, is an investment advisor for Smith Barney and managed both the trust assets and Tamara's

personal investments. Barbara Adams borrowed a substantial amount of money from the trust and from Tamara over the years. 7RP 165-76, 188-93, 199-202, 220-25; Exhibits 11, 12, 13, 19.

Barbara Adams lived with Tamara Adams until she was 42 years old when she met appellant Albert Holdridge¹ and began a relationship with him. 7RP 184-87. Albert Holdridge purchased a Spanish-style mansion on Capitol Hill in Seattle for \$600,000 in 2005 and began remodeling it as a bed and breakfast. 7RP 226-30; Exhibit 14. Barbara and Albert approached Jill and asked her for a loan from the trust to pay for the renovation. 7RP 230-32. On June 21, 2005, the Hitsenko trust loaned Barbara \$50,000 for the bed and breakfast. Exhibit 15. Barbara borrowed an additional \$80,000 from the trust for the bed and breakfast in 2006. 7RP 232-37; Exhibits 16, 17. On December 8, 2006, Albert sent Jill an email asking for another \$60,000 loan from the trust for renovations to the bed and breakfast. 7RP 237-40; Exhibit 18. Jill and James were not comfortable loaning Barbara any more money from the trust because the trust agreement limited loans to family members to twenty-five percent of the trust property and the loans to Barbara

¹ Albert Holdridge was named Ronald Holdridge until he changed his name to Albert sometime after the events described here. He is referred to as "Ronald" throughout the transcript.

exceeded that amount. They refused to loan Albert and Barbara the \$60,000. 7RP 240-43; Exhibit 19.

Albert and Barbara became angry. 7RP 243-55; Exhibit 20. They prevented Jill and James from seeing Tamara. 7RP 277-80. They hired an attorney who drafted a durable power of attorney giving Barbara and Albert control over Tamara's assets and got Tamara to sign it on December 30, 2006. 7RP 262-66; Exhibit 23. Barbara and Albert used the power of attorney to transfer securities with a value of \$351,000 from Tamara's investment account at Smith Barney to an investment account at Washington Mutual. 7RP 268-76; 9RP 463-64; Exhibits 3, 24, 28. Over the course of the next fourteen months Barbara sold over \$200,000 of Tamara's investments and transferred the proceeds to a joint checking account at Bank of America that she shared with Tamara. 9RP 465-68; Exhibits 4, 5. She wrote checks from that account to Albert and to various credit card and finance companies totaling \$193,846.50 from January of 2007 to March of 2008. 9RP 468-70; Exhibit 6.

On December 27, 2007, Jill received a telephone call from Tamara who was extremely upset and said that she was afraid she had no money left and that Barbara had "swindled her out of her

funds.” Tamara told Jill that Barbara had taken all of her bank statements and was afraid she didn’t have any money to pay her bills. Tamara said that she had hidden a bank statement she found under her bed but Barbara had taken it. Jill drove to Seattle to see Tamara that day. Tamara retrieved a letter from Bank of America from under the cushion of her chair and gave it to Jill. Tamara had written the words “Swindler” and “What a daughter” and “December 27, 2007” on the letter. Tamara asked Jill to help her call her banker to see if she had any money left. 7RP 281-84; Exhibit 29. Tamara told Jill that she regretted loaning Barbara and Albert the \$60,000 because now they had taken a lot more than that from her. 7RP 286.

Jill returned to Tamara’s home the next day. Tamara told Jill that she was fearful that she now had nothing and showed Jill an empty drawer in her dining room where she had kept her financial paperwork and said “I have nothing. It’s all gone. Barbara’s taken it. I have nothing left” and started to cry. 7RP 287-88. Jill called Bank of America and discovered the balance in Tamara’s checking account was only \$979.99. They later discovered the balance in Tamara’s investment account at Washington Mutual had been reduced to about \$100,000. 7RP 289.

Jill called the Seattle Police Department to arrange a "welfare check" so she could see Tamara. She went to Tamara's home on January 4, 2007 and saw Albert Holdridge talking to the police. Albert told the police that he had power of attorney and that Jill was not permitted to see Tamara or to go on Tamara's property. The officers went inside with Albert and Barbara for a few minutes while Jill waited outside. When they came back outside they told Jill she could talk to Tamara for five minutes. Jill went inside where Tamara was sitting in her chair in the living room. Tamara was clearly upset and told Jill she was sorry she had gotten Jill "mixed up in this" and said that "Ron and Barbara had gotten a \$60,000 loan from her and that now they had taken all of her funds" and "they [are] now telling me the money was a loan." 7RP 290-95; 8RP 48-9. Jill returned to Tamara's home the next day with attorney and family friend Nicholas George who had drafted a new power of attorney for Tamara's signature but were again prevented by Barbara and Albert from seeing Tamara. 7RP 295-97; 8RP 49-51.

Det. Pamela St. John of the Seattle Police Department and Adult Protective Services worker Cathy Baker went to Tamara's home on January 7 or 8, 2008. 8RP 94-98. Barbara answered the

door and became agitated when St. John asked to speak to Tamara alone. 8RP 99-103. Barbara told St. John that she did not like Jill's control over Tamara's accounts so she transferred \$351,000 from Tamara's account at Smith Barney to an account at Washington Mutual. 8RP 106-07. St. John served search warrants on Smith Barney, Washington Mutual, and Bank of America to obtain Tamara and Barbara's investment and bank account records. 8RP 108.

On March 13, 2008, Albert Holdridge contacted Det. St. John and told her he wanted to tell her some things about the case. Det. St. John met Albert and Barbara at the bed and breakfast. Albert told Det. St. John that he was frustrated with Jill's refusal to loan him more money from the trust and about his desire to move Tamara's money from Smith Barney to an account in Seattle. He told St. John that he was angry that Jill was spreading rumors that he and Barbara had "stripped" Tamara's accounts of \$200,000. He referred to Tamara's account as a "pile of dough." When St. John asked him if Tamara had ever agreed to loan him any money he said "Tamara agreed to (very long pause) loan us \$60,000." 8RP 113-23.

The State charged appellant on March 18, 2008, with 19 counts of first-degree theft for 19 checks over \$1,500 totaling \$148,500 drawn by Barbara Adams against Tamara Adams' bank account made payable to Albert Holdridge between January 17 and December 11, 2007. Exhibit 2; CP 1-17. After hearing the testimony of Jill Tokarczyk-Adams and Albert Holdridge at a pretrial hearing, 7RP 119-52, and considering arguments and authorities presented by the parties, the Hon. Laura Inveen ruled that Tamara Adams' statements to Jill Tokarczyk-Adams on December 27 and 28, 2007 and January 4, 2008 were admissible under ER 803(a)(2) as excited utterances:

Considering all of this, and I find that the standard at this point is a preponderance of the evidence standard, I find that, based upon the preponderance of evidence, that factors required by an excited utterance have been satisfied. Specifically, that the statements that are alluded to both on December 27th and the following day and then January 8th [sic] related to a startling event or condition. That condition being Ms. Adams discovering, at least in her mind, that individuals very close to her, her daughter and son-in-law, had taken her money. That she was under the stress of the excitement caused by that, even though it was over a period of time.

It was very clear that she was under the stress of the event. And it was interesting to the Court that Ms. Tokarczyk appeared genuinely perplexed as to why we were doing a pretrial hearing. So it was clear

she did not know the issues at hand and she had not been coached in any manner. And yet she was very, very detailed in her ability to relate the stress Ms. Adams was under in all of these instances she had contact with her.

On the phone, she described Ms. Adams being stressed, almost in a panic. Her voice was broken and her voice pitch was high. And there was urgency in her voice. On site, when she arrived later that date, she testified she was agitated, she was nervous, she was wringing her hands, she had a white complexion. She also then several days later, the January incident, indicated similar kinds of observations.

Under the totality of the circumstances, I find that there is sufficient corroborating evidence to support the determination that she was under the stress of an event of discovering the purported embezzling, and that's my characterization, of her funds by a close family member. The offer of proof does support that there was a dramatic decrease in her funds in her accounts. There is no evidence to believe there would be any motive for her to make something like this up. There's no evidence there was any conflict between her and her daughter. In fact, they appeared to have a very close relationship. Her daughter was her primary caregiver. And there is, of course, the issue of dementia, and that is of concern to the Court and has been seriously considered by me. And I've also had the benefit of observing a full videotape of Ms. Adams. And although she does digress and it is conceded that she has hallucinated in the past, when she is talking about events that deal with her family members and with her finances, there does not appear to be any hallucination. And any concerns about her dementia would go to the weight as opposed to the admissibility.

7RP 213-19.

At trial Albert Holdridge testified that Tamara was “on board” to loan Barbara and him more than \$60,000 for the bed and breakfast. 11RP 668, 682, 702. On cross-examination he identified the checks charged in counts four through nine in Exhibit 2 as the checks for the \$60,000 loan to which Tamara had agreed. 11RP 725-26. The jury acquitted him of counts four through nine and found him guilty of counts one and three and counts ten through nineteen.² CP 44-46; 52-53. Appellant was sentenced to 90 days in jail and filed a notice of appeal. CP 106-15.

III. SUMMARY OF ARGUMENT

Judge Inveen did not abuse her discretion in ruling that Tamara Adams’ statements to Jill Tokarczyk-Adams on December 27 and 28, 2007, and January 4, 2008 were admissible as excited utterances because there was sufficient proof that Tamara Adams was under the stress and excitement of a startling event when she

² Count 2 was dismissed on motion of the defense. 12RP 890.

made the statements and the statements were related to the startling event.

IV. ARGUMENT

A trial court's determination that a statement is admissible pursuant to a hearsay exception is reviewed under an abuse of discretion standard. See State v. Gribble, 60 Wn. App. 374, 381, 804 P.2d 634, review denied, 116 Wn.2d 1022, 811 P.2d 220 (1991). An appellate court will not, therefore, disturb the trial court's ruling unless it believes that no reasonable judge would have made the same ruling. Id.; State v. Woods, 143 Wn.2d 561, 595-96, 23 P.3d 1046, 1066 (2001).

Tamara Adams' statements to her daughter-in-law Jill Tokarczyk-Adams on December 27 and 28, 2007 and January 4, 2008 are admissible as excited utterances because they were made when she was under the stress and excitement of a startling event or condition:

(2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

ER 803(a)(2). Excited utterances are admissible even though the declarant is available as a witness. ER 803(a).³

There are three requirements a hearsay statement must meet to qualify as an excited utterance: “[1] there must be a startling event or condition; [2] the declarant must make the statement while under the stress or excitement of the event or condition; and [3] the statement must relate to the event or condition.” Warner v. Regent Assisted Living, 132 Wn. App. 126, 139, 130 P.2d 865 (2006); ER 803(a)(2). Tamara’s statements to Jill were made after she discovered that her daughter and son-in-law had been stealing her money and during the later welfare check after the tense confrontation between the defendants and Jill in the presence of police officers. Tamara made all of these statements under the stress or excitement of these events and

³ After Crawford v. Washington, 541 U.S. 36, 1245 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), testimonial statements are inadmissible unless the declarant testifies at trial and is subject to cross-examination. However, unlike statements made to police officers or government agents, statements made to family members are generally not “testimonial” within the meaning of Crawford. State v. Shafer, 156 Wn.2d 381, 389, 128 P.3d 87, cert. denied, 127 S. Ct. 553 (2006); Crawford, 541 U.S. at 51. Since all of the statements by Tamara admitted at trial were made to her daughter-in-law they are not testimonial and are admissible if they qualify as excited utterances regardless of whether Tamara testified at trial.

each of the statements related to the theft of her money. They are therefore admissible as excited utterances.

Appellant argues that the statements Tamara made to Jill are too attenuated in time to fall within the excited utterance exception to the hearsay rule because there is no proof of *when* Tamara discovered the thefts. But the State's evidence included an envelope from Bank of America upon which Tamara had written "Swindler" and "What a daughter" and "December 27, 2007" circumstantially establishing the date she learned of the thefts. Moreover, the amount of time that passes between a startling event and the statement is immaterial if the court finds the declarant is still under the stress or excitement of the startling event when the statement is made:

The amount of time between the startling event and the excited utterance is not dispositive. Johnston v. Ohls, 76 Wn.2d 398, 405, 457 P.2d 194 (1969) (citing May v. Wright, 62 Wn.2d 69, 381 P.2d 601 (1963)). The concern is whether the declarant is still under sufficient stress from 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 194 (1969)). Here, Judge Inveen found that Tamara was still under the stress of

discovering the thefts when she made the statements to Jill. Therefore, the amount of time that had passed since Tamara learned of the thefts is irrelevant.

Nor are the statements Tamara made on January 4, 2008, a week after she first discovered the thefts, too attenuated in time to qualify as excited utterances. In U.S. v. Napier, 518 F.2d 316 (C.A.Or. 1975), the victim was kidnapped and assaulted resulting in brain damage. Approximately eight weeks later she saw a photograph of her assailant in a newspaper and said "He killed me. He killed me." In upholding the trial court's ruling that the statement qualified as an excited utterance the court held: "Although in most cases the 'startling' events which prompt 'spontaneous exclamations' are accidents, assaults, and the like, cf. McCormick, Evidence § 297 at 705 (2d ed. 1972), there is no reason to restrict the exception to those situations." Napier, at 318. Here, as in Napier, the startling event or condition that prompted Tamara's statements on January 4, 2008 was an event that happened after the thefts were discovered--the tense confrontation between the

defendants and Jill at Tamara's home and the presence of police officers in her home.⁴

After hearing the testimony of witnesses, Judge Inveen ruled that Tamara was still under the stress and excitement of the startling events when she made her statements to Jill on December 27 and 28, 2007 and on January 4, 2008 and that the circumstances did not indicate that her statements were the result of fabrication, intervening events, choice, or judgment and were therefore inherently reliable. Judge Inveen did not abuse her discretion in arriving at this ruling.

Holdridge's claim also implies that the trial court abused its discretion because there was no independent proof of when Tamara first discovered the thefts. But this argument also fails because there is no requirement that the State prove the existence of the startling event with independent evidence. This court has rejected a proposed rule that the existence of the startling event must be proved by evidence other than the declarant's statement before an excited utterance is admissible. In State v. Young,

⁴ Several reported cases demonstrate that arrests, encounters with authorities, arguments, and the like may qualify as the sorts of events that can give rise to an excited utterance. K Tegland, 5B Washington Practice, 4th Ed., §803.6 (Supp. 2006) (citations omitted).

123 Wn. App. 854, 99 P.3d 1244 (2004), involving the molestation of an eleven-year-old girl, the defendant asked this court to adopt the ruling in People v. Burton, 433 Mich. 268, 445 N.W.2d 133 (1989), requiring independent proof of the existence of a startling event before admission of an excited utterance. In rejecting the invitation this court held:

Burton, if followed in the present case, would compel reversal. Aside from KL's statements to the neighbors at the time, there was no evidence of the startling event to which the statements relate- i.e., no evidence that Young had tried to put his hands inside her pants. At best, there was evidence of a stressful event with sexual overtones-KL's testimony that Young had attempted to tuck cash into her pants pocket.

Having reviewed the authorities discussed by McCormick and by the Burton court, we conclude that the bright-line Burton analysis is unnecessarily strict. Certainly, trial courts must carefully evaluate the circumstances surrounding the excited utterance to be sure they truly indicate its trustworthiness. The analytical view taken by McCormick best accommodates the discretionary nature of the trial court decision. In this case, KL's own testimony at the preliminary hearing corroborated her earlier hearsay statements in many significant details, including the fact that there was an encounter in the bathroom in which Young "squeezed" her butt while attempting to press money into her pants pocket. Broadly viewed, this testimony constitutes circumstantial evidence of the startling event to which the hearsay statements relate.

Young, supra, at 858-60, 99 P.3d 1244, 1245-46. Like the facts in Young, there is no independent direct evidence of when Tamara discovered her daughter and son-in-law were stealing her money. But Tamara's statements to Jill on December 27 and 28, 2007, coupled with the letter she showed Jill are sufficient circumstantial evidence that she discovered the thefts on or shortly before December 27, 2007 and that she was still under the stress and excitement of that event when she made the statements. In addition to this evidence, Tamara's excited utterances to Jill were corroborated by the bank records showing appellant's theft of \$193,846.50, the statements by the appellant made to police that Tamara only agreed to lend them \$60,000, evidence of the appellant's motive, and lack of any logical reason for Tamara to fabricate the statements. The evidence of a startling event in this case is more than sufficient to support admission of Tamara's excited utterances to Jill in these circumstances. Judge Inveen did not abuse her discretion in admitting Tamara's statements.

Appellant cites Warner v. Regent Assisted Living, supra, in support of his argument that Tamara's statements to Jill were too attenuated in time to be admitted. However, Warner does not support his argument. In Warner, Helen Mantoath, a 91-year-old

woman diagnosed with dementia and bipolar disorder, accused an assisted living aide of trying to climb into bed with her. The court upheld the trial court's exclusion of the woman's excited utterance to that effect not because of the amount of time that had passed (two hours) but because of her dementia and bipolar disorder and the lack of any corroborating evidence of her accusation:

. . . As in Chapin, the trial court had to consider evidence that Mantooth had been diagnosed with both dementia and bipolar disorder, and her perception of events was questionable. She had become increasingly combative and had several physical altercations with other residents. In the days immediately preceding the alleged event, she yelled and struck out at a staff member and angrily accused aides of laughing at her and mocking her when there was no reason to think they had done so. We again note that Mantooth's mental incapacity, taken alone, is not enough to disqualify her statement as an excited utterance. But, as in Chapin, it is a factor in the "totality of the circumstances" we must consider in assessing the reliability of the statement. Our primary concern is the complete lack of evidence of Mantooth's mental state during the two-plus hour time lapse between her statement and the alleged event. Combined with her severe mental deterioration, this raises substantial doubts about whether her statement was a spontaneous and trustworthy response to a startling event. Further, unlike in Chapin, there was not corroborating evidence of an assault. Under these circumstances, her statement simply does not have the guarantees of trustworthiness necessary for admission as an excited utterance.

Warner, at 141, 130 P.3d at 873-74 (2006) (citation omitted).

Although Tamara Adams suffered from mild dementia she had no other diagnosed mental illness or history of false accusations that would tempt a court to look more closely at the reliability of her statements. Moreover, and unlike Warner, there was overwhelming corroborating evidence showing that Tamara Adams' accusations against her daughter were trustworthy. Warner does not support appellant's claim that it was an abuse of discretion for Judge Inveen to admit Tamara Adams' excited utterances under these facts.

Even if Judge Inveen abused her discretion in admitting Tamara Adams' statements the error was harmless. A trial court's evidence exclusion error that does not result in prejudice to the defendant is not grounds for reversal. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); State v. Thacker, 94 Wn.2d 276, 283, 616 P.2d 655 (1980). An error "is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Bourgeois, 133 Wn.2d at 403 (quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). The evidence of Albert Holdridge's guilt was overwhelming. Not only did he tell police that "Tamara agreed to (very long pause) loan us \$60,000," he showed

the jury which of the charged checks constituted that \$60,000 she authorized. The jury found him guilty of exerting unauthorized control over the remaining charged checks. Judge Inveen's ruling, even if in error, could not have been prejudicial given this and other evidence admitted at trial.

V. CONCLUSION

For these reasons, Albert Holdridge's appeal should be denied and his judgment and sentence upheld.

DATED this 19th day of October, 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 Jennifer M. Winkler, the attorney 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. ALBERT J. HOLDRIDGE, Cause No. 65039-4-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.



MONICKA LY-SMITH
Done in Seattle, Washington

10/26/2010
Date