

NO. 32943-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GORDON BIRD,

Appellant.

FILED
COURT OF APPEALS
MAY 26 2006 PM 3:23
PORT ORCHARD, WA

ORIGINAL

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-00185-2

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

JEREMY A. MORRIS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Thomas Weaver
P.O. Box 1056
Bremerton, WA 98337

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED May 26, 2006, Port Orchard, WA
[Signature]
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS.....2

 i. The Events of January 28, 2004..... 2

 ii. Excited Utterances 3

 iii. Voir Dire..... 5

III. ARGUMENT9

 A. BIRD WAIVED ANY OBJECTION TO HIS RECEIVING SIX PEREMPTORY CHALLENGES BECAUSE: (1) PRIOR TO THE VENIRE BEING EXCUSED, BIRD STATED THAT THE TRIAL COURT’S CALCULATION’S WERE ACCURATE; (2) BIRD DID NOT OBJECT TO HIS NUMBER OF PEREMPTORY CHALLENGES; AND, (3) EVEN IF BIRD’S COMMENTS WERE CONSTRUED AS AN OBJECTION SUFFICIENT TO PRESERVE THE ISSUE, THE OBJECTION WAS NOT TIMELY, AS IT WAS NOT MADE UNTIL AFTER THE VENIRE HAD BEEN EXCUSED, THUS DENYING THE COURT AN OPPORTUNITY TO CORRECT ANY ERROR.....9

 B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE STATEMENTS MADE BY MR. POLING TO OFFICER SHAW WERE ADMISSIBLE AS EXCITED UTTERANCES BECAUSE: (1) THE RECORD ESTABLISHED THAT THE STATEMENTS RELATED TO A STARTLING EVENT AND WERE MADE WHILE MR. POLING WAS UNDER THE STRESS OF EXCITEMENT CAUSED BY THE EVENT; AND, (2) EXCITED UTTERANCES ARE NOT “TESTIMONIAL” FOR PURPOSES OF A *CRAWFORD* ANALYSIS.....15

IV. CONCLUSION.....19

TABLE OF AUTHORITIES

CASES

<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).....	11
<i>In re Bennett</i> , 24 Wn. App. 398, 600 P.2d 1308 (1979).....	10
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158L.Ed.2d 177 (2004).....	18
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 904 P.2d 324 (1995).....	10
<i>State v. Evans</i> , 100 Wn. App. 757, 998 P.2d 373 (2000).....	11
<i>State v. Kendrick</i> , 47 Wn. App. 620, 736 P.2d 1079 (1987).....	10, 14
<i>State v. Lopez</i> , 147 Wn. 2d 515, 55 P.3d 609 (2002).....	10
<i>State v. Moen</i> , 129 Wn. 2d 535, 919 P.2d 69 (1996).....	10
<i>State v. Ohlson</i> , 131 Wn. App. 71, 125 P.3d 990 (2005),.....	15, 16, 18
<i>State v. Swan</i> , 114 Wn. 2d 613, 790 P.2d 610 (1990).....	11
<i>State v. Vreen</i> , 143 Wn. 2d 923, 26 P.3d 236 (2001).....	9, 10
<i>State v. Wicke</i> , 91 Wn. 2d 638, 591 P.2d 452 (1979).....	10

United States v. Allen,
666 F. Supp. 847 (E.D.Va.1987)12

United States v. Maseratti,
1 F.3d 330 (5th Cir.1993)11

United States v. Parham,
16 F.3d 844 (8th Cir.1994)11

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Bird waived any objection to his receiving only six peremptory challenges when: (1) prior to the venire being excused, Bird stated that the trial court's calculation's were "accurate;" (2) Bird did not object to his number of peremptory challenges; and, (3) even if Bird's comments were construed as an objection sufficient to preserve the issue, the objection was not timely when it was not made until after the venire had been excused, thus denying the court an opportunity to correct any error?

2. Whether the trial court abused its discretion in finding that the statements made by Mr. Poling to Officer Shaw were admissible as excited utterances when: (1) the record established that the statements related to a startling event and were made while Mr. Poling was under the stress of excitement caused by the event; and, (2) excited utterances are not "testimonial" for purposes of a *Crawford* analysis?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Gordon Bird was charged by information filed in Kitsap County Superior Court with one count of assault in the first degree. CP 1. After a jury trial, Bird was found guilty as charged. CP 120. This appeal followed.

B. FACTS

i. The Events of January 28, 2004

On January 28, 2004, Jimmy Dobras had been at a friend's house at 2145 11th Street in Bremerton. RP 412. Dobras was there with a number of people, and they decided to go to a Safeway store to get pizza. RP 413-15. On the way back from the store, Dobras and Nick Poling fell behind the others and decided to take a shortcut. The shortcut ran through the yard of a residence on Montgomery Street that was then occupied by Mr. Bird. 412. Dobras used to stay at this residence with a previous occupant. RP 412. Dobras had also previously used the shortcut through the Montgomery Street property numerous times without encountering any problems. RP 415, 419-20, 443.

Dobras walked up the driveway and pushed on the gate, but the gate didn't open, so Dobras walked away. RP 420. As Dobras continued walking, he heard Bird behind him yelling about being in his yard. RP 422. By this time Dobras was already on a neighbor's sidewalk. RP 422. Bird was screaming and yelling. RP 422. Dobras specifically recalled Bird yelling, "You were in my yard." RP 422. Dobras turned around, and Bird was, "right there, swinging a sword." RP 422. Dobras backed up while continuing to face Bird, as he didn't want to turn his back on Bird allowing him to "get me in the back or anything." RP 423. Bird kept coming, and Dobras and Poling

“kept going.” RP 424. Bird made poking and swinging motions with the sword. RP 428. Dobras turned to walk away, and was “stuck” twice. RP 428-29. Dobras became aware that the sword had actually penetrated his chest “when blood came out and it started getting cold.” RP 429. Dobras then took off running. RP 430. Dobras was only able to run about a block before feeling like he was going to fall over and experiencing difficulty breathing. RP 430. Dobras sent Poling on ahead to call for an ambulance, and Dobras eventually made it back to his friend’s house. RP 430. Upon arrival, he recalls that everyone was in an “erratic state screaming and yelling.” RP 431. Dobras suffered a punctured lung, and was in the hospital six days. RP 435.

ii. Excited Utterances

When the trial commenced, the State made an offer of proof concerning excited utterances that were heard by Bremerton Police Officer Frank. On the day of the stabbing, Shaw was dispatched and went to the residence where Mr. Dobras, Poling, and two females were found. RP 327. Shaw arrived within minutes of being dispatched. RP 317. Shaw described the people he encountered, stating, “They all looked – they were shook up.” RP 319. Dobras appeared to have been stabbed, and had blood on his chest, and the others present were holding him up or assisting him, and then sat him down on a couch and were tending to him. RP 321-22.

Shaw spoke with Poling twice, once upon arrival, and then again after helping with the victim. RP 326-28. When he first arrived, Shaw asked what had happened, and Poling stated that Dobras had been stabbed and that the sword had gone all the way through him. RP 326. After tending to Dobras and speaking to the others present, Shaw again spoke to Poling about what happened that evening. RP 327-28. Shaw asked Poling questions about what happened, and Poling answered without pausing. RP 329. Shaw further stated that Poling did not have time to fabricate or create stories with respect to any of his responses. RP 329.

Shaw observed that Poling was “excited” by the way he acted and by the way he talked (which Shaw described as “fast”) and that Poling’s voice was louder than a normal speaking voice. RP 325.

Bird conceded that the statements, “Jimmy’s been stabbed” and “the sword went all the way through him” qualified as excited utterances. RP 326, 332. In the second conversation, Poling described the events of the evening to Shaw. RP 328. Poling described that the four of them went to Safeway to get pizza, and that he and Dobras took a shortcut home and were confronted by Bird, that Bird lunged forward and stabbed Dobras in the chest, and that the two then ran towards the 11th street house. RP 333.

Bird argued that Shaw’s second conversation with Poling did not

qualify as an excited utterance because this conversation was an interview “rather than statements just coming forward,” and were thus statements prepared for the purposes of litigation. RP 328-29.

The trial court held that Poling, “by all accounts, was present at the time the stabbing occurred,” then ran back to the house with Dobras. RP 336. The trial court held that this was certainly a startling event, and that Poling’s demeanor, as observed by Officer Shaw, indicated Poling was still under the stress of the event, as he was breathless, excited, and talking quickly and loudly. RP 336. The trial then noted that the law is clear that excited utterances can be responses to police questioning, and the fact that the statements were not “volunteered” is not determinative. RP 337. Rather, the statements need to be spontaneous, and the court stated that there was no indication that Poling had stopped or paused to consider what he said during his conversation with Officer Shaw. RP 337. The trial court then allowed the proposed statements to be admitted. RP 337-38. At trial, Officer Shaw testified concerning the statements that Poling had made to him. RP 346-47.

iii. Voir Dire

At the conclusion of voir dire, the parties exercised their peremptory challenges. After Bird accepted the panel once and exercised six challenges, the following exchange took place:

The Court: Juror No. 32, you are up here in the empty chair. Mr. Mitchell, unless my count is inaccurate, you are complete.

Mr. Mitchell: I have, your honor.

The Court: Mr. Longacre, unless I'm inaccurate in my math, you are completed as well, I think.

Mr. Longacre: Let me double check though.

The Court: I've got seven.

Mr. Longacre: My math could be wrong, because I'm one different.

The Court: The clerk has got you with all seven.

Mr. Longacre: All seven.

The Court: Do you want to check her notes?

Mr. Longacre: No, she's accurate. RP 221.

The court then immediately excused the rest of panel, stating,

“Those of you who weren't chosen, thank you for coming and participating. I hope you enjoyed the civics lesson you had.

We've said this throughout the process, it is the only time citizens get to actively participate in government other than voting. We thank you for adding to our discussion. You are excused, and check in with Rongholt on your way out.” RP 221.

After the remainder of the venire had been excuse, defense counsel asked for a sidebar. RP 222. A sidebar was subsequently held, but was not transcribed by the court reported. Later, however, the Court made a record concerning the contents of the sidebar. RP 230. The court noted on the record that sidebar was after the peremptory challenges had been made “and

the balance of the jurors had been excused.” RP 230. The Clerk’s minutes also state that the sidebar was requested and was held after the remaining prospective jurors had been released. CP 130. The court and counsel described the contents of the sidebar as follows:

The Court: . . . The second sidebar we had was after the preemptory challenges had been made and the balance of the jurors had been excused and I was just getting ready to swear in the panel, Mr. Longacre asked for a sidebar. It related to the question of whether the choice to quote-unquote, “accept the panel,” counted as one of the preemptory challenges, i.e., each side is entitled to seven.

It has been my practice to count an “accept” as a preemptory challenge so that Mr. Mitchell, I think, exercised three of those, of those, I can’t remember now, but nonetheless three of, my clerk tells me, and so he had seven times at bat, so to speak. Certainly, one of his preemptory challenges exercised after the panel may exercise as to the new person.

Mr. Longacre counted his preemptory challenges different and so he believed that he only had six exercised and he wanted to, I presume, excuse Juror No. 32 because of where he was in his challenges and seat no. 33.

I said that my practice was to count those for both sides so that each side had seven and put that on the record. I also told him that we would go on the record afterwards to talk about it.

Now Mr. Mitchell, from your perspective, is there anything we need to supplement to either of those sidebar recitations?

Mr. Mitchell: I don’t believe so, your honor.

The Court: Mr. Longacre.

Mr. Longacre: That covers it, your honor. My position, I had one more and I wanted to seat No. 33, but I think with the court’s ruling, acceptance is counted as a preemptory

challenge, that ended the issue of me attempting to seat 33 at that point. RP 230-31.

Closing arguments were held on February 1, 2005. After closings, the court randomly selected juror number 2 as the alternate. RP 872. On February 2, 2005, the jury returned its verdict, finding Bird guilty of assault in the first degree. CP 120.

On February 14, 2005, Bird filed a Motion for New Trial, citing (for the first time) CrR 7.5 and arguing that the denial of his seventh peremptory challenge required a new trial. CP 149. At the motion for new trial, the court acknowledged that CrR 6.4(e)(2) states that acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to the jurors subsequently called. RP 902.

After hearing argument on the Motion for a New Trial, the trial court denied the motion, and ruled,

The question of whether that was a material departure from established standards and whether there was a waiver of that material departure, I think has to be answered that there was. And I appreciate that Mr. Longacre disagrees with me. But at that point, I think I was not going down the primrose path by myself, and the situation that developed was one that was unfortunate, but also unsolvable at that point. RP 914.

The court then continued, "So in view of the odd circumstances surrounding this case, I'm going to deny the defense request for a new trial." RP 915.

The trial court then sentenced Bird to a standard range sentence. CP 168. This appeal followed.

III. ARGUMENT

- A. **BIRD WAIVED ANY OBJECTION TO HIS RECEIVING SIX PEREMPTORY CHALLENGES BECAUSE: (1) PRIOR TO THE VENIRE BEING EXCUSED, BIRD STATED THAT THE TRIAL COURT'S CALCULATION'S WERE ACCURATE; (2) BIRD DID NOT OBJECT TO HIS NUMBER OF PEREMPTORY CHALLENGES; AND, (3) EVEN IF BIRD'S COMMENTS WERE CONSTRUED AS AN OBJECTION SUFFICIENT TO PRESERVE THE ISSUE, THE OBJECTION WAS NOT TIMELY, AS IT WAS NOT MADE UNTIL AFTER THE VENIRE HAD BEEN EXCUSED, THUS DENYING THE COURT AN OPPORTUNITY TO CORRECT ANY ERROR.**

Bird claims that the trial court erroneously denied him his seventh preemptory challenge and erred in requiring him to demonstrate prejudice, requiring reversal. This argument is without merit.

The State concedes that Bird was entitled to seven preemptory challenges pursuant to CrR 6.4 and 6.5, and that, pursuant to CrR 6.4(e)(2), acceptance of the panel shall not constitute a waiver of any remaining preemptory challenges. In addition, the State concedes that pursuant to *State v. Vreen*, 143 Wn.2d 923, 26 P.3d 236 (2001), erroneous denial of a litigant's preemptory challenge cannot be harmless when the objectionable juror

actually deliberates. *Vreen*, 143 Wn.2d at 932.

To preserve judicial error for appeal, however, a timely objection must be made, otherwise a party waives his right to make such a challenge on appeal. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979); *In re Bennett*, 24 Wn. App. 398, 600 P.2d 1308 (1979). Furthermore, the failure to object at a point that will give the trial judge an opportunity to correct an alleged error waives the right to predicate an appeal thereon. *State v. Kendrick*, 47 Wn. App. 620, 636, 736 P.2d 1079 (1987), citing *State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967). The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error. *State v. Moen*, 129 Wn.2d 535, 547, 919 P.2d 69 (1996) citing *Wicke*, 91 Wn.2d 638. See also, *State v. Avendano-Lopez*, 79 Wn. App. 706, 710, 904 P.2d 324 (1995) (purpose of requiring specific objection is to offer trial court the opportunity to correct any error), *State v. Lopez*, 147 Wn.2d 515, 521, 55 P.3d 609 (2002)(We require a specific objection to offer the trial court the opportunity to correct the error). Similarly, raising the issue in a motion for a new trial does not provide the trial court with the requisite opportunity to correct error. *Kendrick*, 47 Wn. App. at 636. Consequently, counsel may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." *Kendrick*, 47

Wn. App. at 636, *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1026 (1991).

Furthermore, peremptory challenges are not a constitutional right. *State v. Evans*, 100 Wn. App. 757, 763, 998 P.2d 373 (2000) *citing United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 781, 145 L. Ed. 2d 792 (2000). In the context of a *Batson* challenge, however, an allegation of improper exercise of peremptory challenges does rise to a constitutional level due to the equal protection implications. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (the State's discriminatory use of peremptory challenges violates both the defendant's and the potential juror's equal protection rights). Even when dealing with the constitutional issues regarding *Batson* challenges, other courts have held that such a challenge can be waived if it is not timely raised. *See, for instance, United States v. Parham*, 16 F.3d 844, 847 (8th Cir.1994) ("A *Batson* objection must be made at the latest before the venire is dismissed and before the trial commences."); *United States v. Maseratti*, 1 F.3d 330, 335 (5th Cir.1993) ("[T]o be timely, the *Batson* objection must be made before the venire is dismissed and before the trial commences."). Such a rule is supported by concerns of judicial economy, because to allow untimely objections would require the delays and costs associated with bringing in either a new venire or attempting to reassemble the previous venire when such actions could have been avoided if

counsel simply made a timely objection. *See, for instance, United States v. Allen*, 666 F.Supp. 847, 856 (E.D.Va.1987) ("In this and most other jurisdictions, jury costs have risen, and it is impractical to have a venire of 36 to 50 persons called and paid only to have them excused, and a new venire called, just because the defense counsel has not made a timely objection.").

In the present case, before the venire was dismissed, the trial court indicated that Bird had exercised all of his peremptory challenges according to the court's calculations. RP 221. Although Bird initially stated that his calculations were "one different," the trial court gave Bird a chance to review the clerk's records to see if he agreed with the court's calculations. Specifically, the trial court stated, "Do you want to check her notes?" RP 221. Counsel stated in no uncertain terms, "No, she's accurate." RP 221. Then, and only then, did the trial court release the remaining potential jurors. RP 221, 230, CP 130. As the trial court pointed out, any issue with respect to the number of peremptory challenges was "unsolvable at that point," as the venire had been excused. RP 914.

Bird's stated position prior to the venire being excused was that the clerk's count of seven peremptory challenges was "accurate." Even if Bird's comment that his count was "one off" was construed as an objection, such objection was clearly withdrawn by the unequivocal statement that the clerk's count was "accurate." As Bird failed to object prior to the venire being

dismissed, the trial court did not err in finding that Bird had waived his objection to the number or peremptory challenges afforded to him.

Only after the venire had been excused did Bird ask for a sidebar. RP 222, 230, CP 130. The sidebar was not transcribed, and thus the exact contents of that discussion have not been preserved. The trial court, however, later give a brief description of the sidebar. RP 230-31. The court's description, and Bird's brief summary of the sidebar, however, do not indicate whether an objection was made. The court indicated that she explained to counsel that it had been her practice to count an "accept" as a peremptory challenge, and that defense counsel had counted them differently. RP 230-31. There is no indication that Bird objected to the court's "practice," or that the sidebar contained anything more than the parties informal discussion regarding procedure.

Even if defense counsel's statement that, "My position, I had one more and I wanted to seat No. 33, but I think with the court's ruling, acceptance is counted as a peremptory challenge, that ended the issue of me attempting to seat 33 at that point" is construed as a specific objection, the objection was untimely, as the venire had already been dismissed by the time of the sidebar. RP 221, 230-31, CP 130. Once the venire had been dismissed, the trial court was clearly unable to correct any error. As Bird failed to object at a point that would have given the trial judge an opportunity

to correct any alleged error, Bird waived his right to predicate an appeal on this error. *State v. Kendrick*, 47 Wn. App. 620, 636

After Bird was convicted, he filed a motion for a new trial in which he cited the relevant rule for the first time. CP 149. As the trial court noted, however,

The question of whether that was a material departure from established standards and whether there was a waiver of that material departure, I think has to be answered that there was. And I appreciate that Mr. Longacre disagrees with me. But at that point, I think I was not going down the primrose path by myself, and the situation that developed was one that was unfortunate, but also unsolvable at that point. RP 914.

As Bird conceded that the court's calculations were "accurate" prior to the venire being excused, and did not re-raise the issue until after the venire had been excused, and objection to the denial of Bird's seventh peremptory challenge was untimely. The trial court, therefore, did not err in finding that Bird had waived any objection to issue.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE STATEMENTS MADE BY MR. POLING TO OFFICER SHAW WERE ADMISSIBLE AS EXCITED UTTERANCES BECAUSE: (1) THE RECORD ESTABLISHED THAT THE STATEMENTS RELATED TO A STARTLING EVENT AND WERE MADE WHILE MR. POLING WAS UNDER THE STRESS OF EXCITEMENT CAUSED BY THE EVENT; AND, (2) EXCITED UTTERANCES ARE NOT "TESTIMONIAL" FOR PURPOSES OF A CRAWFORD ANALYSIS.

Bird next claims that the trial court erred in admitting the excited utterances of Nick Poling. This claim is without merit because the record established that statements qualified as excited utterances and, pursuant to *State v Ohlson*, excited utterances are never "testimonial" for purposes of a *Crawford* analysis.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *State v. Ohlson*, 131 Wn. App. 71, 76, 125 P.3d 990, (2005), *citing State v. Moran*, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032, 95 P.3d 351 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Ohlson*, 131 Wn. App. at 76, *citing Moran*, 119 Wn. App. at 218.

Evidence Rule (ER) 803(a)(2) allows the admission of excited

utterances as an exception to the rule excluding hearsay statements. *Ohlson*, 131 Wn. App. at 76, citing *State v. Sunde*, 98 Wn. App. 515, 520, 985 P.2d 413 (1999). An excited utterance is "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). Three requirements must be met for a statement to qualify as an excited utterance: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement must relate to the startling event or condition. *Ohlson*, 131 Wn. App. at 76-77, citing *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

Although Bird concedes that the confrontation between Bird and Mr. Dobras was a startling event, Bird argues on appeal that there was insufficient evidence for the trial court to conclude that Mr. Poling was still under the influence of the startling event at the time of the statements. App.'s Br. at 13-14.

In the trial court, however, Bird conceded that the statements, "Jimmy's been stabbed" and "the sword went all the way through him" made during Officer Shaw's initial conversation with Poling qualified as excited utterances. RP 326, 332. Bird's contention below was that the statements made during the second conversation at the scene between Shaw and Poling

were more properly described as an “interview” rather than “statements just coming forward.” RP 328-29.

Bird’s brief argument on appeal is that there was insufficient evidence for the trial court to conclude that Poling was still under the influence of a startling event. App.’s Br. at 13-14. This argument, however is belied by Bird’s own concessions below, as well as by the Officer’s description of Poling’s behavior at the time of the statements. Specifically, Shaw testified that when he arrived at the house he saw Dobras who appeared to have been stabbed. RP 321-22. Shaw stated with respect to the others present, that, “They all looked – they were shook up.” RP 319. In addition, Shaw described Poling as “excited” based on the way he acted and spoke, and stated that spoke quickly and used a loud voice. Shaw also stated that he arrived at the residence shortly after being dispatched, and described that the stabbing victim was present upon his arrival, and that those present were tending to him. RP 321-22. Given these facts, the trial court did not abuse its discretion in finding that Poling statements were excited utterances, as there was sufficient evidence to support the court’s findings that the statements were made while Poling was under the stress of excitement caused by the stabbing, and his statement related to this startling event. Bird’s argument, therefore, must fail.

Bird next argues that the trial court erred in failing to find that the

statements were testimonial for purposes of the confrontation clause. App.'s Br. at 14, citing *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Bird, however, acknowledges that in *Ohlson*, the court held that excited utterances are never testimonial. App.'s Br. at 15.

In *Crawford*, the United States Supreme Court held that the admission of a witness's testimonial, out-of-court statements violates the confrontation clause when the witness does not testify at trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness regarding the out-of-court statements. *Crawford v. Washington*, 541 U.S. 36, 68-69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Here, as with the declarant in *Ohlson*, it is undisputed that Poling did not testify at trial and that Bird had no prior opportunity to cross-examine him. Thus, as in *Ohlson*, the issue whether Poling's statements made in response to questioning by a police officer were "testimonial" as *Crawford* contemplated. In *Ohlson*, the court, citing numerous authorities, adopted a per se rule that "excited utterances cannot be testimonial." *Ohlson*, 131 Wn. App. at 73, 84. As the court in *Ohlson* concluded, if the statements qualify as excited utterances, then they are admissible as non-testimonial. In the present case, the statements made by Poling qualified as excited utterances and were not, therefore, testimonial for purposes of *Crawford*. Bird's argument, therefore, must fail.

Finally, Bird argues that the record does not show that Poling was unavailable for trial, nor any evidence that the state sought to subpoena Poling. App.'s Br. at 14. Evidence Rule 803(a) states that the hearsay exceptions found in ER 803 apply "even if the declarant is available as a witness." Although a showing of unavailability is required for ER 804, no such requirement exists for ER 803. The question of whether Poling was available or not, therefore, is irrelevant.

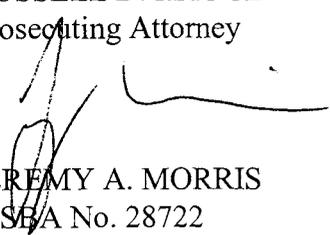
IV. CONCLUSION

For the foregoing reasons, Bird's conviction and sentence should be affirmed.

DATED May 26, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

DOCUMENT1