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STATE OF WASHINGTON  
NO. 34949-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KEITH EDWARD BERRY,

Appellant.

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

The Honorable Frank E. Cuthbertson, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence to support Mr. Berry's conviction for second degree assault with a deadly weapon.

2. The trial court erred in admitting the testimonial hearsay of the complaining witness, Lukia Neal.

3. The trial court erred in admitting the hearsay statements of Ms. Neal and her daughter Forest as excited utterances.

4. The prosecutor's misconduct in forcing Mr. Berry to comment on the credibility of other witnesses denied Mr. Berry a fair trial.

5. The trial court erred in ruling that the state's cross-examination opened the door to the admission of a 911 tape.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where the evidence showed that Mr. Berry threatened only to use the bat to vandalize a truck and where Ms. Neal testified that she did not think Mr. Berry would hit her with the bat, was there insufficient evidence to convict Mr. Berry of assault with a deadly weapon?

2. Where the state did not call Lukia Neal as a witness at trial, did the court err and deny Mr. Berry his Sixth Amendment right to confrontation of witnesses by admitting her hearsay statements to the police?

3. Where Ms. Neal was distressed primarily by not knowing where her daughter was, not her interaction with Mr. Berry, and was able to give a narrative account to the police, and where her daughter was crying because she was angry with her mother and Mr. Berry for arguing, did the trial court err in determining that the statements of these two witnesses were admissible as excited utterances?

4. Did the prosecutor commit misconduct in forcing Mr. Berry to comment on the credibility of state's witnesses and forcing him to speculate about the motives of the other witnesses?

5. Did the trial court err in ruling that the state's forcing Mr. Berry to comment on the credibility of a witness opened the door to the 911 tape of the witness reporting the incident?

6. Did the trial court err in ruling the 911 tape was admissible as a prior consistent statement

to rebut a claim of recent fabrication where the 911 tape was not shown to have been made prior to any motive to fabricate?

7. Did the trial court err in ruling the 911 tape was admissible under ER 613 where that rule does not authorize the admission of prior *consistent* statements.

**C. STATEMENT OF THE CASE**

**1. Procedural history**

The Pierce County Prosecutor's Office charged appellant Keith Berry with assault in the second degree (count I); assault in the fourth degree (count II); and harassment (count III). CP 1-3. All counts arose from the same incident. CP 1-3.

At the outset of trial, the court dismissed count II with prejudice on the prosecutor's motion. CP 21; RP 101. Mr. Berry was convicted as charged on the two remaining counts after a jury trial before the Honorable Frank E. Cuthbertson. CP 48-49. The jury also found that Mr. Berry was armed with a deadly weapon at the time of the incident. CP 49.

On June 2, 2006, the court imposed standard-range sentences and a deadly-weapon enhancement. CP

63-76. Mr. Berry filed subsequently filed a timely notice of appeal. CP 68-79.

## 2. Overview

The charges arose from an incident between Mr. Berry and his girlfriend Lukia Neal which took place on June 2, 2005, at approximately 8:00 a.m. RP 120-121, 189. Two employees of a school near the home of Mr. Berry and Ms. Neal, Ron Surrett and Yuri Kosiuga, testified at trial. Mr. Surrett testified that he heard a scream and looked up to see what he believed to be Mr. Berry dragging Ms. Neal down the street by her hair; according to Surrett, Mr. Berry was swinging a baseball bat.<sup>1</sup> RP 122-129. Mr. Berry and Ms. Neal stopped in front of a house on the street and Mr. Berry let go of Ms. Neal's hair. RP 127. Although Mr. Surrett candidly admitted that he could not hear what either was saying, he believed they continued arguing as they stood in front of the house. RP 127. Mr. Surrett called security on his radio and Mr. Kosiuga, the custodian, called 911. RP 130, 164.

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<sup>1</sup> Neither Mr. Surrett nor Mr. Kosiuga knew Mr. Berry and Ms. Neal. Mr. Berry's name and Ms. Neal's are being used for clarity. Identity was not an issue at trial.

Yuri Kosiuga testified that he heard a scream and went outside. RP 158. He heard Mr. Surrectt on the radio and within a minute called 911. RP 160-164. Mr. Kosiuga testified at trial that he saw Mr. Berry dragging Ms. Neal and swinging a bat, and that he could hear Ms. Neal pleading with Mr. Berry to let her go. RP 160. Mr. Kosiuga, however, had reported during a defense interview that he could not hear what was being said. RP 170.

Mr. Kosiuga remained on his cell phone with the 911 operator until the police arrived. RP 166. Later, the 911 call was admitted into evidence and played for the jury and Mr. Kosiuga never told the 911 operator that Ms. Neal was pleading with Mr. Berry, that Mr. Berry was dragging Ms. Neal, that he had her hair or that he could hear anything that was said. Exhibit 5. He stated only that they were arguing and that Mr. Berry was swinging the bat or had the bat on his shoulder. Exhibit 5.

Mr Berry explained in his testimony that he and Ms. Neal had had an argument the previous evening; and, although he believed that they had concluded the argument, that Ms. Neal still seemed angry the morning of June 2, as she got ready for work. RP

246-250. Ms. Neal and her daughter Forest left the house. RP 251-252. When he did not hear the truck start, Mr. Berry went outside and caught up with Ms. Neal two blocks away; Ms. Neal told Forest to go call her grandmother (actually Ms. Neal's aunt) to come give them a ride. RP 255-258. As Ms. Neal and Mr. Berry were walking back to the house, she slipped and he caught her and grabbed her hair. RP 260. Mr. Berry denied that he and Ms. Neal were having a serious argument or that he threatened her. RP 2660-262. He agreed that he told her he would knock out the lights of the truck so she would have to return before dark. RP 313-315. He was making a point about not coming home late. RP 315.

The police arrived and Ms. Neal was very upset about not knowing where Forest was. RP 194-195, 216. The police searched for Forest, who was returned by her aunt, who had picked her up at the convenience store. RP 214, 493-495. Mr. Berry testified that Ms. Neal started crying when an officer drew his gun and she feared he was going to be shot by the officer. RP 320.

Defense investigator Glenn Glover testified that Mr. Kosiuga was 200 feet away at the time of the incident. RP 370.

## **2. Pre-trial rulings**

Prior to trial the court, the court granted the defense motion to suppress the aluminum bat seized by the police inside Mr. Berry's home on the day of the incident. RP 97-98. The court ruled, however, that references to the bat by witnesses who had seen it would not be suppressed. RP 105-107.

The court excluded the 911 call of Mr. Kosiuga on the grounds that it was cumulative. RP 220.

The court ruled that Mr. Berry's two custodial statements to the police, "I have my keys in my pocket," and "I only wanted Ms. Neal not to drive the truck," were admissible. RP 99.

The prosecutor alerted the court that Ms. Neal would not appear for trial. RP 100, 114. This was reiterated throughout the state's case in chief. RP 198-199. Defense counsel made efforts to locate Ms. Neal and have her attend trial. RP 286, 356-358.

## **3. Hearsay testimony**

Over defense hearsay objection, Tacoma Police Officer Barbara Salinas was permitted to testify

that she talked to Ms. Neal outside and later inside her home on June 2, and to testify about what Ms. Neal allegedly said to her. RP 194-195. According to Officer Salinas, Ms. Neal was upset and crying and trying to locate Forest, whom she said she had sent for help. RP 194-195. The state argued that the testimony was not for the truth of the matter asserted, but to show what the officer did next.<sup>2</sup> RP 195.

Over further defense objection, the state was permitted to elicit from Officer Salinas that Ms. Neal said she sent Forest with her purse to get help, that she and Mr. Berry had been arguing and that as she prepared to leave, Mr. Berry said he was going to vandalize her car. RP 208. Officer Salinas reported that Ms. Neal said that when she was outside with Forest, Mr. Berry chased them and grabbed her by the hair and started pulling her back to the house. RP 206. Officer Salinas further reported that Ms. Neal said that Mr. Berry said that if the police car was coming for them he was going to hit her upside the head. RP 208. Ms. Neal

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<sup>2</sup> In closing argument, the prosecutor argued that Ms. Neal sent Forest to call her aunt because she knew what was going to happen. RP 547.

provided a written statement to Officer Salinas. RP 211.

The statements of Ms. Neal to the police were admitted as excited utterances, although Officer Salinas testified that Ms. Neal became a lot calmer when her daughter returned home, although she was still upset and crying. RP 207-208. On cross-examination Salinas said that it was her impression that Ms. Neal calmed down after her daughter was located and the majority of her hysteria was a result of the missing child. 215-216.

Lieutenant Mark Fedderson testified that when he arrived he saw Mr. Berry and Ms. Neal standing off the side of the roadway talking; Mr. Berry had a bat slung over his shoulder. RP 226-227. A short time later, Fedderson arrested Mr. Berry. RP 229-234.

#### **4. Testimony of Ms. Neal as a defense witness**

The state called Ms. Neal as a defense witness after she came to court, in response to a message from defense counsel, and the state declined to call her as a state's witness. RP 356, 358, 376, 387-388.

Ms. Neal testified in a manner which was largely consistent with Mr. Berry's testimony. RP 390-427. She denied that Mr. Berry threatened her. RP 427. She denied that she believed that Mr. Berry was going to hit her with a bat. RP 459.

**5. Cross-examination of Mr. Berry and the state's rebuttal**

During cross-examination of Mr. Berry, the following took place:

Q. Lukia didn't yell, so there was no reason for Yuri's attention to be drawn to her?

A. Yell for help or just --

Q. Never screamed --

A. No.

Q. --let go of me?

A. No.

. . . .

Q. . . . So Yuri couldn't have seen what he believes he saw?

A. I didn't say -- I can't tell you what Yuri saw.

Q. Well, you heard what Yuri testified to?

A. I heard Yuri lie too.

Q. Yuri lied?

A. Yeah, When he said he saw me swing the bat, that was a lie.

Q. Did Yuri testify that he also told the 911 operator that he saw you swinging the bat?

A. Yeah, on the 911 tape.

Q. And so then and nine months later, and there's no reason for him to do it, is there?

A. There's no reason for him to do what?

Q. For him to lie.

A. I guess -- I guess not. I don't know. I don't know what his motive.

Q. You heard Ron Surrett testify?

A. Yes,

Q. And Ron testified that he saw you swinging the bat; intimidating Lukia; that was his testimony as well?

A. That's what his testimony said.

Q. Scaring her, dragging her by her hair?

A. That's what he said.

. . . .

Q. And that never happened?

A. That never happened.

Q. And you've heard what Officer Salinas testified Lukia said; Lukia's version to Officer Salinas was very, very similar to what the two witnesses, Yuri and Ron, had to say, wasn't it?

A. I guess.

. . . .

Q. And Lukia had no reason to come up with this story because you and she were pretty

much getting along because you'd sorted everything out the night before?

A. What story?

Q. What she told Officer Salinas what happened?

A. Okay. Could you be specific what she told Officer Salinas?

[prosecutor repeats Officer Salinas's testimony in detail]

Q. So this is not a story about a woman mad at you telling lies?

A. Shouldn't be.

RP 309-320.

As a result of this cross-examination, the court allowed the state to play for the jury the 911 tape of Mr. Kosiuga, as a present sense impression and under ER 613 because Mr. Kosiuga's credibility had been attacked and as a prior consistent statement to rehabilitate him. RP 504-510, 524. Mr. Kosiuga said three times on the 911 tape that Mr. Berry was swinging the bat. RP 522-525. He admitted, however, that Ms. Neal did not scream while he was on the telephone with the 911 operator and that most of the time Mr. Berry and Ms. Neal were standing there arguing. RP 533.

The jury asked to hear the 911 tape during their deliberations. RP 578.

The state was also called Forest Neal as a rebuttal witness. Forest testified that her mom and Mr. Berry were arguing. RP 482. When she and her mother were halfway down the street, her mother told Forest to go to the store to get her grandmother (aunt) and ask for a ride while Ms. Neal talked to Mr. Berry. RP 482-483. Forest did and her grandmother came to get her. RP 483-485.

Ethel Smith, the person Forest called her grandmother, confirmed that Forest called her crying and asking if she could come pick her up. RP 490. According to Ms. Smith, Forest said that her mother and Mr. Berry were fighting. RP 492. The court admitted the testimony as an excited utterance.

Henry Chapman, Ethel Smith's husband, testified that he called 911 because he did not like his wife going to the Hilltop area. RP 500-503.

**D. ARGUMENT**

- 1. THERE WAS INSUFFICIENT EVIDENCE THAT MR. BERRY ASSAULTED MS. NEAL WITH A DEADLY WEAPON.**

As the jury was properly instructed, to convict Mr. Berry guilty of assault in the second degree, the state had to prove beyond a reasonable doubt that he assaulted Lukia Neal with a deadly weapon.

CP 29, 30. Assault was defined for the jury as an intentional touching or striking, an act done with intent to inflict bodily injury, or

an act done with the intent to create in another person apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 33.

The prosecutor conceded during closing argument that there was no evidence of a touching or striking with a deadly weapon nor any act done with intent to inflict bodily injury. RP 556-557. The state's theory of the case was that Mr. Berry intended to place Ms. Neal in apprehension and imminent fear of bodily injury by swinging the bat. RP 556-557.

There was, however, insufficient evidence to support the state's theory. All of the testimony in the case was that Mr. Berry threatened to break the windows of the car or vandalize the tires with the bat, not hit Ms. Neal with it. see, e.g., RP 208. The only time it was alleged that he threatened to hit Ms. Neal with a bat was when the incident was over and the police were arriving; that threat was the basis for the harassment charge, not the

assault. RP 557-558. Thus, the first time Mr. Berry threatened to hit Ms. Neal, under the state's theory, was when the police were arriving, and not before that time.

Moreover, Ms. Neal specifically testified that she did not believe that Mr. Berry was going to hit her with a bat. RP 459. Her testimony was unrebutted. Her testimony alone defeats a finding that Mr. Berry assaulted her with a deadly weapon. State v. Bland, 71 Wn. App. 365, 860 P.2d 1046 (1993) (actual imminent fear of bodily injury on the part of the victim is an essential element of the assault).

The state, in fact, never argued that Mr. Berry intended to create an imminent fear of bodily injury in Ms. Neal, only that he wished to force her to come back to the house with him. RP 547. And the limited testimony that her demeanor was consistent with fear, did not establish that Mr. Neal feared she would be hit with the bat. RP 530. She said that she did not. RP 459. Under these circumstances no reasonable juror could have found beyond a reasonable doubt that Mr. Berry assaulted Ms. Neal with a deadly weapon. While the state's

evidence, if believed, may have established a second degree assault, it did not establish a second degree assault with a deadly weapon, the only means of assault charged.

Due process, under the state and federal constitution, requires that the state prove beyond a reasonable doubt every fact necessary to establish the essential elements of the crime charged. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Therefore, as a matter of state and federal constitutional law, a conviction cannot be affirmed unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980). Because there was insufficient evidence that Mr. Berry assaulted Ms. Neal with a deadly weapon, his conviction for second degree assault should be reversed and vacated.

**2. THE TRIAL COURT ERRED IN ADMITTING TESTIMONIAL HEARSAY.**

The state did not call the complaining witness, Lukia Neal, to testify. For this reason, the

introduction of her out-of-court statements to investigating officer Barbara Salinas violated Mr. Berry's right under the Sixth Amendment to confront the witnesses against him. Ms. Neal's statements to Officer Salinas were testimonial hearsay and not admissible in the state's case-in-chief unless the state called her as a witness. The fact that the defense later called Ms. Neal as a witness did not cure the constitutional error; if the state had not been permitted to introduce Ms. Neal's testimonial hearsay, the defense would not have had the same incentive and need to call her as a witness. What was clear at trial was that the state wished to present Ms. Neal's hearsay testimony without providing the opportunity to confront her. The state never sought a material witness warrant to compel her testimony.

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation." The Court defined

"testimonial statements" to include "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Crawford, 124 S. Ct. at 1364 (quoting NACDL Amicus Brief).

The Court in Crawford placed statements such as Lukia Neal's statements to the police squarely in the testimonial category: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Crawford, 124 S. Ct. at 1364. The Court noted that even an accusatory *letter* to the police is testimonial, citing the letter of accusation used against Sir Walter Raleigh.<sup>3</sup> 124 S. Ct. at 1360. "Involvement of governmental officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse." Crawford, 124 S. Ct. at 1367 n.7. Most

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<sup>3</sup> See also, 1 James Stephen, A History of the Criminal Law in England, at 326 (1883) (common law confrontation right applied to "depositions, confessions of accomplices, letters and the like"), quoted in California v. Green, 399 U.S. 149, 156-157), 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (Harlan, J. concurring).

importantly, the Court held that the recorded statement of the wife in Crawford "given in response to structured police questioning, qualifies under any conceivable definition [of testimonial evidence]." Crawford, 124 S. Ct. at 1365 n.4.

In Davis v. Washington, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Supreme Court considered statements to police during 911 calls, and held that statements can be "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, at 165 L. Ed. 2d 237. Based on this holding, in Davis, the Court held that statements made during a 911 call which were made while an emergency was unfolding and to enable the police to meet the on-going emergency were nontestimonial while statements made as investigation into possible past criminal conduct

once the police responded were testimonial. Davis, at 239-240. The Court held further that even statements made during "interrogation to determine the need for emergency assistance . . . can evolve into a testimonial statement" once the emergency has resolved -- such as when the assailant has left the premises during a 911 call. Davis, at 241.

Here, Ms. Neal's statements to Officer Salinas were made after Mr. Berry had been arrested and placed in a patrol case. Under the analysis in Davis, there was no on-going emergency.

Although Ms. Neal initially expressed concern about where Forest was to Officer Salinas, Forest's location in and of itself was not relevant at trial and therefore inadmissible. The only relevance was whether Ms. Neal's statement about her daughter tended to incriminate Mr. Berry and, in that sense, it was testimonial hearsay. Moreover, as in Davis, this initial concern quickly evolved into a testimonial statement and the trial court erred in admitting Ms. Neal's statements through Officer Salinas.

Even though Ms. Neal eventually testified in the defense case, this does not cure the error. As

the Washington Supreme Court noted in State v. Rohrich, 132 Wn.2d 742, 478, 939 P.2d 697 (1997), the state's failure to have the witness testify "puts the defendant in 'a constitutionally impermissible Catch-22' of calling the child for direct or waiving his confrontation rights." In Rohrich, the issue was when a child witness "testifies" sufficiently to support admission of child hearsay. The Rohrich court held that the child witness does not "testify" unless state elicits testimony about the acts of sexual contact. Rohrich, at 474. The court noted that 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 411 at 122 (Supp. 1997), provides that courts "have rejected the argument that the defendant's rights are adequately safeguarded by giving the defendant the opportunity to call the child as a witness." The Rohrich court further cited Lowrey v. Collins, 996 F.2d 779, 771-772 (5th Cir. 1993) and quoted Michael J. Graham, The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship, 72 MINN. L. REV. 523, 583 (1988), as follows:

In every decision, the [Supreme] Court implicitly premised its discussion on the

firm principle that the confrontation clause requires the prosecution to call available witnesses whose testimony is crucial and devastating at trial for examination in the presence of the accused and for cross-examination by defense counsel. None of those decisions hinted even slightly that the sixth amendment permits the prosecution to introduce [hearsy statements] merely because the accused may call and examine such a witness at trial.

The state was obligated to call Ms. Neal as a witness to preserve Mr. Berry's rights to confrontation of witnesses.

The error in admitting the testimonial hearsay was constitutional and not harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Ms. Neal was the complaining witness. Her out-of-court statements were the heart of the state's case and gave content to the testimony of the two school employees who could only testify that they saw something that caused them concern. The error should result in reversal of Mr. Berry's convictions.

**3. MS. NEAL'S HEARSAY STATEMENTS AND FOREST'S HEARSAY STATEMENTS WERE NOT ADMISSIBLE AS EXCITED UTTERANCES.**

The trial court erred in admitting the hearsay statements of Ms. Neal and her daughter Forest as

excited utterances. Ms. Neal was upset when she spoke to Officer Salinas because she did not know where her daughter was. RP 207-208. This concern, however, did not establish that Ms. Neal was so under the influence of her interaction with Mr. Berry that she lacked the capacity to reflect and consider. She calmed down after she learned that Forest was safe, and Officer Salinas candidly admitted on cross-examination that most of Ms. Neal's emotional state was because she was worried about Forest. RP 207-208, 215-216. Forest testified at trial that she cried when she spoke to her grandmother because she was mad at her mother and Mr. Berry for arguing. RP 476-477.

The excited utterance exception does not make admissible all out-of-court statements or responses to police questioning merely because the person making the statement is upset or crying. The exception is applicable only where the declarant is so under the influence of an occurrence that the capacity to think or reflect is absent.

ER 803(a)(2) provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excite-

ment caused by the event or condition" need not be excluded as hearsay. The exception is based on the rationale that an event may be so startling that any statements made while still under the influence of the event are spontaneous, without reflection and truthful:

'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.'

State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence § 1747, at 195 (1976)). As a result, the "key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting Johnson v. Ohls, 76 Wn.2d 398, 405, 457 P.2d 194 (1969)); State v. Brown, 127 Wn.2d 749, 758-759, 903 P.2d 459 (1995).

Accordingly, three conditions must be met: "(1) a startling event or condition must have occurred; (2) the statement must have been made

while the declarant was still under the stress of the startling event or condition; and (3) the statement must relate to the startling event or condition." State v. Lawrence, 108 Wn. App. 226, 31 P.3d 1198 (2001) (citing State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997)). "The second element 'constitutes the essence of the rule' and "[t]he key to the second element is spontaneity.'" Lawrence 108 Wn. App. at 234 (quoting Chapin, 118 Wn.2d at 688).

In Brown, the Supreme Court held that the trial testimony of the victim that she decided not to tell the truth in a portion of her 911 call defeated a finding that her call was an excited utterance. Brown, 127 Wn.2d at 757-759. The victim testified that she had discussed with her boyfriend the fact that the police might not believe her because she had gone willingly with the defendant and because she was a prostitute and, for this reason, she decided to tell the police that the defendant had abducted her and threatened her with a knife and gun. Brown, 127 Wn.2d at 752. The court held that, by the victim's own testimony, "she had the opportunity to, and did in fact, decide to fabricate a

portion of her story prior to making the 911 call." Brown, at 759.

In this case, the conditions did not establish that either Ms. Neal or Forest were so under the influence of Ms. Neal's interaction with Mr. Berry that she could not have reflected or fabricated. Ms. Neal was distressed because she did not know where her daughter was, and she conveyed this to the police. RP 207-208. Once she knew that her daughter was safe she calmed down. RP 215-216. Forest was able to go to the store, call for a ride and follow instructions to wait for her grandmother to arrive. RP 490-494. These facts are not sufficient to qualify as excited utterances. Merely being upset, angry or crying is not enough. There must be facts supporting the inference that a particular event gave rise to virtually spontaneous statements about the event that could not likely have been fabricated. Here, Ms. Neal was waiting outside her home and was approached and questioned by the police. She responded that she did not know where her daughter was, not about her interaction with Mr. Berry. Ms. Neal's statements and Forest's

statements should not have been admitted as excited utterances.

**4. THE PROSECUTOR'S MISCONDUCT IN FORCING MR. BERRY TO COMMENT ON THE CREDIBILITY OF OTHER WITNESSES DENIED MR. BERRY A FAIR TRIAL AND THE COURT ERRED IN RULING THAT THIS CROSS-EXAMINATION OPENED THE DOOR TO THE ADMISSION OF THE 911 TAPE REPORTING THE INCIDENT.**

In spite of the fact that it is well-settled that witnesses are not to be asked to comment on the credibility of other witnesses, the prosecutor's cross examination of Mr. Berry forced him to answer questions about why Yuri Kosiuga would have his attention drawn to Ms. Neal if she had not screamed or to tell the 911 operator that he saw Mr. Berry swing the bat if he had not, whether Yuri "couldn't have seen what he believes he saw," whether Ron Surrett testified about something that never happened, and whether Ms. Neal had any reason to tell a story to Officer Salinas. RP 309-320.

While the prosecutor was free to argue to the jury the inconsistencies and contradictions, it was improper to require Mr. Berry to testify about the motives and truthfulness of the state's witnesses. Credibility determinations are for jurors, not witnesses. Further, it was error for the court to

rule that this improper testimony elicited by the state opened the door to the admission of the 911 tape.

**a. Improper cross-examination**

A witness may not give an opinion as to another witness's credibility, and it is misconduct to ask the defendant to testify that a state's witness is untruthful. State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996); State v. Casteneda-Perez, 61 Wn. App. 354, 360, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Credibility determinations are the sole province of the jury. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

When the prosecutor engages in well-established areas of misconduct, the misconduct should be deemed ill-intentioned, and review should not be precluded even though defense counsel failed to object below.

Where there is a "substantial likelihood" that the prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where, as here, defense counsel does not object to the misconduct, appellate review is not

precluded (1) if the cumulative effect of the misconduct rises to the level of manifest constitutional error that is not harmless beyond a reasonable doubt, State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997); or (2) "if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." Belgarde, 110 Wn.2d at 507; RAP 2.5(a).

Here, the misconduct was of a type that is so well-established that continuing to engage in it should be deemed flagrant and ill-intentioned, Fleming, supra. Moreover, the cumulative impact of the misconduct denied Mr. Berry a fair trial. The prosecutorial misconduct constituted manifest error affecting a constitutional right because the misconduct invaded the province of the jury, denying Mr. Berry his right to have the jury resolve the credibility issues in determining the facts. Const. art, 4, § 16; art. 1, §22. The misconduct was manifest constitutional error because it had "practical and identifiable consequences in the

trial of the case." State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

The prosecutorial misconduct was not harmless because Mr. Berry testified in his own behalf; and, where a defendant testifies in his own behalf on disputed matters and gives a plausible explanation, which is facially believable, an appellate court cannot find beyond a reasonable doubt that the error was harmless; it cannot find that a reasonable jury would have found the defendant guilty in the absence of the constitutional error. State v. Heller, 58 Wn. App. 414, 421, 793 P.2d 461 (1990); State v. Gutierrez, 50 Wn. App. 583, 591, 749 P.2d 213 (1988). This is because a holding that the error was harmless would require the appellate court to make a credibility determination that only the jury can make. The error here was not harmless and Mr. Berry's convictions should be reversed.

**b. Erroneous admission of the 911 tape**

The prejudice of the prosecutor's misconduct was compounded by the trial court's error in ruling that the cross-examination by the prosecutor opened the door to admission of the the 911 tape and that the 911 tape was a prior consistent statement

admissible to rehabilitate Mr. Kosiuga's credibility.

First, the defense did not open the door to the 911 tape. The testimony that the state used to claim that the door had been opened was elicited by the prosecutor on cross-examination. "Opening the door" is a rule which allows one party to bring up evidence to rebut evidence introduced by the opposing party where "fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter the proponent first introduced through the witness." State v. Gallagher, 112 Wn. App. 601, 609, 51 P.3d 100 (2004); State v. Gefeller, 76 Wn.2d 449, 455, 488 P.2d 17 (1969). Nothing in this rule provides that a party, the proponent, can open the door by introducing the topic itself on cross-examination.

Second, the statement was not admissible as a prior consistent statement under ER 801(d)(1)(ii), because the 911 tape was not made before any motive to fabricate arose. See, Tome v. United States, 513 U.S. 150, 115 S.Ct. 696, 130 L. Ed 574 (1995); State v. Thomas, 150 Wn.2d 821, 865, 83 P.3d 970 (2004); State v. McDaniel, 37 Wn. App. 768, 771, 683 P.2d

231 (1984). Nor does ER 613 provide a basis for introducing a prior consistent statement. ER 613(a) is entirely procedural and requires only that a witness be provided with a copy of the prior statement while being examined about it, and ER 613(b) deals with prior *inconsistent* statements.

There were no evidentiary grounds for admitting the 911 tape. It was not admissible to rebut a claim of recent fabrication because the 911 tape was not made before any motive to fabricate arose. It was not admissible under ER 613 because that evidentiary rule does not provide for the admission of prior consistent statements. Moreover, the defense did not open the door to the admission of the evidence.

The jury asked to listen to the 911 tape during deliberations. RP 578. Obviously it was significant evidence and the error in admitting it not harmless.

**E. CONCLUSION**

Appellant respectfully submits that his convictions should be reversed and his conviction for second degree assault dismissed. If the

CERTIFICATE OF SERVICE

I certify that on the 23<sup>rd</sup> day of October, 2006, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via prepaid first class mail:

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