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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

vs.

KENNETH EUGENE WRIGHT,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 06-1-04520-5  
The Honorable Brian Tollefson, Judge

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OPENING BRIEF OF APPELLANT

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## TABLE OF CONTENTS

|      |   |    |
|------|---|----|
| I.   | ASSIGNMENTS OF ERROR .....  | 1  |
|      | A. Assignments of Error.....  | 1  |
|      | B. Issues Pertaining to the Assignments of Error.....   | 1  |
| II.  | STATEMENT OF THE CASE .....   | 2  |
|      | A. Procedural History .....   | 2  |
|      | B. Substantive Facts.....   | 3  |
| III. | ARGUMENT & AUTHORITIES.....   | 8  |
|      | A. The trial court erred when it admitted hearsay statements without any evidence to establish that the statements qualify for admission under one of the exceptions to the hearsay rule..... | 8  |
|      | B. The State failed to present sufficient evidence to establish the essential elements of the charged crimes.....   | 10 |
|      | 1. <u>Insufficient Proof of Identity</u> .....  | 12 |
|      | 2. <u>Insufficient Proof of a Substantial Risk</u> .....  | 13 |
| IV.  | CONCLUSION.....   | 13 |

## TABLE OF AUTHORITIES

### CASES

|  |    |
|--|----|
| <i>City of Tacoma v. Luvene</i> ,<br>118 Wn.2d 826, 827 P.2d 1374 (1992) .....           | 10 |
| <i>State v. Brown</i> , 127 Wn.2d 749, 903 P.2d 459 (1995) .....                         | 9  |
| <i>State v. Flett</i> , 40 Wn. App. 277, 699 P.2d 774 (1985) .....                       | 9  |
| <i>State v. Hardy</i> , 133 Wn.2d 701, 946 P.2d 1175 (1997) .....                        | 9  |
| <i>State v. Hill</i> , 83 Wn.2d 558, 520 P.2d 618 (1974) .....                           | 12 |
| <i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....                      | 11 |
| <i>State v. Sellers</i> , 39 Wn. App. 799, 695 P.2d 1014 (1985) .....                    | 9  |
| <i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997) .....                      | 8  |
| <i>State v. Valdobinos</i> , 122 Wn.2d 270, 858 P.2d 199 (1993) .....                    | 8  |
| <i>Warner v. Regent Assisted Living</i> ,<br>132 Wn. App. 126, 130 P.3d 865 (2006) ..... | 10 |

### OTHER AUTHORITIES

|                     |        |
|---------------------|--------|
| ER 802 .....        | 8      |
| ER 803 .....        | 9      |
| RCW 9.41.040 .....  | 11     |
| RCW 9A.36.045 ..... | 11, 13 |

## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred when it admitted hearsay statements without any evidence to establish that the statements qualify for admission under one of the exceptions to the hearsay rule.
2. The State failed to provide sufficient evidence to prove beyond a reasonable doubt the identity of the shooter, an essential element of the crimes of drive-by shooting and unlawful possession of a firearm.
3. The State failed to provide sufficient evidence to prove beyond a reasonable doubt that the discharge of the gun created a substantial risk of death or injury, an essential element of the crime of drive-by shooting.

### **B. Issues Pertaining to the Assignments of Error**

1. Where there was no evidence or testimony that the declarant was under the stress of the event at the time he made his statements, did the trial court err when it admitted the declarant's hearsay statements as excited utterances?  
(Assignment of Error 1)
2. Where the State's evidence only established that the

Appellant was in the same neighborhood and in a white car at the time of the charged incident, did the State present sufficient evidence to prove beyond a reasonable doubt that Appellant was the individual who fired a gun from a white car? (Assignment of Error 2)

3. Where the State's evidence only established that a gun was fired in a residential area late at night and not towards persons or property, did the State present sufficient evidence to prove beyond a reasonable doubt that the gun was fired in a manner that created a substantial risk of death or injury to another person? (Assignment of Error 3)

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

The State charged Kenneth Eugene Wright by Information with one count of drive-by shooting (RCW 9A.36.045) and one count of first degree unlawful possession of a firearm (RCW 9.41.040). (CP 1-2) A jury convicted Wright as charged. (RP 504; CP 42, 44) The court sentenced Wright within his standard range to a total of 75 months of confinement. (RP 528; CP 47-48, 54-55) This appeal timely follows. (CP 62)

## **B. Substantive Facts**

Around 2:40 in the morning of September 23, 2006, Tacoma Police dispatch received a 911 call reporting gunshots fired in an East Tacoma neighborhood. (RP 150-51) Tacoma Police Officers Ashley Metzger and John Branham responded. (RP 150, 152) As they neared the area, an unidentified man flagged them down from his truck and told them that he saw a white Lincoln drive away from a blue house on East 62nd Street, and that he heard five gunshots coming from the vehicle. (RP 156, 373-74) The man showed the officers the blue house, which was located at 1321 East 62nd Street, a residential street intersected by Portland Avenue. (RP 136, 157)

Metzger and Branham approached the blue house, and noticed several adults gathered together in the street out front. (RP 157, 376) Metzger also saw a woman standing in the doorway of the blue house; the woman was talking on the telephone and appeared to be upset and crying. (RP 157, 160)

Metzger approached the woman, Jonnice Morris, and began questioning her. (RP 162-63) Morris told Metzger that her brother, Kenneth Wright, had come by earlier and demanded money. When Morris refused, he yelled and cursed at her, and demanded some

of his belongings. Morris gave the items to Wright, and then Wright left. (RP 164-65) Morris told Metzger that she saw Wright get into a white car and heard him drive away. (RP 165) She heard gunshots a few seconds later. (RP 163, 165) Although Morris did not see where the gunshots came from, she believed that her brother was responsible. (RP 163) Morris told Metzger that Wright lived with his girlfriend in the Parkland area, and gave Metzger their phone number. (RP 164)

Metzger and Branham found Wright's address on their patrol car's computer and drove to the home. (RP 168-69, 385) They arrived about five to ten minutes later, at 3:16 in the morning. (RP 388) They parked about half a block away from the home and waited for backup units to arrive. (RP 169, 171) As they waited, they saw Wright and a woman come out of the house and walk to a white Chevrolet Impala parked in the driveway. (RP 172, 174-75) Then the backup units arrived, and all of the officers approached the home with emergency lights on and guns drawn. (RP 177, 181-82) The woman immediately began yelling and demanding to know what was going on, but Wright turned and walked back inside the home. (RP 177)

After a few moments, another older woman exited the home,

followed by Wright, who was holding a toddler in his arms. (RP 179, 183) Wright handed the child to the younger woman, and the officers took Wright into custody. (RP 183-84)

The officers questioned Wright and the two women, Wright's girlfriend Jestina Niumaiialolo and her mother Gail Niumaiialolo. They gave differing accounts of their activities that evening, and changed their stories when confronted with inconsistencies. (RP 191-93) Jestina ultimately told the officers that Wright was gone from their home for about 45 minutes and arrived back just minutes before police arrived, but Wright denied going to his sister's home that night. (RP 426, 193) Wright told Metzger that he was being wrongfully accused, that he would never shoot a gun into the air because that was "kid's stuff," and that if he was going to shoot a gun, he would shoot at someone. (RP 194)

Several neighbors testified at trial. Kathy Devlin lives in a house on East 64th Street. (RP 236) She was awakened by the sound of gunfire nearby, and she immediately called 911. (RP 236-37, 239) She did not see any suspicious persons or vehicles. (RP 238) She testified that she often hears gunshots because it is a "rough neighborhood." (RP 237, 238, 239)

John Smith also heard the sound of gunshots that night.

(RP 241) He looked out his living room window, which faces East 62nd Street, and saw a white car drive quickly down the street, then turn onto Portland Avenue. (RP 242, 249) He saw the vehicle at the same time that he heard the final gunshot, but he could not tell whether the gunshots came from the white car. (RP 244) He went outside to see what was happening, and noticed several shell casings on the ground on East 62nd Street. (RP 244, 246, 247) He gave the casings to Officer Branham. (RP 378, 383) Smith also testified that he often hears gunshots around the neighborhood. (RP 241)

James Cook heard the gunshots while he was watching television in his home on East 62nd Street. (RP 260-61) It sounded to Cook as if the shots were fired nearby, but he did not see any persons or any vehicles in the area. (RP 261-62) He went outside to see if there had been any damage to his cars or property. He found no damage, but he did find shell casings in the street. (RP 263) He also testified that he hears gunshots in the neighborhood all the time, and has seen shell casings in the street in the past. (RP 267)

The crime lab analyzed the five shell casings retrieved at the scene, and concluded that they were all fired from the same gun.

(RP 286) Although the officers searched Wright's car and home, they did not find a gun, nor did they find any bullets matching those found at the scene. (RP 185, 186, 309, 311) Officers did find documents inside the white car that had Wright's name on them, and a woman testified that she sold a white Chevrolet Impala to Wright several months before the incident. (RP 316, 254)

Jonnice testified at trial that her brother came to her home that night to ask for money she had promised him. (RP 138) He was angry and yelled at her because she could not give him the money. (RP 138-39) She testified that she did not see him leave in a car and did not hear the gunshots. (RP 140, 142-43, 144) She believed the police were called because Wright had been yelling at her. (RP 146) When Metzger approached her, she was on the telephone with her boyfriend, and they were in the middle of an argument. (RP 140, 146)

Jestina testified at trial that she and Wright had been out bowling and drinking that night. (RP 321) She testified that they argued after they came home, and that Wright went out for a short time. (RP 324) Jestina testified that Wright came back about 45 minutes before the police arrived. (RP 325)

### III. ARGUMENT & AUTHORITIES

- A. The trial court erred when it admitted hearsay statements without any evidence to establish that the statements qualify for admission under one of the exceptions to the hearsay rule.**

During trial, Officer Metzger testified that the unidentified man told them that he saw the white car leave the blue house, and heard the gunshots coming from the vehicle. (RP 156) Wright objected to the officers' testimony regarding these statements, arguing that they were inadmissible hearsay. (RP 154-55, 198, 199-200, 295, 298) The trial court overruled the objection, finding that the statements were excited utterances. (RP 155, 296) A trial court's evidentiary rulings are generally reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable. *State v. Valdobinos*, 122 Wn.2d 270, 279, 858 P.2d 199 (1993).

Hearsay is generally inadmissible at trial. ER 802. However, a hearsay statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is generally

admissible under the excited utterance exception. ER 803(a)(2). “The principal elements of the exception are a sufficiently startling event and a showing that the declarant was still under the stress of excitement while making the statement.” *State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985).

The crucial question is whether 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. Brown*, 127 Wn.2d 749, 757, 903 P.2d 459 (1995); *State v. Sellers*, 39 Wn. App. 799, 804, 695 P.2d 1014 (1985) (citing *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

For example, in *State v. Hardy*, the Court found that hearsay statements were excited utterances where the police officer testified that both declarants were visibly shaken and excited when they made the statements just minutes after the alleged robbery. 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

In *Warner v. Regent Assisted Living*, the court affirmed the trial court’s exclusion of hearsay statements because:

[there was] no evidence that [the declarant] remained in an emotional and agitated state during this intervening period. [The declarant] needed to provide

at least some evidence that she remained in a state such that she had not engaged in reflective thought between the event and the statement. Because she could not do so, she did not demonstrate the spontaneity necessary for an excited utterance.

132 Wn. App. 126, 140-41, 130 P.3d 865 (2006).

In this case, there was absolutely no testimony from either officer that the unidentified man was upset, emotional, agitated, or otherwise under the stress of excitement caused by witnessing the incident. There is simply no evidence or testimony from which the trial court could conclude that the unidentified man's statements were excited utterances. The trial court therefore abused its discretion when it admitted the statements under this exception to the hearsay rule. The error is also not harmless, as it is the only evidence that directly ties the white car to the gunshots. As a result, Wright's conviction should be reversed.

**B. The State failed to present sufficient evidence to establish the essential elements of the charged crimes.**

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to

support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

The State charged Wright with two crimes. First, it alleged that Wright committed a drive-by shooting in violation of RCW 9A.36.045, which states:

(1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

(2) A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.

The State next charged Wright with first degree unlawful possession of a firearm, in violation of RCW 9.41.040(1)(a), which states:

A person . . . is guilty of the crime of unlawful

possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense[.]

The State failed to prove the essential element of identity, and failed to prove that the discharge of the firearm caused a “substantial risk of death or serious physical injury to another person[.]”

1. Insufficient Proof of Identity

The State bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the charged offense. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). The State’s evidence here established only that the shots might have been fired from a white car, and that Wright was in the area and in a white car at the time of the incident. There is no evidence linking Wright’s car to the cartridges found on the street, Wright was never seen in possession of a gun, and no gun was ever found in his car or home. And the neighbors all testified that they often heard gunshots in the neighborhood, and one had even found spent cartridges on the street in the past. (RP 237, 239, 243, 267)

Wright’s mere presence at the same time and place of the

crime does not prove that he committed the crime. The State's evidence does not establish that he was the person who fired the gun, or that he was in possession of a gun at the time the shots were fired. The State therefore failed to prove the essential element of identity, and Wright's convictions should be reversed.

2. Insufficient Proof of a Substantial Risk

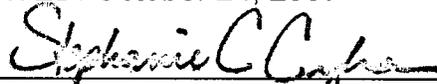
RCW 9A.36.045(1) requires proof that the firearm was discharged "in a manner which creates a substantial risk of death or serious physical injury to another person[.]" In this case, the incident occurred in a residential area, but in the middle of the night when the streets were nearly empty. (RP 136, 150-51, 262) There was no damage to cars or property, indicating that the gun was not pointed towards any homes, yards, cars, or other areas where people might be at risk. (RP 246-47, 263) Thus, the evidence does not show that the gun was fired in a manner that created a **substantial risk** of death or injury to another person. The State therefore failed to prove this element of the crime of drive-by shooting, and Wright's conviction must be reversed.

**IV. CONCLUSION**

The trial court erred when it admitted the hearsay statements of the unidentified man without any evidence that the man was

under the stress of excitement from the event. Furthermore, the State failed to present sufficient evidence to establish that Wright was the person who possessed and fired a gun in the early morning of September 23rd, and also failed to prove that the discharge of the gun created a substantial risk of death or injury to other persons. For all these reasons, Wright's convictions should be reversed.

DATED: October 24, 2007



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**CERTIFICATE OF MAILING**

I certify that on 10/24/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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