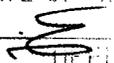


FILED
COURT OF APPEALS
DIVISION II

09 FEB -2 AM 9:28

STATE OF WASHINGTON
BY  DEPUTY

No. 38207-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JAMES BENEDICT STOCKHOLD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 08-1-01181-1
The Honorable Sergio Armijo, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR 1

II. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR 1

III. STATEMENT OF THE CASE 1

 A. Procedural History..... 1

 B. Substantive Facts..... 2

IV. ARGUMENT & AUTHORITIES 5

V. CONCLUSION 11

TABLE OF AUTHORITIES

CASES

<u>State v. Briscoeray</u> , 95 Wn. App. 167, 974 P.2d 912 (1999).....	7
<u>State v. Brown</u> , 127 Wn.2d 749, 903 P.2d 459 (1995).....	6, 9
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992).....	6
<u>State v. Dixon</u> , 37 Wn. App. 867, 684 P.2d 725 (1984)	7, 8, 9
<u>State v. Lawrence</u> , 108 Wn. App. 226, 31 P.3d 1198 (2001)	7
<u>State v. Sharp</u> , 80 Wn. App. 457, 909 P.2d 1333 (1996)	8-9
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004)	7
<u>State v. Woods</u> , 143 Wn.2d 561, 23 P.3d 1046 (2001)	6

OTHER AUTHORITIES

ER 801(c).....	5
ER 803(a)(2)	5
56 F.R.D. 183, <i>Advisory Committee's Note</i> (1975).....	6

I. ASSIGNMENT OF ERROR

The trial court erred when it admitted statements, made at the hospital by the alleged victim to the investigating officer, under the excited utterance exception to the hearsay rule.

II. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Where the evidence showed that, after the incident, the alleged victim drove to her workplace then to the hospital, that the alleged victim had conversations with several people about the incident before making statements to the investigating officer, and where the only evidence of the alleged victim's demeanor was that she was upset and crying at the time she made her statements to the investigating officer, did the trial court err when it admitted the alleged victim's statements under the excited utterance exception to the hearsay rule?

III. STATEMENT OF THE CASE

A. Procedural History

The State charged James Benedict Stockhold by Amended Information with one count of violation of a domestic violence court order by assault (RCW 26.50.110(4)), one count of intimidating a witness (RCW 9A.72.110(1)(a)), one count of fourth degree assault (RCW 9A.36.041), and three counts of violation of a no-contact order (RCW 26.50.110(1)). (CP 18-21)

The trial court held a CrR 3.5 hearing before trial, and found that statements made to the investigating officer were non-custodial, voluntary, relevant and admissible. (RP1 37, 43) The trial court also found that statements made by the victim to the

investigating officer were admissible as excited utterances. (RP2 108-09)

The jury found Stockhold guilty of violating a domestic violence court order, intimidating a witness, and fourth degree assault, but not guilty of the three violating a no-contact order charges.¹ (RP3 227-28; CP 46-53, 59) The trial court sentenced Stockhold within his standard range to a total of 36 months of confinement. (SRP 11; CP 60, 63) This appeal follows. (CP 72)

B. Substantive Facts

James Stockhold and Kimberly Temons dated for about four years, but the relationship ended gradually several years ago. (RP2 51-52) By February of 2008, the relationship had deteriorated to the point that Temons had obtained a protection order prohibiting Stockhold from contacting her. (RP2 56) There were also criminal charges pending against Stockhold in Steilacoom Municipal Court, and Temons was a prospective State's witness in that case. (RP2 60, 110-11; CP 9-11)

According to Temons, Stockhold came to her house on February 26, 2008, to get some of his belongings. (RP2 53)

¹ The Judgment and Sentence incorrectly lists Stockhold's conviction for count two as Harassment (RCW 9A.46.020). (CP 59)

Temons testified that she and Stockhold argued, and the altercation became physical. (RP2 57) Temons could not remember who began the physical contact, but she testified that Stockhold hit her several times with his fists. (RP2 57-58, 69) She went to the kitchen and obtained a knife, but Stockhold eventually took it away from her. (RP2 59) Temons testified that Stockhold threatened to hurt her if she testified against him in the Municipal Court case, but later testified that she could not remember if he threatened her. (RP2 61-62, 71)

Temons testified that she could not call 911 because the telephone was damaged during the fight. (RP2 59, 111) But she did manage to go outside with the kitchen knife and carve the letters "DV" into Stockhold's van. (RP 84-85)

Temons did not seek help from her neighbors or the police during or after the incident. (RP2 85, 111) Instead, she drove to her workplace to show her co-workers the injuries. (RP2 60, 86) The co-workers advised Temons to go to the emergency room, so she drove herself to Saint Clair Hospital. (RP2 62, 86, 144) Temons told the triage nurse that she was assaulted, and the nurse noted injuries consistent with Temons' explanation. (RP2 147, 149-50, 152)

Steilacoom Police Detective Mark Rettig contacted Temons at the hospital. (RP2 92-93) He observed cuts, blood and bruises on Temons' arms and head. (RP2 94, 99, 100) The injuries were consistent with a physical assault. (RP2 101, 111)

Over defense objection, Rettig testified that Temons told him Stockhold assaulted her. (RP2 101, 102-09) Temons described the assault, and told Rettig that it lasted 15 to 20 minutes. (RP2 109) Temons told Rettig that Stockhold accused her of seeing other men, and that he threatened to hurt her if she testified against him. (RP2 110-11)

Rettig went to Temons home the following day, and Temons played several phone messages she claimed were left by Stockhold. (RP2 117, 122, 124-25) The first two were friendly, the third was simply a hang-up, and the third was a rambling message saying: "Die, die, die, kill, kill, kill. . . . What kind of way is it to start a day off like that?" (RP2 124)

Using a cellular phone number provided by Temons, Rettig attempted to contact Stockhold. (RP2 127-28) He was unsuccessful at first, but he did make contact with Stockhold's mother. (RP2 136-37) She told Rettig that she would try to contact Stockhold herself. (RP2 137)

Rettig eventually made telephone contact with Stockhold. (RP2 127-28) Stockhold told Rettig that he knew the officer was looking for him in order to talk about the incident on February 26. (RP2 130-31) Stockhold wanted to take care of personal business before he went to prison, so he agreed to turn himself in the following day. (RP2 131-32) He did so, and was taken into custody by Rettig. (RP2 132)

At trial, the defense questioned Temons about letters that appeared to have been written by Temons and mailed to Stockhold. (RP 66-67, 75-82) At first, Temons denied any knowledge of or connection to the letters. (RP 66-67, 72) Later, she admitted that she wrote and sent them to Stockhold as part of a "healing" process. (RP 72, 89, 90)

IV. ARGUMENT & AUTHORITIES

Although ER 801(c) generally excludes out-of-court statements offered to prove the truth of the matter asserted, ER 803(a)(2) excepts "[a] statement relating to a startling event or condition made while . . . under the stress of excitement caused by the event or condition." According to the advisory committee that promulgated Federal Rule of Evidence 803(2), from which Washington's ER 803(a)(2) was copied, the underlying theory "is

simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."²

Accordingly, "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. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995) (alteration in original) (internal quotations omitted) (quoting State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992)).

The proponent of excited utterance evidence must satisfy three "closely connected requirements": (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

In this case, the trial court determined that Temons was still

² 56 F.R.D. 183, *Advisory Committee's Note* at 304 (1975); accord, State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995).

under the stress and excitement of the event when she spoke to Rettig at the hospital. (RP2 108-09) The trial court was incorrect, and the State did not meet its burden of establishing the second element.³

"The second element 'constitutes the essence of the rule' and '[t]he key to the second element is spontaneity.'" State v. Lawrence, 108 Wn. App. 226, 234, 31 P.3d 1198 (2001) (quoting Chapin, 118 Wn.2d at 687-88). Spontaneity depends on factors that indicate whether the declarant had an opportunity to reflect on the event and fabricate a story about it. State v. Briscoeray, 95 Wn. App. 167, 173-74, 974 P.2d 912 (1999). Such factors may include the amount of time that passed between the startling event and the statement, as well as the declarant's emotional state when making the statement. Briscoeray, 95 Wn. App. at 173-74.

For example, in State v. Dixon, police officers arrived at the scene of an assault shortly after the incident, remained for approximately two hours, and took a detailed statement from the victim. 37 Wn. App. 867, 869, 684 P.2d 725 (1984). Officers described the victim's demeanor as "somewhat hysterical, in tears

³ A trial court's determination that a hearsay exception applies is judged on an abuse of discretion standard. State v. Thomas, 150 Wn.2d 821, 854, 83 P.3d 970 (2004).

and having a hard time breathing[.]” 37 Wn. App. at 869. On appeal, the court determined that the victim’s statements to police were improperly admitted as excited utterances, noting: “Other than being described as “upset”, there is nothing to indicate that her ability to reason, reflect, and recall pertinent details was in any way impeded. 37 Wn. App. at 874. The court went on to note:

If [the victim’s] statement to the police were to be admissible as an excited utterance simply because she was “upset”, virtually any statement given by a crime victim within a few hours of the crime would be admissible because many crime victims remain upset or frightened for many hours, and even days and months, following the experience.

37 Wn. App. at 873-74.

The passage of time between the startling event and the alleged excited utterance is also a factor to be considered. Dixon, 37 Wn. App. at 873. “[T]he more time that passes will usually increase the likelihood that the controlling stress of the event has lessened and the ability of the declarant to think and fabricate has been recovered.” Dixon, 37 Wn. App. at 873.

For example, in State v. Sharp, the court addressed “whether statements made by a victim 30 to 40 minutes after an incident, under questioning by a police officer, following conversations by the declarant with his grandparents, fall within the

definition of an excited utterance,” and held they did not. 80 Wn. App. 457, 458-59, 461-62, 909 P.2d 1333 (1996).

In this case, the trial court abused its discretion when it found that Temons’ statements to Rettig at the hospital were excited utterances. Regarding Temons’ demeanor, Rettig testified that Temons was crying and seemed fearful and upset. (RP2 101) That is the extent of evidence regarding her demeanor. As Dixon makes clear, simply because Temons appeared upset at the time the statements were made does not mean they come within the excited utterance exception. 37 Wn. App. at 873-74. There must be some evidence to show that Temons was still under the stress of the event, and that this stress decreased her ability to reflect upon the events. Brown, 127 Wn.2d at 758. There was no evidence presented to the court to support such a finding in this case.⁴

Moreover, the facts show that Temons had both the time and the opportunity to reflect on the events. During the incident,

⁴ Temons became extremely upset during cross-examination, and asked to stop the proceedings. (RP2 72-73) This occurred before the trial court ruled on the admissibility of her statements. (RP2 108-09) But this supports a finding that Temons’ demeanor at the hospital was not necessarily a result of stress from the event, and that her being upset does not alone prove that her statements are spontaneous and excited utterances. However, the trial court noted the behavior but dismissed its relevance. (RP2 108-09)

Temons obtained a kitchen knife, went outside and, instead of trying to escape or seek help from a neighbor, stopped and carved the letters "DV" into the side of Stockhold's van. (RP2 59, 84-85) Once the incident was over, rather than seeking help from police or neighbors, she drove to her place of work so that she could show her co-workers her injuries and seek advice on how to proceed. (RP2 60, 85, 86) After discussing the situation with her co-workers, she then drove to the hospital, where she told her story to a triage nurse. (RP2 60, 86, 147, 149) Only after two solitary drives, an extended passage of time, and several conversations with other people, did she finally give her version of events to the police officer. (RP2 93, 101)

Temons also had a motive to fabricate or modify her version of events. She was the first to obtain a deadly weapon, and used that weapon to vandalize Stockhold's car. (RP2 59, 84-85) She therefore had strong motivation to alter the narrative of events to her benefit, and to place as much blame on Stockhold as possible.

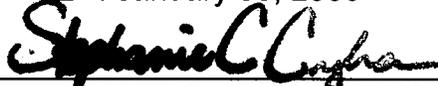
The evidence before the court does not support a finding that Temons' statements to Rettig were excited utterances, and they should not have been admitted at trial. The error was not harmless, because the State's entire case rested on whether the

jury believed Temons' version of events. The unreliable statements that she made to Rettig tended to bolster her credibility, and could have swayed the jurors in their decision to believe her version of events. Accordingly, the error requires that Stockhold's convictions be reversed.

V. CONCLUSION

The trial court committed a prejudicial error when it admitted Temons' statements under the excited utterance exception to the hearsay rule. Stockhold's convictions should be reversed, and his case remanded for a new trial.

DATED: January 30, 2009



STEPHANIE C. CUNNINGHAM
WSBA No. 26436
Attorney for James B. Stockhold

CERTIFICATE OF MAILING

I certify that on 01/30/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) James B. Stockhold DOC# 808329, Airway Heights Corrections Center, P.O. Box 1839, Airway Heights, WA 99001-1839.



STEPHANIE C. CUNNINGHAM
WSBA No. 26436

COURT OF APPEALS
DIVISION II
09 FEB -2 AM 9:28
STATE OF WASHINGTON
BY  DEPUTY