

NO. 38207-5-II

FILED
COURT OF APPEALS
DIVISION II

09 APR 10 PM 4:32

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JAMES BENEDICT STOCKHOLD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Sergio Armijo

No. 08-1-01181-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted statements made by the victim of an assault to a police officer as excited utterances?

B. STATEMENT OF THE CASE.

1. Procedure

On March 6, 2008, the Pierce County Prosecutor's Office charged JAMES BENEDICT STOCKHOLD, hereinafter "defendant," with one count of domestic violence court order violation, one count of intimidating a witness, one count of fourth degree assault, and three counts of violation of a no contact order. CP 1-4. The case proceeded to trial on July 8, 2008, in front of the Honorable Sergio Armijo. RP¹ 3.

A 3.5 hearing was held on July 8, 2008, where the court found statements made by the defendant to an investigating officer were admissible. RP 43. During trial, under the excited utterance hearsay exception, the court admitted statements made by Kimberly Temons, the victim in the case, to Detective Rettig, the investigating officer. RP 107-09. An amended information containing the same counts, but changing

¹ The verbatim record of proceedings shall be referred to as follows:
The continuance motion on 06/18/2008 shall be referred to as 06/18/2008 RP.
The three sequentially number volumes shall be referred to as RP.
The sentencing record of proceedings shall be referred to as SRP.

the language charging defendant with intimidating a witness from “former witness” to “current or prospective witness”, was filed on July 10, 2008. CP 18-21; RP 6.

On July 10, 2008, the jury found defendant guilty of one count of violation of a no contact order, one count of intimidating a witness, and one count of fourth degree assault. CP 46, 48-49; RP 227-228. The jury found defendant not guilty on all other counts. CP 50-52; RP 227-28. On August 15, 2008, defendant was sentenced to a total of 36 months in confinement to be followed by 9 to 18 months of community custody. CP 70-71; RP 11-12. Defendant filed a timely notice of appeal. CP 72.

2. Facts

Kimberly Ann Temons and defendant dated for four years and the relationship ended a year or two prior to the incident. RP 53-4. In October of 2005, Ms. Temons obtained a protective order against defendant. RP 55-56. Ms. Temons testified during trial that on February 26, 2008, defendant went to Ms. Temons’ house to pick up some belongings and the two argued. RP 53, 56-57. At the time, Ms. Temons was a witness against the defendant in a pending case. RP 60. Defendant threatened Ms. Temons not to testify in the case against him. RP 61-62. The fight turned physical and defendant struck Ms. Temons with his fists multiple times causing her to fall backward and knock over plants, a telephone and the television. RP 57-58. Eventually, Ms. Temons was

able to grab a knife from the kitchen drawer. RP 59. She went outside and scratched “DV”, for domestic violence, into defendant’s van. RP 85.

Because her phone was not working and she was unable to call for help, Ms. Temons drove to her workplace. RP 60. After explaining to her co-workers what had happened, Ms. Temons drove to St. Clare’s hospital on the advice of her co-workers. RP 60. She arrived at the hospital with cut up arms and a cut lip. RP 63. Valinda Walter was the triage nurse on call at the time and testified that she wrote in her report:

assaulted by ex-boyfriend at her home this a.m. about 30 minutes ago. Struck in head with fist, no loose teeth, laceration to buccomucosal left side. Bruise to right clavicle. Complained of headache. Unknown loss of consciousness. Skin tear, right anterior lower leg. Abrasions and skin tears to both hands, dorsum, right forearm. Denies abdominal trauma. Hit in back.

RP 149.

The medical personnel called the police. RP 63. Detective Mark Rettig arrived and took pictures of Ms. Temons’ injuries. RP 63. Ms. Temons’ arms, from the elbow to the fingertips, were bloody from scratches and the right side of her face was swollen. RP 99-100. Detective Rettig testified that she was very fearful, crying, sobbing, visibly scared and upset. RP 101. She told Detective Rettig that she and defendant had argued and he threatened her not to testify against him, saying he could kill her right then and there if he wanted to. RP 101, 110-

11, 141. She also stated that he assaulted her for 15 to 20 minutes and she could not call the police because her phone was broken. RP 101, 110-11.

The next day, Detective Rettig went to Ms. Temons' home to investigate. RP 64. He found defendant's identification there. RP 132. He also photographed the broken items and listened to, as well as recorded, the four messages on the answering machine from defendant. RP 64. The first two messages were hellos and a happy Valentine's day. RP 124. The third message was a hang up and the fourth was defendant saying "die, die, die, kill, kill, kill. What kind of way is it to start a day off like that?" RP 124.

Over the course of the investigation, Detective Rettig was able to contact the defendant by telephone twice. RP 127-29. The second time, Detective Rettig informed defendant he was investigating the incident that occurred February 26, 2008. RP 130-31. Defendant told Detective Rettig that he wanted to turn himself in and would do so the next day, but needed to take care of some personal business first. RP 131-32. The next day on March 5, 2008, defendant surrendered himself to Detective Rettig and was arrested. RP 132.

During trial, the parties stipulated that on February 26, 2008, defendant was also a defendant in a criminal prosecution in Steilacoom, Washington, and Ms. Temons was a witness for the prosecution in that case. RP 153. Defendant chose not to testify at trial.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED STATEMENTS MADE BY THE VICTIM OF AN ASSAULT TO AN INVESTIGATIVE OFFICER AS EXCITED UTTERANCES.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004); *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *Thomas*, 150 Wn.2d at 856; *Guloy*, 104 Wn.2d at 421. A trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. *Thomas*, 150 Wn.2d at 854.

Under ER 803(a)(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition" is admissible as a hearsay exception. A statement must satisfy three qualifications before it qualifies as an excited utterance. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). "Excited utterances," for purposes of the excited utterance hearsay

exception, are spontaneous statements made while under the influence of external physical shock before declarant has time to calm down enough to make a calculated statement based on self interest. *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

Three requirements must be met for hearsay to qualify as excited utterance: (i) a startling event or condition must have occurred; (ii) the statement must have been made while declarant was still under the stress of startling event; and, (iii) the statement must relate to the startling even or condition. *Hardy*, 133 Wn.2d at 714.

A recent decision of the United States Supreme Court has added a new overlay to a determination of whether excited utterances should be admissible at trial. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1359, 158 L.Ed.2d 177 (2004). The confrontation clause of the Sixth Amendment gives an accused the fundamental right to confront the witnesses against him. *Id.* The confrontation clause bars the admission of “testimonial statements” made by witnesses outside of court, unless the witnesses are unavailable and the defendant had a previous opportunity to cross-examine. *Crawford*, 124 S. Ct. at 1369. The Crawford court expressly declined to provide a comprehensive definition of “testimonial statements.” *Crawford*, 124 S. Ct. at 1374. However, the Court stated that “[w]hatever else the term covers it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Crawford*, 124 S. Ct. at 1374. Thus, an

excited utterance that was also “testimonial” would not be admissible unless the declarant testified at trial or the declarant was unavailable and defendant had had a prior opportunity to cross-examine. In the case at hand, without determining if the statement was testimonial, the declarant testified at trial giving the defendant an opportunity to cross examine her. RP 51. Therefore, no issue exists with respect to *Crawford*.

In the present case, defendant contends the trial court erred in admitting Ms. Temons’ statements to Detective Ritteg over defendant’s objection because the State failed to establish the second element of *Hardy* that requires “the statement must have been made while declarant was still under the stress of startling event.” *Hardy*, 133 Wn.2d at 714. This argument fails as the evidence establishes that Ms. Temons was still under stress from the assault and numerous cases support the understanding that spontaneity is not always limited or diminished by the passage of time.

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, 416-417, 832 P.2d 78 (1992)(quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

An excited utterance may also be given in response to a general question, such as asking what happened. *State v. Owens*, 128 Wn.2d 908,

913, 913 P.2d 366 (1996). For instance, in *State v. Strauss*, 119 Wn.2d 401, 405-406, 832 P.2d 78 (1992), the defendant picked up a 17 year-old girl and took her back to his apartment where he repeatedly raped her at knifepoint. When the officer took the victim's statement, she was very distraught, very red in the face, crying, and appeared to be in a state of shock three and half-hours after the incident. *Id.* at 416. The court found that the victim was still under the influence of the incident when she made her statement to the police. *Id.*

Similar to *Strauss*, in the present case, the evidence shows that Ms. Temons was still under stress from the assault when Detective Rettig spoke with her at the hospital. When he asked Ms. Temons what had happened, he testified that she was "very fearful, crying, sobbing, tears out of both eyes, mucus coming out of the nose. Just very visibly scared, upset." RP 101. He also stated that she had a difficult time communicating with him. RP 102.

This demeanor is unlike that in the case of *State v. Dixon*, 37 Wn. App. 867, 684 P.2d 725 (1984), which defendant argues is comparable. In *Dixon*, the trial court erred in admitting a four page written statement by a girl who spoke to police after she had been sexually molested. *Dixon*, 37 Wn. App. at 869. The officers described the girl as being upset and having a hard time breathing when they arrived. *Dixon*, 37 Wn. App. at 869. But, over the course of two hours with the police, they calmed her down and she wrote the four page written statement describing what had

happened. *Dixon*, 37 Wn. App. at 869. In the present case, there was no four page written statement and no two hour period with Detective Ritteg where he calmed Ms. Temons down. Rather, Ms. Temons had difficulty communicating with Detective Rettig, and was very visibly upset when she talked with him. RP 101-02. As such, the present case is not comparable to *State v. Dixon*.

The fact that there was some passage of time between the assault and the statements to Detective Rettig does not abolish the fact that Ms. Temons was still under the stress from the assault when she spoke to him. The passage of time alone is not dispositive in an excited utterance analysis. *State v. Thomas*, 46 Wn. App. 280, 284, 730 P.2d 117 (1986)(trial court did not err in determining that statements made after a 6- to 7-hour time span qualified as excited utterances), aff'd, 110 Wn.2d 859, 757 P.2d 512 (1988); *State v. Flett*, 40 Wn. App. 277, 699 P.2d 774 (1985)(a statement made 7 hours after a rape was properly admitted as an excited utterance because of the declarant's "continuing stress" during that time period). Rather, the passage of time between the startling event and the declarant's statement is a factor to be considered in determining whether the statement is an excited utterance. *State v. Woodward*, 32 Wn. App. 204, 206-07, 646 P.2d 135, *review denied*, 97 Wn.2d 1034 (1982).

In the present case, Ms. Temons was assaulted, wrote on defendant's car, drove to her workplace to show her co-workers what happened, and then proceeded to the hospital where she spoke to Detective

Rettig. RP 60. Defendant arrived at Ms. Temons' home the morning of February 26, 2008 and that same day Ms. Temons checked into the hospital around 9:52 am according to the nurse's report. RP 53, 56, 147. This is similar to *State v. Fleming*, 27 Wn. App. 952, 621 P.2d 779 (1980), where a rape victim told her friend about the attack three hours after it occurred, and then told police about the attack three hours after that. *Fleming*, 27 Wn. App. at 954-55. The court held that because during both statements the victim was described as being in a state of emotional turmoil and clearly stressed from the rape, the statements were properly admitted under the excited utterance exception.

Likewise, in the present case, the trial court properly concluded that Ms. Temons' statements to Detective Rettig were admissible under the excited utterance exception when stated "it's a continuous stressful event to her, notwithstanding the fact that she wrote what she wrote on the car and what she said to the co-workers." RP 108. Based on the evidence of Ms. Temons' demeanor, and the previous case law regarding this issue, the trial court properly admitted Ms. Temons' statements to Detective Rettig under the excited utterance hearsay exception as she was clearly under the stress of the assault when she spoke to him.

If the court does find the trial court erred in admitting Ms. Temons' statements to Detective Ritteg, the court should still affirm defendant's convictions as the error was harmless. An error of non constitutional magnitude is harmless if, within reasonable probabilities, it

did not affect the outcome of the trial. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). An error in the admission of evidence is not prejudicial when the same facts are established by other evidence. *Feldmiller v. Olsen*, 75 Wn.2d 322, 325, 420 P.2d 816 (1969).

The outcome of the present case would have been the same without the admission of Ms. Temons' statements to Detective Rettig, as Ms. Temons herself and the triage nurse, using statements made for the purpose of medical diagnosis, both testified that defendant was the one who assaulted Ms. Temons that day. RP 57-61. Detective Rettig testified that Ms. Temons told him that defendant had assaulted her after the two had been arguing. RP 110-11. Ms. Temons herself reiterated this when she told the court that it was defendant who had assaulted her. RP 57-61. Furthermore, the triage nurse also wrote in her report and stated to the court that Ms. Temons reported being assaulted by her ex-boyfriend. RP 149. Since properly admitted evidence existed to cover the same information addressed in Detective Rettig's testimony regarding the excited utterances, any error was harmless as the evidence was cumulative. The court should affirm defendant's convictions.

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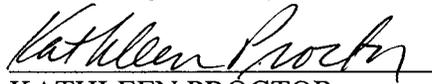
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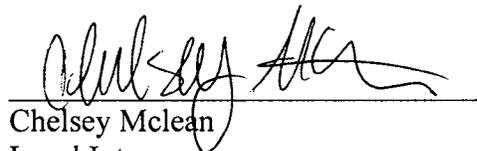
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: April 10, 2009.

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Chelsey Mclean
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.10.09 
Date Signature