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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38541-4-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MATTHEW AARON SCHMIDT,

Appellant.

BRIEF OF RESPONDENT

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for Respondent

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9-10-09

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Rules

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I. ISSUES

1. Can a court admit an out-of-court statement of a witness when it is an excited utterance, is nontestimonial, and does not violate the defendant's right to confrontation?
2. Do questions and arguments that are not intended and do not invite the jury to draw a negative inference from a defendant's exercise of his constitutional rights infringe upon the defendant's constitutional rights?
3. Can a court admit a defendant's voluntary, spontaneous, and unsolicited out-of-court statements?

II. SHORT ANSWERS

1. Yes. A court can admit an out-of-court statement of a witness when it is an excited utterance, is nontestimonial, and does not violate the defendant's right to confrontation.
2. No. Questions and arguments that are not intended and do not invite the jury to draw a negative inference from a defendant's exercise of his constitutional rights do not infringe upon the defendant's constitutional rights.
3. Yes. A court can admit a defendant's voluntary, spontaneous, and unsolicited out-of-court statements.

III. FACTS

The appellant, his wife, Tracie Schmidt, and their twelve-year old daughter, Natasha Schmidt, live at 175 Lenora Avenue, Kelso, Washington. RP 33 and 201-202. On December 31, 2007, they invited the appellant's sister, Tatiana Brown, and Edward Paulsen to their residence to celebrate New Year's Day. Everyone except Natasha Schmidt drank a lot of alcohol that evening. RP 203-207.

On January 1, 2008, at approximately 12:45 a.m., Mrs. Schmidt called 911 to report being assaulted by the appellant. RP 31-33 and 37-38. Prior to admitting portions of the 911 call, the trial judge, the Honorable James Warne, listened to the 911 call in its entirety and admitted the following portions of the 911 call as an excited utterance. RP 15-31. The admitted portions of the 911 call went as follows:

Dispatch: 911. (Voices in the background.)
Caller: I hope you're happy.
Dispatch: 911. What's your emergency? (Voices in the background.) 911. 911.
Caller: Yes. I need somebody up here at 175 –
Dispatch: What's going on?
Caller: My husband and my husband's best friend just beat the shit out of me. (Voices in the background.)
Voice: You beat the fuck out of me, bitch.
Dispatch: Okay, Take a deep breath, Honey. Your husband hit who?
Caller: My husband beat the crap out of me in front of my twelve-year-old daughter and his sister at 175 Lenora Lane. Hello?
Dispatch: I'm typing what you're telling me.
Caller: My husband -- my so husband just came in here and beat the living crap out of --
Dispatch: Do you need an ambulance?
Caller: I have bruises all over my head.
Dispatch: Do you need an ambulance?
Caller: Yes, I do. My daughter is locked in the laundry room right now because my husband just drug me across the house and beat the shit out of me.
Dispatch: Ma'am, have you been drinking?
Caller: We all had been drinking, except for my twelve-year-old daughter who was asleep, and my husband just came in and beat the shit out of me. I have lumps on my head.

Dispatch: Okay, ma'am. You've told me that. What's your husband's name?

Caller: His name is Matthew Aaron Schmidt. RP 31-33.

Several deputies of the Cowlitz County Sherriff's Office were dispatched to the scene. RP 33, 37-39, 82-85, and 189-191. Deputies contacted Mrs. Schmidt, were invited into the residence, and searched the residence for the appellant. The appellant had fled the scene and his whereabouts was unknown. RP 39-40 and 86. The interior of the residence was in disarray and the floor was littered with Mrs. Schmidt's underwear and broken and knocked over furniture. RP 91 and 97-98. Mrs. Schmidt was crying, appeared disheveled, and had fresh bruising, swelling, and cuts to her face and hand. RP 91, 99-104, 148, and 159. Mrs. Schmidt spoke and gave a written statement to Deputy McDaniel about the events in question. RP 143-145 and 149.

During the search for the appellant, Deputy Shelton, followed by Deputy Plank, entered a bedroom upstairs, identified himself as a law enforcement officer, and announced, "Sheriff's Office. Come out." RP 42, 44-45, and 68. Deputy Shelton was wearing his uniform and performing his professional duties at the time. RP 79-80 and 165. Once inside the bedroom, Deputy Plank saw the appellant's foot on the floor next to the bed and called out, "There's a foot." RP 44-45, 106, and 162-166. The appellant immediately jumped to his feet, raised his arms, and

aggressively came towards Deputy Shelton. RP 44-47, 70, 106, and 162-166.

Deputy Shelton told the appellant to stop, but he continued to aggressively come towards Deputy Shelton. Deputy Shelton kicked and pushed him back. After being initially pushed back, the appellant again aggressively came after Deputy Shelton swinging his fists and trying to hit Deputy Shelton. RP 47-52, 70-72, 106-108, and 167-171. Deputy Shelton was unable to evade him the second time and the appellant grappled and got Deputy Shelton in a headlock. During the struggle, Deputy Shelton told the appellant to stop, but he continued to fight and pose a danger to Deputy Shelton. RP 52-54, 56-57, 71-75, 107-108, and 171-174. Deputy Plank intervened and ended the struggle by tasing the appellant. RP 54-55, 108, 172, and 176.

Deputy O'Neill arrested and secured the appellant. RP 134. The appellant appeared to be under the influence of some drugs and/or alcohol. RP 56-57, 74-75, 132-134, and 174. He had an odor of intoxicants, swayed, staggered, slurred his speech, and experienced mood swings that caused him to cry, be angry, and be apologetic. The appellant spontaneously made several repetitive statements apologizing for causing the deputies to be at his residence, hitting Deputy Shelton, and hitting his wife. RP 112-113 and 132-134. When asked if he understood his rights,

he told Deputy O'Neill that he chose to squeeze his rights. RP 110-111. Deputy O'Neill removed him from the residence and transported him to the hospital for treatment. RP 55 and 137. Despite the cold temperature outside, the appellant refused to put on a shirt and shoes. RP 113-114.

Prior to Deputy O'Neill testifying to the appellant's statements, the court conducted a 3.5 hearing in the middle of trial to consider the admissibility of the appellant's voluntary, spontaneous, and unsolicited statements to Deputy O'Neill. RP 115-118. During the 3.5 hearing, Deputy O'Neill indicated that while he was securing the appellant and reading him his rights, the appellant made numerous spontaneous repetitive apologetic statements. Prior to, during, and after Deputy O'Neill had read him his rights, the appellant cried, screamed, and apologized all at the same time on his own and not in response to any questions being asked of him. RP 118-119 and 123-124. The only question Deputy O'Neill asked the appellant was whether he understood his rights and he replied, "I choose to squeeze them." RP 119-120 and 128. Deputy O'Neill did not ask him any questions after that. RP 119-120. The appellant did not testify and did not present any evidence to the contrary. RP 118-132.

Judge Warne orally held that the appellant's statement, "I choose to squeeze them," was not a request to speak to a lawyer, was relevant and

compelling evidence of his intoxication, was a nonsense response to Deputy O'Neill's inquiry about his understanding of his rights, and was not a comment on his right to remain silent. RP 130-131. Judge Warne also held that his spontaneous repetitive apologetic statements were admissible because they were spontaneous remarks and not in response to interrogation. RP 132.

Shortly after the appellant attacked Deputy Shelton, Deputy Bauman saw Natasha Schmidt curled up in the corner by a door in the kitchen/dining room area. She sat in a fetal position with her back against the wall, arms folded across her chest, and knees up. RP 191-193. She appeared scared and terrified. RP 193. She said, "I was on the couch. Mom was trying to get Ed out of here. She called his mom. I heard dad throw the chairs and he grabbed my mom and started beating her. I threw things at my dad to try to get him off of her. I followed them through the house and then he left. I stayed in the laundry room with the door closed. I waited until everything went quiet except my mom saying, "Oh, my god. Oh, my god." Mom then called the police." RP 193-194.

Prior to Deputy Bauman testifying to the statement of Natasha Schmidt, the court conducted a hearing to consider the admissibility of her statement. During that hearing, he indicated that he arrived at the scene within 15 minutes of the 911 call. RP 5 and 10-11. Within three to four

minutes of being on scene, he came into contact with the appellant and Natasha Schmidt inside the residence. RP 6 and 9. Deputy Bauman saw her within mere seconds of seeing the appellant in handcuffs, being upset and agitated, sweating profusely, and yelling things like, “Take me to jail, take me to jail.” RP 6. She was curled up in the fetal position with her arms crossed and knees up on the floor in the corner of the dining room. RP 6-8. She appeared terrified and very scared with wide eyes and wavering voice. RP 7. Deputy Bauman asked, “What had happened?,” and she made the statement indicated above. RP 8. Deputy Bauman did not ask her any other questions and let her go to her mother because she was so obviously upset. RP 9. Judge Warne admitted her statement as an excited utterance because it was made while under the influence of an exciting event and was not a product of an interrogation. RP 14.

The appellant called Mrs. Schmidt and Ms. Brown to testify on the appellant’s behalf. Mrs. Schmidt denied being assaulted and injured by the appellant. RP 208-210. She testified that it was she who was the assaultive person and not the appellant. She testified to catching Mr. Paulsen and Ms. Brown in her daughter’s bed and assaulting Mr. Paulsen. She indicated that the appellant stepped in to protect Mr. Paulsen by pulling her off of Mr. Paulsen and dragging her into the living room. In the process, a lamp fell over, struck her, and caused her injuries. RP 207-

211. At no time did the appellant assault or cause her any injuries. RP 201-250. Mrs. Schmidt's testimony at trial contradicted her prior written statement to Deputy McDaniel, her prior conversation with Deputy Plank, and her prior statements to the 911- dispatcher. RP 234-250 and 264-278.

Ms. Brown testified to Mrs. Schmidt assaulting Mr. Paulsen and the appellant stepping in to protect Mr. Paulsen by pulling Mrs. Schmidt off of Mr. Paulsen. RP 252-253. Ms. Brown indicated that at no time did the appellant assault Mrs. Schmidt and that Mrs. Schmidt fabricated the story because Mrs. Schmidt was upset with the appellant. RP 250-258. Ms. Brown's testimony at trial did not correspond with her prior written statement to Deputy McDaniel. RP 259-261.

The appellant's version of the events was that Mrs. Schmidt became enraged and attacked Mr. Paulsen. The appellant intervened, pulled her off of Mr. Paulsen, and dragged her into the living room. Once in the living room, the appellant released Mrs. Schmidt and went to lie down in his bedroom. At no time did the appellant assault Mrs. Schmidt. Fifteen to twenty minutes later, the appellant was startled by three strange men in his bedroom and took the necessary actions to exit the bedroom and get away from the men. RP 317-339.

The State's version of the events was that the appellant was highly intoxicated and became enraged over Mrs. Schmidt ordering Mr. Paulsen

to leave the residence after she caught him and Ms. Brown in her daughter's bed. As a result of his intoxicated and enraged state, the appellant went into his daughter's room, dragged Mrs. Schmidt into the living room, and proceeded to beat Mrs. Schmidt. After beating Mrs. Schmidt, the appellant fled and hid in his bedroom. When deputies found the appellant in his bedroom, the appellant's rage transferred to the deputies and the appellant attacked Deputy Shelton. RP 298-317 and 339-347.

After considering all the evidence and listening to all the arguments, the jury found the appellant guilty of assaulting Deputy Shelton and Mrs. Schmidt. RP 348-349. The appellant appeals both guilty verdicts.

IV. ARGUMENTS

1. **NATASHA SCHMIDT'S OUT-OF-COURT STATEMENT WAS PROPERLY ADMITTED AT TRIAL BECAUSE IT IS AN EXCITED UTTERANCE, IS NONTESTIMONIAL, AND DOES NOT VIOLATE THE APPELLANT'S RIGHT TO CONFRONTATION.**

"ER 803(a)(2) provides that a statement is not excluded as hearsay if it is an excited utterance 'relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.' The excited utterance exception does not require a showing that the declarant is unavailable as a witness. State v. Chapin, 118

Wash.2d 681, 686, 826 P.2d 194 (1992). This court has recognized that the proponent of excited utterance evidence must satisfy three ‘closely connected requirements’ that (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. Ohlson, 162 Wash.2d 1, 8-9, (2007). A trial court’s decision to admit a hearsay statement as an excited utterance is reviewed for abuse of discretion and will not be reversed unless a reviewing court believes “that no reasonable judge would have made the same ruling.” Id.

“Whether statements made during police interrogation are testimonial or nontestimonial is discerned by objectively determining the primary purpose of the interrogation. If circumstances objectively indicate that the primary purpose is to enable police assistance to meet an ongoing emergency, the elicited statements are nontestimonial. If circumstances indicate that the primary purpose is to establish or prove past events, the elicited statements are testimonial.” Id. at 15-16. Factors to be considered are (1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation. Id. at 12-13.

In Ohlson, the defendant racially harassed and almost ran over two minors with his motor vehicle. One of the minors called 911 and an officer responded to the scene within five minutes of the 911 call. When the officer contacted the two minors, the officer noticed they were pretty upset and pretty shaken up. One of the minors made a statement at the scene about the events in question and did not testify at trial. Id. at 5-7. At trial, the defense objected to the officer testifying to the out-of-court statement of the nontestifying minor. The trial court overruled the objection, admitted the nontestifying minor's statement as an excited utterance, and held that the statement did not violate the defendant's right to confrontation. Id. at 6-7.

On appeal, the court held that the nontestifying minor's out of court statement was an excited utterance, was nontestimonial, and did not violate the defendant's right to confrontation. Id. at 19. The court noted the statement was nontestimonial because the statement was made close in time to the event in question, was a call for help against a bona fide physical threat, was necessary for the officer to resolve a present emergency, and was obtained at the scene and not in a formal interrogation setting. Id. at 17-19.

Like the nontestifying minor's statement in Ohlson, Natasha Schmidt's statement is an excited utterance, is nontestimonial, and does

not violate the appellant's right to confrontation. She witnessed her father assault her mother and was frightened by the event. Within minutes of the event, she was still under the stress of that startling event when she made her statement to Deputy Bauman regarding the startling event she witnessed.

Natasha Schmidt's statement is nontestimonial and does not violate the appellant's right to confrontation. Her statement was made close in time to the events in question, was made when there was a threat of harm posed by the situation, was necessary to resolve a present emergency, and was obtained at the scene and not in a formal interrogation environment. Minutes prior to her statement the appellant assaulted Mrs. Schmidt. When deputies arrived on scene, they saw the residence was in disarray and Mrs. Schmidt had fresh injuries. The appellant had fled the scene and his whereabouts were unknown. The situation escalated when some of the deputies found the appellant hiding in one of the bedrooms and the appellant attacked Deputy Shelton.

Her statement was made within seconds of the escalated situation when some of the deputies were searching for the appellant and the appellant attacked Deputy Shelton. Her statement was necessary for Deputy Bauman to access the present emergency and check on her well being because he was not in the residence when the appellant was located

and attacked Deputy Shelton. Deputy Bauman asked her only one general question as she sat curled up in a fetal position on the floor of the dining room. Her narrative statement was not a product of countless specific questions asked of her by Deputy Bauman. After her statement, Deputy Bauman did not ask any follow up questions and turned her over to Mrs. Schmidt because Natasha Schmidt was so obviously upset. The decision of the trial court to admit Natasha Schmidt's statement should be affirmed because her statement is an excited utterance, is nontestimonial, and does not violate the appellant's right to confrontation.

In the event that the court views Natasha Schmidt's statement as not being an excited utterance, is testimonial, or does violate the appellant's right to confrontation, the State believes the admission of her statement was harmless error as applied to Count II, the fourth degree assault charge involving Mrs. Schmidt. The admission of her statement has no bearing on Count I, the third degree assault charge involving Deputy Shelton, because the facts contained in her statement only apply to the charge involving Mrs. Schmidt. To find an error affecting a constitutional right harmless, the reviewing court must find it harmless beyond a reasonable doubt. The Washington Supreme Court has adopted the "overwhelming untainted evidence" standard in harmless error analysis; therefore, the reviewing court will look only at the untainted

evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty. State v. Reuben, 62 Wash.App. 620, 626-627 (1991).

In the present case, there is overwhelming untainted evidence to uphold the appellant's conviction for assaulting Mrs. Schmidt. The 911 call indicates that the appellant had just assaulted Mrs. Schmidt. When the deputies arrived on scene, the appellant had fled the scene, the residence was in disarray, and Mrs. Schmidt had fresh injuries, which were photographed and documented as being caused by the appellant. The untainted evidence proves beyond a reasonable doubt that the appellant had just assaulted Mrs. Schmidt and his conviction should be affirmed.

2. QUESTIONS AND ARGUMENTS THAT ARE NOT INTENDED AND DO NOT INVITE THE JURY TO DRAW A NEGATIVE INFERENCE FROM THE APPELLANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS DO NOT INFRINGE UPON THE APPELLANT'S CONSTITUTIONAL RIGHTS.

“[T]he State can take no action which will unnecessarily ‘chill’ or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right.” State v. Gregory, 158 Wash.2d 759, 806 (2006). The State may not invite the jury to draw a negative inference from the defendant's exercise of his constitutional rights, but “not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those

rights.” Id. at 806. The relevant issue is “whether the prosecutor manifestly intended the remarks to be a comment on that right.” Id. at 807. “So long as the focus of the questioning or argument ‘is not upon the exercise of the constitutional right itself,’ the inquiry or argument does not infringe upon a constitutional right.” Id. at 807.

Where a defendant has received Miranda warnings, the invocation of the right to remain silent must be clear and unequivocal, whether through silence or articulation, in order to be effectual; if the invocation is not clear and unequivocal, the authorities are under no obligation to stop and ask clarifying questions, but may continue with the interview. State v. Walker, 129 Wash.App. 258, 273-276 (2005). In State v. Radcliffe, 139 Wash.App. 214 (2007), the court upheld the trial court’s admission of the defendant’s statement because his statement, “Maybe he should contact an attorney,” is an equivocal statement about his right to remain silent and the officer was not obligated to stop their questioning of him. Id. at 220 and 224. In State v. Cross, 156 Wash.2d 580 (2006), the court affirmed the trial court’s finding that the defendant’s equivocal protests, “I don’t know man. I just told [you] that it’s...Quit asking me some of the fuckin’ things, man, will ya?,” did not effectively assert his right to remain silent. Id. at 619-621.

Washington courts have held that the Fifth Amendment prohibits the State from using the defendant's silence as substantive evidence of his guilt. "Therefore, '[a] police witness may not comment on the silence of the defendant so as to infer guilty from a refusal to answer questions.'" State v. Henderson, 100 Wash.App. 794, 798 (2000). "But 'a mere reference to silence which is not a 'comment' on the silence is no reversible error absent a showing of prejudice.'" Id. at 798. "[M]ost jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." Id. at 799. A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. Id. at 799.

In Gregory, the defendant was convicted of three counts of first-degree rape and one count of aggravated murder in two separate trials that were consolidated on appeal. Gregory, 158 Wash.2d at 777. During one trial, one of the rape charges came down to a credibility contest between the defendant and the victim. The defendant claimed that the victim fabricated the story as revenge for his failure to compensate the victim with \$20 for a broken condom. The State rebutted the defendant's claim by showing that the victim did not relish having to testify and be cross-examined at the defendant's trial. Id. at 807. The court concluded that

questions and arguments touching on the defendant's constitutional rights to trial and confront witnesses were proper because the focus of the questions and arguments was not on the defendant's exercise of his constitutional rights, but was on the credibility of the victim as compared to the credibility of the accused. Id. at 807-808.

In State v. Carneh, 153 Wash.2d 274 (2004), the defendant was charged with four counts of aggravated first-degree murder and exerted the defense of insanity. Id. at 277. The State obtained an order to have the defendant evaluated by the State's expert, but was unable to obtain an evaluation because he invoked his statutory right to refuse to answer any questions that called for an incriminating answer. Id. at 277-280. The trial court held that the State was allowed to introduce evidence at trial of the defendant's refusal to answer all questions to explain why the State's expert was unable to evaluate the defendant. The State sought discretionary review on other issues and the defendant cross-review on the trial court's ruling permitting the State to introduce evidence of the defendant's refusal to answer questions. Id. at 279-280. On review, the court affirmed the trial court's ruling allowing the State to introduce evidence of the defendant's refusal to answer questions because the "State will not refer to his silence for the purposes of leading the jury to infer sanity. Instead, the State seeks only to explain the WSH experts' failure to

form an opinion as to an issue raised by [the defendant] himself, namely his sanity at the time of the crimes.” Id. at 288.

In the present case, the appellant’s statement, “I choose to squeeze them,” is an ambiguous statement and is an equivocal statement that does not effectively invoke his right to remain silent. Admittance of his statement at trial is not an impermissible comment on his right to remain silent. As in Gregory and in Carneh, the admission of the appellant’s statement, “I choose to squeeze them,” was not intended to draw a negative inference from the appellant’s exercise of his constitutional rights and did not infringe upon his constitutional right to remain silent. The appellant’s bizarre answer to Deputy O’Neill’s simple question highlighted the appellant’s highly intoxicated state and was relevant to explain why he assaulted Mrs. Schmidt and Deputy Shelton. At no time did the State argue or imply that his statement should be taken to infer his guilt in the case.

Judge Warne did not perceive the appellant’s statement to mean he was invoking his constitutional rights, thought his statement was a nonsense response to Deputy O’Neill’s question, did not consider it as a comment on the appellant’s right to remain silent, and thought it was relevant and compelling evidence of his intoxication. The decision of the trial court to admit the appellant’s statement should be affirmed because it

was an equivocal statement about his right to remain silent and the admission of his statement did not draw a negative inference from his exercise of his constitutional rights and did not infringe upon his right to remain silent.

3. THE TRIAL JUDGE CORRECTLY ADMITTED THE APPELLANT'S VOLUNTARY, SPONTANEOUS, AND UNSOLICITED OUT-OF-COURT STATEMENTS.

The appellant's custodial statements may be admitted as substantive evidence if the State establishes that he was informed of his constitutional rights and he knowingly and voluntarily waived his rights. State v. Brown, 132 Wn.2d 529, 582 (1997) and Miranda v. Arizona, 384 U.S. 436, 475 (1966). "Any statement given freely and voluntarily without any compelling influences is, of course, admissible evidence." State v. Miner, 22 Wash.App. 480, 483 (1979). "[V]olunteered statements of any kind made to police are not barred by the Fifth Amendment." State v. Godsey, 131 Wash.App. 278, 285 (206). "The general rule is that a statement is voluntary if it is made spontaneously, is not solicited, and not the product of custodial interrogation." State v. Sadler, 147 Wash.App. 97, 131 (2008).

Miranda warnings are required when the State's inquiry is (1) custodial, (2) interrogation, and (3) by an agent of the State. Miranda, 384 U.S. at 444. CrR 3.5 was enacted to implement the constitutional

requirement that the appellant be afforded a hearing on the voluntariness of his confession prior to its admission at trial. State v. Summers, 52 Wash.App. 767, 774 (1988). “The rule provides the court must state in writing: ‘(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reason therefore.’ CrR 3.5(c). Nonetheless, ‘failure to enter findings required by CrR 3.5 is considered harmless error if the court’s oral findings are sufficient to permit appellate review.” State v. Grogan, 147 Wash.App. 511, 516 (2008). “We will uphold a trial court’s CrR 3.5 findings of fact if substantial evidence supports them.” Radcliffe, 139 Wash.App. at 219. “We review a trial court’s legal conclusions de novo.” Id.

In State v. Thompson, 73 Wash.App. 122 (1994), the defendant appealed his conviction for third-degree assault and claimed that the trial court erred in permitting the State to cross-examine him about an out-of-court statement that was contradictory to his in-court testimony and in conducting a CrR 3.5 hearing to determine the admissibility of the statement during his case in chief. Id. at 124. The court held that “a CrR 3.5 hearing held during the middle of a trial does not violate a defendant’s due process right to a fair trial.” Id. at 128. “Although a mid-trial hearing does not ‘precisely conform to the bifurcated procedure contemplated by

the rules, CrR 3.5, 4.5' it does not amount to a denial of due process absent 'a showing of prejudice.'" Id.

Like Thompson and contrary to what the appellant claims, a 3.5 hearing was conducted in the middle of the appellant's trial to consider the admissibility of his voluntary, spontaneous, and unsolicited out-of-court statements to Deputy O'Neill. RP 115-118. During the 3.5 hearing, Deputy O'Neill testified that prior to, during, and after he had secured and read the appellant his Miranda rights, the appellant cried, screamed, and made numerous voluntary, spontaneous, and unsolicited statements apologizing for causing the deputies to be at his residence, hitting Deputy Shelton, and hitting Mrs. Schmidt. The appellant's statements were repetitive and not in response to any questions being asked of him. RP 118-119 and 123-124. The appellant did not testify and did not present any evidence to the contrary. RP 118-132. Judge Warne orally held that

the appellant's spontaneous statements were admissible because they were spontaneous remarks and not in response to interrogation. RP 131-132.

While Judge Warne did not enter writing findings with regards to the 3.5 hearing, the record is sufficient for appellate review. It is clear from the record that the facts pertaining to the 3.5 hearing are undisputed because the only person who testified at the 3.5 hearing was Deputy O'Neill. Based on his testimony, the appellant made numerous statements prior to, during, and after Deputy O'Neill had secured the him and read him his Miranda rights. The appellant's statements were voluntary, spontaneous, and unsolicited in nature as they were not made in response to any inquires made by Deputy O'Neill. The appellant's claim of prejudice from having the 3.5 hearing conducted in the middle of trial and from Judge Warne not entering written findings is not persuasive because the record is undisputed and clearly supports Judge Warne's findings of fact and conclusions of law. Judge Warne correctly admitted the appellant's statements because they were spontaneous and not in response to interrogation.

V. CONCLUSION

The appellant's appeal should be denied because the State did not comment on the appellant's right to remain silent and the trial court correctly admitted Natasha Schmidt's out of court excited utterance and

the appellant's voluntary, spontaneous, and unsolicited out of court statements.

Respectfully submitted this 10 day of September 2009.

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By:



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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
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 Appellant,)
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 vs.)
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 MATTHEW AARON SCHMIDT,)
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NO. 38541-4-II
Cowlitz County No.
08-1-00002-5

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DEPUTY

I, Michelle Sasser, certify and declare:

That on the 10th day of September, 2009, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent to the following parties:

John Hays
Attorneys at Law
1402 Broadway
Longview, WA 98632

Court of Appeals, Clerk
950 Broadway, Suite 300
Tacoma, WA 98402

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of September, 2009.

Michelle Sasser
Michelle Sasser