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DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY Cm  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

FREDERICK STEVEN FOSTER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable K.S. van Doornink, Judge

No. 08-1-05183-0

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**BRIEF OF RESPONDENT**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Whether the trial court properly admitted the 911 tape when defendant stipulated to the chain of custody; when the State identified the voices on the tape by circumstantial evidence; and when the statements on the tape were admissible under several exceptions to the hearsay rule ..... 1

    2. Whether defendant’s sentence for assault in the second degree with a knife and a sentencing enhancement for being armed with a deadly weapon in the commission of the assault were lawful when the jury found that defendant had been armed with a deadly weapon and when the Legislature explicitly authorized such enhanced punishment..... 1

B. STATEMENT OF THE CASE. .... 1

    1. Procedure..... 1

    2. Facts ..... 2

C. ARGUMENT..... 6

    1. THE TRIAL COURT PROPERLY ADMITTED THE 911 TAPE BECAUSE THE STATE LAID PROPER FOUNDATION WITH THE CIRCUMSTANTIAL EVIDENCE AND BECAUSE THE STATEMENTS FELL UNDER SEVERAL EXCEPTIONS TO THE HEARSAY RULE ..... 6

    2. DOUBLE JEOPARDY PROTECTIONS WERE NOT VIOLATED WHERE DEFENDANT WAS SENTENCED FOR ASSAULT IN THE SECOND DEGREE WITH A KNIFE AND RECEIVED A DEADLY WEAPON SENTENCING ENHANCEMENT..... 20

D. CONCLUSION. .... 31

## Table of Authorities

### State Cases

<i>McCandless v. Inland Northwest Film Serv., Inc.</i> , 64 Wn.2d 523, 532-533, 392 P.2d 613 (1964).....	18
<i>Passovoy v. Nordstrom, Inc.</i> , 52 Wn. App. 166, 171, 758 P.2d 524 (1988) .....	8, 9
<i>State v. Avery</i> , 103 Wn. App. 527, 538, 13 P.3d 226 (2000) .....	11
<i>State v. Caldwell</i> , 47 Wn. App. 317, 319, 734 P.2d 542, <i>review denied</i> , 108 Wn.2d 1018 (1987).....	26
<i>State v. Calle</i> , 125 Wn.2d 769, 776, 888 P.2d 155 (1995).....	20, 21
<i>State v. Chapin</i> , 118 Wn.2d 681, 686, 826 P.2d 194 (1992) .....	15
<i>State v. Claborn</i> , 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981).....	26
<i>State v. Cunningham</i> , 51 Wn.2d 502, 506, 319 P.2d 847 (1958).....	14
<i>State v. Danielson</i> , 37 Wn. App. 469, 681 P.2d 260 (1984).....	7, 8, 9, 12
<i>State v. Deaver</i> , 6 Wn. App. 216, 218-219, 491 P.2d 1363 (1971).....	8
<i>State v. Dixon</i> , 37 Wn. App. 867, 873, 684 P.2d 725 (1984) .....	15
<i>State v. Freeman</i> , 153 Wn.2d 765, 770, 108 P.3d 753 (2005) .....	20, 21
<i>State v. Guizzotti</i> , 60 Wn. App. 289, 295-296, 803 P.2d 808 (1991).....	15
<i>State v. Hardy</i> , 133 Wn.2d 701, 713, 946 P.2d 1175 (1997) .....	16
<i>State v. Harris</i> , 102 Wn.2d 148, 160, 685 P.2d 584 (1984), <i>overruled on other grounds by State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988) .....	26
<i>State v. Husted</i> , 118 Wn. App. 92, 95, 74 P.3d 672 (2003) .....	26
<i>State v. Michielli</i> , 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997) .....	20

<i>State v. Moran</i> , 119 Wn. App. 197, 218, 81 P.3d 122 (2003), review denied, 151 Wn.2d 1032, 95 P.3d 351 (2004) .....	6
<i>State v. Nguyen</i> , 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), review denied, 163 Wn.2d 1053, 187 P.3d 752 (2008) .....	26, 27, 28, 30
<i>State v. Pentland</i> , 43 Wn. App. 808, 811, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986).....	26
<i>State v. Pugh</i> , ___ Wn.2d ___, ___ P.3d ___, (2009) (2009 WL 5155364) .....	18, 19
<i>State v. Ross</i> , 42 Wn. App. 806, 714 P.2d 703 (1986).....	16
<i>State v. Roybal</i> , 82 Wn.2d 577, 512 P.2d 718 (1973).....	21
<i>State v. Simms</i> , 151 Wn. App. 677, 690, 214 P.3d 919 (2009).....	22, 27, 28
<i>State v. Sims</i> , 77 Wn. App. 236, 890 P.2d 521 (1995).....	15, 16
<i>State v. Tharp</i> , 96 Wn.2d 591, 598-599, 637 P.2d 961 (1981).....	12
<i>State v. Weisenburger</i> , 42 Wn.426, 85 P.20 (1906) .....	14
<i>State v. Whelchel</i> , 115 Wn.2d 708, 717, 801 P.2d 948 (1990).....	13
<i>State v. Williams</i> , 136 Wn. App. 486, 499, 500, 150 P.3d 111 (2007)...	7, 8
<i>State v. Workman</i> , 90 Wn.2d 433, 554 P.2d 382 (1978).....	23
<i>State v. Young</i> , 160 Wn.2d 799, 813-814, 161 P.3d 967 (2007) .....	15

**Federal and Other Jurisdictions**

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	27, 30
<i>Ball v. U.S.</i> , 470 U.S. 856, 860, 105 S. Ct. 1668, 1671, 84 L. Ed. 2d 740 (1985).....	20
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	27, 30

<i>Crawford v. Washington</i> , 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	6
<i>Missouri v. Hunter</i> , 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).....	21, 26, 28
<i>Schriro v. Summerlin</i> , 542 U.S. 348, 354, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).....	30

**Constitutional Provisions**

Article I, section 9 of the Washington State Constitution .....	21
Fifth Amendment of the United States Constitution .....	20
RCW Const. Art. 1, §9 .....	21
Sixth Amendment.....	30
U.S.C.A. Const. Amend. 5 .....	21

**Statutes**

H.R. Bill Rep., I. 159, at 8 (1995) .....	24
Laws of 1983, ch. 115, § 2 .....	22
Laws of 1995, ch. 129, § 1 (Initiative Measure No. 159).....	25
RCW 9.94.533(4) .....	25
RCW 9.94A.530 .....	25
RCW 9.94A.533 .....	29
RCW 9.94A.533(4).....	25
RCW 9A.36.021 .....	29
RCW 9A.46.020 .....	13
RCW 9A.56.200 .....	29
S. Bill Rep., I. 159, C. 129, at 1 (1995).....	23

**Rules and Regulations**

ER 104(b) ..... 8

ER 801(c)..... 11

ER 801(d)(2)..... 12

ER 802 ..... 11

ER 803 ..... 11

ER 803(a)(1)..... 17

ER 803(a)(2)..... 14

ER 803(a)(3)..... 14

ER 804 ..... 11

ER 804(a)..... 13

ER 804(a)(1)..... 13

ER 804(b)(3)..... 13

ER 901 ..... 7, 8

ER 901(a)..... 7

ER 901(b)(4)..... 8

**Other Authorities**

State of Washington Sentencing Guidelines Commission, Implementation  
Manual, Comment to RCW 9.94A.125, II-30 (1995) ..... 22

State of Washington Sentencing Guidelines Commission, Implementation  
Manual, Comment to RCW 9.94A.125, II-30 (1994) ..... 23

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

1. Whether the trial court properly admitted the 911 tape when defendant stipulated to the chain of custody; when the State identified the voices on the tape by circumstantial evidence; and when the statements on the tape were admissible under several exceptions to the hearsay rule.
2. Whether defendant's sentence for assault in the second degree with a knife and a sentencing enhancement for being armed with a deadly weapon in the commission of the assault were lawful when the jury found that defendant had been armed with a deadly weapon and when the Legislature explicitly authorized such enhanced punishment.

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Frederick Steven Foster, hereafter "defendant", by amended information with assault in the second degree (Count I) with a deadly weapon, a knife, and with assault in the fourth degree (Count II), both assaults committed under the circumstances amounting to a domestic violence incident. CP 14-15. The State also alleged that defendant was armed with a deadly weapon in the commission of assault in the second degree. CP 14-15.

The case proceeded to a jury trial in front of the Honorable Kitty-Ann Van Doorninck. RP 2. The State asked the court for a pre-trial ruling on admissibility of the 911 tape. RP 3; Exhibit 1. The State argued that the tape was admissible under the present sense impression and excited utterance exceptions to the hearsay rule. RP 5. The State also argued that the taped statements were non-testimonial and not made in anticipation of litigation. RP 7. Defense counsel conceded that the statements were non-testimonial, but argued that the hearsay exceptions did not apply. RP 10-13, 17, 18. Defense counsel also partially stipulated to the foundation of the tape, specifically to the chain of custody authentication. RP 43.

The court ruled that the statements on the tape were admissible as excited utterance and as statements against interest. RP 26. The court also ruled that, alternatively, Ms. Foster's statements were admissible as *res gestae*. RP 26-27.

After the State rested, defendant moved to dismiss the charges. RP 118; CP 28-30. The court denied the motion. RP 121.

The jury found defendant guilty of assault in the second degree and of assault in the fourth degree. RP 157; CP 53, 55. In special verdict forms, the jury found that defendant was armed with a deadly weapon at the time of the commission of assault in the second degree, and that defendant and the victim were members of the same family or household on November 1, 2008. RP 157, 158; CP 54, 56.

On Count I, the court sentenced defendant to three months of confinement, the low end of the standard range, and an additional statutorily mandated 12 months for the deadly weapon enhancement. RP 168; CP 57-70. On Count II, defendant received 365 days, with 361 days suspended, and credit for time served. RP 168; CP 71-75.

Defendant filed a timely notice of appeal. CP 76-97; 102-103.

## 2. Facts

On November 1, 2008, at about 2:54 a.m., the 911 call center received a phone call. Exhibit 1. No one spoke to the 911 dispatcher; rather, the dispatcher could listen in and hear what was happening on the other end of the line. *Id.*

First, one listening to the tape can hear a female voice yell: “Why do you keep pushing me in my head? ...I am calling a cab...I am calling a cab... Leave me alone, man. What the fuck is wrong with you? Stop pushing me in the head.” *Id.* While the female is yelling, one can hear a male voice repeating something unintelligible over her screams, almost chanting. *Id.* Then the female squeals loudly. *Id.* Then she yells, “Stop! Leave me alone. It’s fucked up!...your fucking wife...you gonna kill me?” The male voice then says multiple times, “Who is my fucking wife?” and “Where is my wife going? Where are you going? Tell me where you are going.” The female voice yells out hysterically, “Stop! Leave me the fuck alone. I am fucking doing nothing. You are a real man to beat a girl...You are a real man to beat me on the head”.

After some period of time when only muted sounds can be heard, the female voice screams, "No Frederick! Don't stab me!" The male voice yells, "I am gonna fucking kill you!" Exhibit 1. The female voice screams, "No, Frederick, please, no! Oh God!" The male yells, "I'll kill you before I let you go" and then, "I can't let you go, Lora." *Id.* Then a little later, the male voice says multiple times, "I will take you back home. Let me take you back home. OK?" *Id.* Then, for a few minutes there is silence, but occasionally muted cries or sobs and words can be heard. *Id.* At some point, the male voice says, "I am sorry, Lora." *Id.*

Then one can hear new sounds, and a new male voice (most likely a police officer) says to the dispatcher on the phone: "[unintelligible] still there? We are out with them now." *Id.* The dispatcher says, "thank you, bye bye." *Id.* After that, the tape continues with the police radio communication, listing the address, from which the phone call had been made: 5110 Chicago Ave., Lakewood. *Id.*<sup>1</sup>

On November 1, 2008, Officers Brian Wurts and Ryan Moody of Lakewood Police Department were working a night shift. RP 67, 103-104. At about 3 a.m., the officers were dispatched to an apartment at 5110 Chicago Avenue in Lakewood. RP 67, 69, 104. When the officers approached the apartment in question, they found a male and a female

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<sup>1</sup> From the record, it appears that the State did not admit the part of the tape with the police radio traffic. RP 9, 10.

outside the door. RP 70-71, 104-105. The female, identified as Lora Foster, was holding her head. RP 71. No one else was in or near the apartment. RP 79, 114.

When Officer Wurts began talking to Ms. Foster, it became apparent to him that she did not want to speak in front of the male; so, the officer led her away from the male. RP 71-72. As the officer was talking to Ms. Foster, he noticed a swelling on her right temple, redness on her neck, and a laceration on her leg. RP 73, 106; Exhibits 3-6. The officer asked Ms. Foster if she wanted to sit down, and she went inside the apartment and sat on the couch. RP 74.

Officer Wurts noticed that Ms. Forster was wearing one earring, while the other one was on the floor next to the couch. RP 74. As the officer was talking to Ms. Foster, she became upset and began sobbing and crying. RP 75.

Officer Ryan Moody of the Lakewood Police Department testified that on the night in question he was partnered with Officer Wurts, and they as well as another police vehicle, responded to what sounded like a domestic violence call at an apartment in Lakewood. RP 103, 104. When Officer Moody came into the apartment, it appeared as if it had been the scene of a struggle. RP 105. He also found a knife on the floor in the back bedroom. RP 105; Exhibit 7, 8. At trial, Officer Moody identified the male subject who they had contacted at the apartment as defendant, Frederick Foster. RP 113-114.

The State offered and the court admitted into evidence a certified document, showing that defendant and Ms. Foster were husband and wife. Exhibit 2. The victim did not testify at trial because she had left the country. RP 8-9. Defendant did not testify at trial.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED THE 911 TAPE BECAUSE THE STATE LAID PROPER FOUNDATION WITH THE CIRCUMSTANTIAL EVIDENCE AND BECAUSE THE STATEMENTS FELL UNDER SEVERAL EXCEPTIONS TO THE HEARSAY RULE

This Court reviews the trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Moran*, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032, 95 P.3d 351 (2004). “A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons.” *Moran*, 119 Wn. App. 197, 218.

At trial, defendant conceded that the statements on the 911 tape were non-testimonial<sup>2</sup> and also stipulated to the authenticity of the tape recording, requiring no witness to testify about the chain of custody. RP

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<sup>2</sup> “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

10-13, 17, 18, 43. On appeal, defendant only argues that the State failed to identify the voices heard on the tape, and that the statements on the tape were inadmissible hearsay. *See* Opening Brief of Appellant, p. 5-13. Defendant's arguments, however, fail because the State identified the voices heard on the tape by circumstantial evidence, and because several exceptions to the hearsay rule apply to the taped statements.

a. The State presented evidence which proved the identities of the voices heard on the tape

Before an exhibit can be admitted into evidence, a party introducing it must authenticate or identify the exhibit "by evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901(a). The requirement is satisfied when the proponent makes a prima facie showing that the evidence is authentic. *See State v. Williams*, 136 Wn. App. 486, 499, 500, 150 P.3d 111 (2007); *State v. Danielson*, 37 Wn. App. 469, 681 P.2d 260 (1984). "The State satisfies ER 901...if it introduces sufficient proof to permit a reasonable juror to find in favor of authenticity or identification." *Williams*, 136 Wn. App. 486, 500.

In deciding the issue of authenticity, the trial court may consider evidence that might be otherwise objectionable under other rules. *See Danielson*, 37 Wn. App. 469, 471. For example, the *Danielson* court rejected Danielson's contention that the State could not establish the identity of the caller by reference to the same hearsay sought to be

introduced as substantive evidence. *Id.* The court reasoned that “[b]ecause determination of the identity of the caller was a preliminary question, and thus a matter of conditional relevance governed by ER 104(b), *see* comment to ER 901, the rules of evidence do not apply.” *Id.*<sup>3</sup>

Authenticity and identity can be established by circumstantial proof. *See* ER 901(b)(4); *Williams*, 136 Wn. App. at 501 (holding that, among other reasons, the fact that the events recounted by the caller were consistent with those testified by a witness spoke to the authenticity of the 911 tape). Although alone self-identification during a telephone conversation has been held insufficient, a phone call will usually be authenticated when self-identification is corroborated by other evidence. *See Danielson*, 37 Wn. App. 469; *State v. Deaver*, 6 Wn. App. 216, 218-219, 491 P.2d 1363 (1971); *see also Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 171, 758 P.2d 524 (1988) (“courts routinely find a call to be authenticated when self-identification is combined with virtually any circumstantial evidence”). Testimony of voice recognition is not a requirement of authenticating a telephone conversation – the foundation can be laid by circumstantial evidence. *See Williams*, 136 Wn. App. 486, 500; *Passovoy*, 52 Wn. App. 166, 171; *Danielson*, 37 Wn. App. 469.

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<sup>3</sup> Under this rule, although it is not clear whether it had, the trial court could have relied on the police report, in which Officer Wurts stated that Ms. Foster admitted to him that defendant had attacked her and that she was the 911 caller pleading not to be stabbed. CP 4-13.

In *Danielson*, two suspects were in a vehicle chased by the police; and when the vehicle got stuck in the mud and the suspects fled, the police apprehended the passenger, but not the driver. *Id.* at 470-471. The passenger's father told the police that the driver will call them. *Id.* Subsequently, a person called the police, identified himself as Rick Danielson, gave his birth date, address, said that he was calling because the passenger's father had asked him to, and disclosed other information consistent with defendant's identity. *Id.* at 472. Considering the aforementioned evidence, the *Danielson* court held that the trial court did not abuse its discretion by admitting the telephone conversation into evidence. *Id.*

In *Passovoy*, the court held that the plaintiff laid proper foundation that he received a phone call from a Nordstrom employee when "[i]n addition to the fact that the caller identified herself as a Nordstrom employee, the call was made in response to Passovoy's call, and the caller demonstrated familiarity with the facts of the incident." 52 Wn. App. 166, 171.

Here, the voices on the tape self-identified, and the identifications were corroborated by substantial circumstantial evidence. First, the two people on the tape referred to each other as Lora and Frederick. Exhibit 1. The State showed that defendant's first name was Frederick and that Ms. Foster's first name was Lora by presenting their marriage certificate. Exhibit 2. In addition, Officer Wurts testified that the female at the scene

had been identified as Lora Foster, while Officer Moody identified defendant, Frederick Foster, in court as the male he had contacted at the scene and subsequently arrested. RP 71, 113-114. Defendant and Ms. Foster were the only people in or near the apartment when the police arrived. RP 79, 114.

The 911 call came in at 2:54 a.m. on November 1, 2008, and the police arrived at the defendant's and Ms. Foster's apartment at about 3 a.m. on November 1, 2008. Exhibit 1; RP 67, 69, 104. The call came from 5110 Chicago Avenue in Lakewood, and that is where the officers contacted defendant and Ms. Foster. Exhibit 1; RP 69.

The taped phone call itself indicated that the female, Lora, had just been hit in the head by the male, Frederick, and/or was being hit in the head by him at the time of the call. Exhibit 1. That fact was consistent with the officers' testimony that, when they contacted Ms. Foster, she had a swelling in the area of her right temple and was missing an earring. RP 73, 106; Exhibits 3-6.

The tape also indicated that the female begged not to be stabbed, and that the male would kill the female before he let her go. Exhibit 1. In the apartment, the officers found a kitchen knife on the floor in the bedroom, and observed that Ms. Foster had a laceration on her leg. Exhibits 6, 7, 8; RP 105. Finally, Ms. Foster became very upset and

started crying as soon as Officer Wurts separated her from defendant and started talking to her – a reaction consistent with a reaction of a person who had just been assaulted. RP 75.

From the aforementioned evidence, a reasonable juror could have found that the male and the female on the tape were defendant and Ms. Foster. The trial court’s ruling that the State authenticated the 911 tape was not manifestly unreasonable.

b. The trial court properly admitted the tape under the exceptions to the hearsay rule

“Hearsay” is an out-of-court statement offered to prove the truth of the matter asserted. *See* ER 801(c). Although generally hearsay is not admissible, there are multiple exceptions to the rule. *See* ER 802, 803, 804. Because this court can uphold the trial court on any ground supported by the record, the State will discuss all exceptions to the hearsay rule applicable to the facts at bar: those that were the bases for the trial court’s decision to admit the tape and those that were not. *See State v. Avery*, 103 Wn. App. 527, 538, 13 P.3d 226 (2000) (appellate court can affirm a trial court’s decision to deny a suppression motion on any ground supported by the record, even if the trial court made an erroneous legal conclusion).

**i. Defendant's statements were admissions by party-opponent.**

Admission by party-opponent is not "hearsay", and therefore, is exempted from the hearsay inadmissibility rule. Admission by party-opponent is a party's own statement offered against that party. *See* ER 801(d)(2).

When it is not obvious that the statement in question was made by the opposing party, the proponent of the evidence must establish, as a matter of foundation, some link between the statement and the opposing party. *State v. Tharp*, 96 Wn.2d 591, 598-599, 637 P.2d 961 (1981). As indicated above, the State established the link with a combination of self-identification and circumstantial evidence of matching time, place, names, injuries, and victim's demeanor.

Defendant's statements made during the 911 phone call were party-opponent admissions. *See Danielson*, 37 Wn. App. at 472. In *Danielson*, discussed *supra*, Danielson's statements made during the telephone conversation with a police officer were held to have been properly admitted as admissions. *Id.* Similarly, here, defendant's statements were not hearsay, but admissions of party-opponent. The State offered defendant's statements as substantive evidence of guilt against defendant, and therefore, the statements were admissible.

**ii. Defendant's statements were statements against penal interest.**

Defendant's statements were admissible as statements against penal interest under ER 804(b)(3).<sup>4</sup>

For this exception to apply, the declarant must be "unavailable". ER 804(a). Defendant choosing not to take the stand in his defense makes him "unavailable" to the State under ER 804(a)(1). *See State v. Whelchel*, 115 Wn.2d 708, 717, 801 P.2d 948 (1990) (unavailability as a witness includes not testifying because of constitutional rights and privileges).

ER 804(b)(3) provides that hearsay statements against penal interest are admissible when "the statements so far tend to expose the declarant to criminal liability that a reasonable person in the same position would not have made the statement unless convinced of its truth, and corroborating circumstances clearly indicate the statement's trustworthiness." *Whelchel*, 115 Wn.2d 708, 715-716.

Defendant's statements that he would kill Ms. Foster before he let her go were statements against his penal interest because they tended to expose defendant to criminal liability, if not for assault, then for harassment. RCW 9A.46.020. Finally, as indicated above, the

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<sup>4</sup> Although this exception is rarely applied to criminal defendants because defendants' statements are generally admitted as admissions of party-opponent, nothing makes this rule inapplicable to defendants' statements. Therefore, while the trial court chose a somewhat unorthodox basis for its ruling, the ruling was not erroneous. It is also likely that the trial court simply misspoke.

circumstances surrounding defendant making those statements – during an emotional confrontation with his wife that was recorded by the 911 center – indicate their trustworthiness. The trial court did not err in admitting defendant’s statements under this hearsay exception.

**iii. Defendant’s and victim’s statements were then existing mental, emotional, or physical condition.**

Defendant’s and Ms. Foster’s statements fell under the ER 803(a)(3) exception to the hearsay rule. The rule exempts those of declarant’s statements from the hearsay rule that are “then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)...”. ER 803(a)(3).

Here, defendant’s threats and statements “I will kill you before I let you go”, “I can’t let you go”, “I will take you home” were within this hearsay exception as intent, plan, or motive. *See, e.g., State v. Cunningham*, 51 Wn.2d 502, 506, 319 P.2d 847 (1958) (the trial court properly admitted witness’s testimony recounting Cunningham’s statements that he was going to kill his wife and her employer); *State v. Weisenburger*, 42 Wn.426, 85 P.20 (1906). Finally, many of Ms. Foster’s responses and screams show her state of mind at the time.

**iv. Victim’s statements were excited utterance.**

Ms. Foster’s statements were admissible as an excited utterance exception to the hearsay rule. ER 803(a)(2). Excited utterance is a

statement relating to a startling event or condition, made while declarant was under the stress of excitement caused by the event or condition. *Id.*

Three requirements must be met for a statement to qualify as an excited utterance: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement must relate to the startling event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). Passage of time between the startling event and the statements is not fatal to whether the statements are excited utterances; the declarant must merely still be under the stress of the event when he makes the statements. *See State v. Guizzotti*, 60 Wn. App. 289, 295-296, 803 P.2d 808 (1991). The key to the rule is spontaneity. *State v. Dixon*, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

To show that the declarant's state of excitement was due to a startling event, the State must present something more than just the statements. To establish that foundational requirement, the State can present circumstantial evidence, including the declarant's demeanor and the context within which the statement was made. *State v. Young*, 160 Wn.2d 799, 813-814, 161 P.3d 967 (2007).

*State v. Sims*, 77 Wn. App. 236, 890 P.2d 521 (1995) is on point. In *State v. Sims*, the victim's description of an assault to a police officer was held admissible as an excited utterance. 77 Wn. App. 236, 238. In reaching its holding, the court reasoned that the officer arrived within a

few minutes after being dispatched, the victim was crying and upset, and the victim made her statement “right after” the assault. *Sims*, 77 Wn. App. at 237-238. A similar result was reached in *State v. Hardy*, 133 Wn.2d 701, 713, 946 P.2d 1175 (1997).

Similarly, statements by a witness of assault during the witness’s telephone call to 911 were admitted as an excited utterance. *State v. Ross*, 42 Wn. App. 806, 714 P.2d 703 (1986). The court reasoned that the witness was “crying and agitated” throughout the conversation and that the call was made “contemporaneously with the shooting or shortly thereafter.” *State v. Ross*, 42 Wn. App. 806, 809.

Here, the State showed that Ms. Foster’s state of excitement was due to a recent or on-going startling event – her husband attacking and beating her - and her statements related to that event. On the tape, Ms. Foster sounded frightened, angry, and, at times, hysterical. *See* Exhibit 1. She talked about defendant hitting her in the head. *Id.* She begged defendant not to stab her. *Id.* Defendant can be heard threatening to kill Ms. Foster. *Id.*

Additionally, the police officers testified and the exhibits showed that Ms. Foster had suffered visible physical injuries. RP 73, 106; Exhibits 3-6. The Fosters’ apartment looked like a scene of a struggle. RP 105. Ms. Foster herself was missing an earring, which was found on the living room floor, while a kitchen knife was found on the floor in the bedroom. RP 74, 105.

Ms. Foster was under the stress of the startling event when the 911 call was being recorded. During the call, Ms. Foster sounded upset and, at times, hysterical. Exhibit 1. She was still upset and under the stress of the beating when the police arrive a few minutes later, because she began sobbing when Officer Wurts separated her from defendant and started asking her questions. RP 75. If Ms. Foster was still under the stress of the beating when the police arrived, she had definitely been under the stress of the beating when she made the statements captured by the 911 tape.

All the circumstantial evidence combined with the tape itself showed that Ms. Foster's statements were excited utterances made under the stress of being beaten by her husband.

**v. Victim's statements were present sense impression of what was happening in the apartment at the time.**

Ms. Foster's statements were admissible as present sense impression. Present sense impression is excepted from the hearsay inadmissibility rule under ER 803(a)(1). Present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. *Id.*

While no loud sounds of hits or blows are heard on the tape, many of Ms. Foster's and defendant's statements and the emotional manner in which the statements are spoken, demonstrate that they were present sense

impressions of a struggle. Many of Ms. Foster's statements were present sense statements asking defendant to stop, to stop pushing her in the head, to leave her alone, and not to stab her. Exhibit 1. Ms. Foster sounded frightened, angry, and hysterical. *Id.* Her statements and exclamations were consistent with defendant's statements, threats, and responses and with the observations of police officers, who arrived minutes later. *Id.* It follows then that Ms. Foster's statements were present sense impressions of defendant's assault on her.

**vi. Victim's statements were res gestae.**

Alternatively, Ms. Foster's statements were admissible as res gestae. *State v. Pugh*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, (2009) (2009 WL 5155364), is directly on point. *See also McCandless v. Inland Northwest Film Serv., Inc.*, 64 Wn.2d 523, 532-533, 392 P.2d 613 (1964).

In *Pugh*, the Supreme Court held that statements by defendant's wife during 911 call fell within res gestae doctrine and were admissible. Ms. Pugh called 911 and reported that her husband was beating her up "really bad". When asked if her husband was still there, she said that he was walking away and provided his description. Ms. Pugh then said that her husband was just outside walking toward the street. The trial court admitted the 911 tape as excited utterance.

In discussing Ms. Pugh's statements in the context of defendant's state confrontation right, the Supreme Court expounded in great detail on the res gestae doctrine, its history, and its connection to excited utterance and present sense impression. The *Pugh* court then held that:

The statements made by Bridgette Pugh to the 911 operator fall within the res gestae doctrine as it existed when our state constitution was adopted... They were natural statements growing out of the assault on her, not merely a narrative of what had happened, and they explained events that had occurred within minutes as well as present and continuing circumstances. They were statements of fact, not opinion. They were spontaneous utterances dominated and evoked by the events themselves without premeditation or reflection. They were made at a time and under circumstances that exclude any presumption, based on passage of time, that they were the result of deliberation. They were made by a participant-the victim-of the transactions described.

*Id.*

The foregoing analysis can, in its totality, be applied to this case because the circumstances were so similar. Moreover, this case amplifies all the circumstances described above because Ms. Foster was still in her attacker's presence when the 911 call was made and recorded, and she was not answering the dispatcher's questions but rather communicating with defendant directly. Ms. Foster's statements were growing out of the assault on her and were devoid of any sign of premeditation or reflection. Her statements fell under the res gestae doctrine.

In sum, the trial court's ruling to admit the 911 tape was not manifestly unreasonable because defendant stipulated to the chain of custody; the State identified the voices by circumstantial evidence combined with self-authentication; and several exceptions to the hearsay rule applied to defendant's and Ms. Foster's statements.

2. DOUBLE JEOPARDY PROTECTIONS WERE NOT VIOLATED WHERE DEFENDANT WAS SENTENCED FOR ASSAULT IN THE SECOND DEGREE WITH A KNIFE AND RECEIVED A DEADLY WEAPON SENTENCING ENHANCEMENT

This court reviews de novo the issue of whether defendant's conviction of and sentence for assault in the second degree and sentence enhancement for being armed with a deadly weapon violate double jeopardy. See *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). The review "is limited to assuring that the court did not exceed its legislative authority by imposing multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

The State may bring multiple charges arising from the same criminal conduct in a single proceeding. *Ball v. U.S.*, 470 U.S. 856, 860, 105 S. Ct. 1668, 1671, 84 L. Ed. 2d 740 (1985); *Freeman*, 153 Wn.2d 765, 770 (citing *State v. Michielli*, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)). Although the Fifth Amendment of the United States Constitution

and Article I, section 9 of the Washington State Constitution prohibit multiple punishments for the same offense, an unlawful act may be punished twice if such was the legislative intent. U.S.C.A. Const. Amend. 5; RCW Const. Art. 1, §9; *State v. Roybal*, 82 Wn.2d 577, 512 P.2d 718 (1973); see also *Missouri v. Hunter*, 459 U.S. 359, 368, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (“the question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. *Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution*”); *Freeman*, 153 Wn.2d at 768 (whether double jeopardy clause has been violated turns on whether the legislature intended to punish the conduct that violates multiple statutes as separate crimes or as a single “higher” felony); *Calle*, 125 Wn.2d 769, 776 (“the question whether punishments imposed by a court, following conviction upon criminal charges, are unconstitutionally multiple cannot be resolved without determining what punishments the legislative branch has authorized”). Therefore, legislative intent is the crux of the inquiry in determining whether double jeopardy was triggered and violated.

This Court first looks at whether the Legislature expressed its intent.<sup>5</sup> *State v. Simms*, 151 Wn. App. 677, 690, 214 P.3d 919 (2009). Here, the legislative intent is express and unambiguous: the Legislature, as well as the people of the State of Washington, wanted to punish offenders for arming themselves with deadly weapons - in addition to punishing them for the underlying crime.

“The Sentencing Reform Act did not originally provide sentence enhancement for all crimes involving a deadly weapon.” State of Washington Sentencing Guidelines Commission, Implementation Manual, Comment to RCW 9.94A.125, II-30 (1995). However, in 1983, the Legislature adopted the Commission’s recommendations that additional time be added to the offender’s presumptive sentence for some crimes where the use of the deadly weapon warranted additional punishment. Laws of 1983, ch. 115, § 2. Among the crimes listed was *Assault 2*. *Id.*<sup>6</sup> (emphasis added).

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<sup>5</sup> Only if the Legislature is silent, do the Washington courts employ three means in determining implicit legislative intent: “same evidence” rule, the *Blockburger* test, and the merger doctrine. *Simms*, 151 Wn. App. 677, 691.

<sup>6</sup> “Additional time added to the presumptive sentence if the offender was armed with a deadly weapon as defined in this chapter:

“24 months (Rape 1, Robbery 1, Kidnapping 1)

“18 months (Burglary 1)

“12 months (*Assault 2*, Escape 1, Kidnapping 2, Burglary 2 of a building other than a dwelling).” Laws of 1983, ch. 115, § 2 (emphasis added).

According to the Sentencing Manual:

The Commission was aware that *State v. Workman*, 90 Wn.2d 433, 554 P.2d 382 (1978), prohibits the “double counting” of an element for the purpose of proving the existence of the crime and using it as a factor in enhancing the sentence without specific legislative intent to so allow. Therefore, the Commission recommended enhancing the penalty for crimes involving deadly weapons *for which the weapon is only an alternative element*. The Commission decided that if there are different ways of committing an offense, that the method involving a deadly weapon deserved additional enhancement through a special allegation process.

State of Washington Sentencing Guidelines Commission, Implementation Manual, Comment to RCW 9.94A.125, II-30 (1994) (emphasis added).

In 1995, the people of the State of Washington passed Initiative Measure No. 159, known as “The Hard Time for Armed Crime Act.” The initiative was sponsored by the people of the State of Washington because:

In recent few years, the public has become increasingly concerned about violent crime...Current laws provide for enhanced penalties for certain crimes committed with a deadly weapon, which includes a firearm. However, it is felt that penalties for crimes involving firearms should be increased, and *that the deadly weapon enhancements should apply to more crimes*.

S. Bill Rep., I. 159, C. 129, at 1 (1995) (emphasis added).

The testimony for the bill clearly demonstrated that the people and the Legislature aimed to enact much harsher penalties to deter and punish armed criminals and safeguard the public:

Armed crime will be severely punished. The costs of imposing longer sentences are justified by the benefits of protecting the public from armed criminals. ...Armed

criminals need to be held accountable for their acts and not given second chances. The highest priority is public safety. The Initiative will stop people from carrying weapons. We need to incarcerate armed criminals and keep them there for longer periods of time. A person in prison cannot harm the public. Citizens want strong solutions like this one. ...

H.R. Bill Rep., I. 159, at 8 (1995).

When passed, the measure was accompanied by Findings and Intent:

- (1) The people of the state of Washington find and declare that:
  - (a) Armed criminals pose an increasing and major threat to public safety and can turn any crime into serious injury or death.
  - (b) Criminals carry deadly weapons for several key reasons including: Forcing the victim to comply with their demands; injuring or killing anyone who tries to stop the criminal acts; and aiding the criminal in escaping.
  - (c) Current law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals, and far too often there are no deadly weapon enhancements provided for many felonies, including murder, arson, manslaughter, and child molestation and many other sex offenses including child luring.
  - (d) Current law also fails to distinguish between gun-carrying criminals and criminals carrying knives or clubs.

(2) By increasing the penalties for carrying and using deadly weapons by criminals and closing loopholes involving armed criminals, the people intend to:

- (a) Stigmatize the carrying and use of any deadly weapons for all felonies with proper deadly weapon enhancements.
- (b) Reduce the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentence received upon conviction.
- (c) Distinguish between the gun predators and criminals carrying other deadly weapons and provide greatly

increased penalties for gun predators and for those offenders committing crimes to acquire firearms.

(d) Bring accountability and certainty into the sentencing system by tracking individual judges and holding them accountable for their sentencing practices in relation to the state's sentencing guidelines for serious crimes.”

Laws of 1995, ch. 129, § 1 (Initiative Measure No. 159).

As a result, the Legislature codified and amended the sentencing enhancement provisions dealing with penalties for armed crime. Thus, under RCW 9.94A.530 and 9.94A.533(4), if the offender was armed with a deadly weapon other than a firearm, and he is being sentenced for one of the crimes listed in RCW 9.94.533(4), additional mandatory time is added to the offender's standard sentence range, to be served consecutively with any other sentence. The Legislature mandated that the deadly weapon enhancements apply “to *all* felony crimes *except* the following: [p]ossession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony”. RCW 9.94.533(4) (emphasis added).

Therefore, the Legislature and the people of the State of Washington were not only aware that offenders would be punished multiple times for the same conduct but intended Measure No. 159 to have such an effect on armed criminals. Defendant's argument to the contrary has no merit and fails in the face of express legislative intent, legislative history, and the plain language of the statute.

Further, Washington courts have repeatedly rejected arguments that weapons enhancements violate double jeopardy. *See State v. Claborn*, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981); *State v. Nguyen*, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006), *review denied*, 163 Wn.2d 1053, 187 P.3d 752 (2008); *State v. Husted*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). More importantly, courts have also rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. *See State v. Harris*, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988); *State v. Caldwell*, 47 Wn. App. 317, 319, 734 P.2d 542, *review denied*, 108 Wn.2d 1018 (1987); *State v. Pentland*, 43 Wn. App. 808, 811, 719 P.2d 605, *review denied*, 106 Wn.2d 1016 (1986).

These cases make clear that, for purposes of sentence enhancements, “the double jeopardy clause does no more than prevent greater punishment for a single offense than the Legislature intended.” *Caldwell*, 47 Wn. App. at 319 (*quoting Pentland*, 43 Wn. App. at 811-12 (*citing Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983))). The *Caldwell* court concluded that the Legislature had clearly expressed its intent that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, “notwithstanding the fact that being armed with a deadly weapon was an element of the offense.” 47 Wn. App at 320.

In this case, defendant was convicted of assault in the second degree with a knife and assault in the fourth degree. CP 53, 55. The jury also found a deadly weapon enhancement on assault in the second degree as defendant was armed with a knife. CP 54. Thus, defendant's sentence included three months of the standard range for assault in the first degree and one year for one deadly weapon enhancement. CP 57-70.

On appeal, defendant argues that in light of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), this court must reexamine the legislative action and the well-settled rule that a sentence enhancement imposed for being armed with a deadly weapon does not violate double jeopardy where the use of a deadly weapon is also an element of the offense.

But defendant's argument has been already rejected by the courts. Division I held that "nothing in *Blakely* gives reason to question prior Washington cases holding that double jeopardy is not violated by weapon enhancements even if the use of the weapon is an element of the crime." *Nguyen*, 134 Wn. App. 863, 869; accord *Simms*, 151 Wn. App. 677, 690. In reaching its conclusion, the *Nguyen* court properly relied on legislative intent:

[U]nless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies.

*Nguyen*, 134 Wn. App. at 868; *see also Simms*, 151 Wn. App. at 690-691.

Further, defendant's attempt to apply the *Blockburger* test here is erroneous. *See* Opening Brief of Appellant, p. 17. The *Blockburger* test is a tool used to discern *implicit* legislative intent – the test is irrelevant when the Legislature has made its intent clear:

Our analysis and reasoning in *Whalen* and *Albernaz* lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in *Whalen* is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

*Hunter*, 459 U.S. at 368.

As demonstrated above, the Washington Legislature too made its intent crystal clear. It made all felonies subject to the deadly weapon enhancement but the specifically enumerated few. The Legislature exempted only those crimes that had use or possession of a deadly weapon

as *the only* way to commit the crime; the Legislature chose to enhance sentences for crimes for which the weapon is only an *alternative* way to commit the crime, such as assault in the second degree or robbery in the first degree. RCW 9.94A.533; RCW 9A.36.021; RCW 9A.56.200.

Such differentiation makes sense in light of the legislative intent to deter and punish more severely crimes and methods of committing a crime, which involve the use of a deadly weapon or a firearm. The Legislature wanted to punish armed assault more severely than the alternative ways of committing that degree of assault to deter armed assaults as they are considered more dangerous. However, such deterrent effect cannot be achieved when there are no alternative methods to committing a crime, e.g., drive-by shooting or theft of a firearm. Hence, those crimes are exempted.

Finally, defendant argues that the deadly weapon allegation is essentially duplicative of an element of the crime. This argument is moot. First, even if the deadly weapon allegation was duplicative of an element of the crime, double jeopardy is not violated because, as shown above, the Legislature intended multiple punishments.

Second, Division I already rejected a claim similar to the one that defendant makes here:

Nguyen's argument is essentially based upon semantics, and he assigns an unsupportable weight to the *Blakely* Court's use of the term "element" to describe sentencing factors. But the meaning of the Court's language in *Blakely* was made clear in *Recuenco*, wherein the Court pointed out

that “elements and sentencing factors must be treated the same for Sixth Amendment purposes.” Nguyen does not contend his Sixth Amendment rights to a unanimous jury and proof beyond a reasonable doubt were violated.

*Nguyen*, 134 Wn. App. at 869 (internal citations omitted). The requirement that sentencing enhancement be presented to the jury was a procedural requirement in that it only altered the method for determining the sentencing enhancement. *Schriro v. Summerlin*, 542 U.S. 348, 354, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). The jury trial guarantee for the sentencing enhancement did not alter the range of conduct that the State could criminalize. *Id.*

In the instant case, the jury made a finding that defendant had been armed with a deadly weapon at the time of the commission of the crime of assault in the second degree. Defendant does not contend that his Sixth Amendment rights were violated. Because the sentencing enhancement was submitted to the jury, the requirements of *Blakely* were met.

In sum, defendant’s double jeopardy argument fails, because it extends *Blakely* and *Apprendi* to legal distances those cases were not meant to go; because it has been rejected by the Washington courts; because it is not supported by the legislative history; and, most importantly, because it contradicts the express legislative intent. Double jeopardy ensures that the punishment is not more than the legislature intended. The Legislature intended to punish defendant’s assault in the second degree committed with a knife more severely than if he assaulted

his wife with his fists. The jury made a finding that defendant was armed with a deadly weapon, and defendant's sentence was properly enhanced.

D. CONCLUSION.

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

DATED: January 19, 2010.

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Rule 9 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.

1-20-10   
Date Signature

STATE OF WASHINGTON  
BY  DEPUTY

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