

No. 44722-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CARL LOUIS WARNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in admitting the complaining witness's out-of-court statement made to the 911 operator because the statement was inadmissible hearsay.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

An out-of-court statement is not admissible under the "excited utterance" exception to the hearsay rule if the declarant deliberately fabricated a portion of the statement. Here, the complaining witness called 911 and told the operator that Carl Warner assaulted her in her hospital room. She told the operator that she did not knowingly or willingly let Mr. Warner into her room, but that claim was later contradicted by a hospital nurse. Did the trial court abuse its discretion in admitting the statement as an excited utterance where it was plain that the witness fabricated at least a portion of the statement?

C. STATEMENT OF THE CASE

Carl Warner and Jaunette Norvey had a romantic relationship and lived together for about four years. RP 89. Although they were not legally married, they called each other "husband" and "wife." RP 89. In November 2012, they were going through a rocky period. RP 103. A no-contact order was in place prohibiting Mr. Warner from

having contact with Ms. Norvey. RP 91. The no-contact order was issued against Ms. Norvey's wishes and she had begun the process of having it lifted. RP 91, 93.

On November 6, 2012, Ms. Norvey was a patient at St. Claire Hospital in Lakewood. RP 90. She had been admitted the day before for treatment of a blood clot in her leg. RP 90. At 1:22 p.m. on November 6, Ms. Norvey called 911 and said, "I'm in the hospital, St. Claire Hospital. My husband just beat the shit out of me." RP 70; Exhibit 2. She said that her husband was Carl Warner, that he choked her and hit her on the side of the head, and that she had a bloody lip. Exhibit 2. She said this happened in her hospital room. Id.

When the 911 operator asked Ms. Norvey if Mr. Warner lived with her, she said no, because "we have a restraining order." Exhibit 2. The operator asked how long Mr. Warner had been at the hospital and Ms. Norvey said he had spent the night. Id. The operator then asked, "If you have a restraining order against him, why is he spending the night with you?" Id. Ms. Norvey said someone had called Mr. Warner the night before after Ms. Norvey was found walking down the street, delirious due to the infection in her leg. Id. The operator asked if Ms. Norvey told them she had a restraining order against Mr. Warner and

she said no, she could not because she was delirious. Id. The operator pointed out that it was now 1:30 p.m. and asked whether Mr. Warner had been there all day. Id. Ms. Norvey replied, “I just woke up. I woke up to him choking and beating the hell out of me.” Id.

The operator then called the hospital directly and spoke to a nurse who was attending Ms. Norvey. That conversation was captured on the same recording as the operator’s conversation with Ms. Norvey; the entire recording was admitted at trial. Exhibit 2. The operator asked the nurse if Mr. Warner had been in Ms. Norvey’s room all day and the nurse said, “I don’t know exactly how long he’s been there today, but he has been there today.” Id. The operator asked if Ms. Norvey had been awake all day and the nurse said, “As far as I know, yes.” Id. When the operator informed the nurse that Ms. Norvey had a restraining order against Mr. Warner, the nurse said, “Oh, I didn’t, we didn’t know that and she’s allowed him to be in the room.” Id.

A police officer responded to Ms. Norvey’s hospital room. She told the officer that Mr. Warner had arrived the previous evening and spent the night in her room, sleeping on a chair. RP 144. She said when she woke up on the present afternoon, they argued and he pinned her in the corner of the room and punched her in the mouth. RP 144.

A short time later, police found Mr. Warner walking through a parking lot about four blocks from the hospital. RP 155. He told police he thought the order prohibiting him from having contact with Ms. Norvey had been dismissed. RP 158. He said he did not assault Ms. Norvey. RP 146.

Mr. Warner was charged with one count of felony violation of a court order, domestic violence. CP 1. The State alleged he violated the no-contact order by assaulting Ms. Norvey. CP 1, 27.

Before trial, defense counsel moved to exclude the recording of Ms. Norvey's 911 call, arguing it did not qualify as an excited utterance. CP 10-11; RP 13. The court overruled the objection. RP 35-38. The recording was played for the jury during the trial. RP 95.

At trial, Ms. Norvey testified she did not remember being assaulted by Mr. Warner, calling 911, or talking to police. RP 93, 97-99. She did not remember seeing Mr. Warner at all that day. RP 99. She was taking several medications at the time, including Klonopin, an anti-anxiety medication, and Fentanyl, for pain. RP 99-100. She also took heroin while in the hospital. RP 100. She had brought it with her and injected herself. RP 101. As a result of all the prescription and non-prescription drugs she was taking, Ms. Norvey blacked out and lost

her memory for about four days. RP 96. She had no memory at all of the alleged incident. RP 96.

During deliberations, the jury asked to listen to the recording of the 911 call. CP 13; RP 207-08. The jury found Mr. Warner guilty as charged of felony violation of a no-contact order. CP 35.

D. ARGUMENT

Ms. Norvey’s out-of-court statement was not admissible under the “excited utterance” exception to the hearsay rule because she consciously and deliberately fabricated a portion of the statement

Hearsay¹ is not admissible at trial except as specifically provided by the rules of evidence, court rules, or statute. State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992); ER 802.

An out-of-court statement is admissible at trial as an exception to the hearsay rule if it qualifies as an “excited utterance.” ER 803(a)(2). An excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Id.

The “excited utterance” exception is based on the idea that “under certain external circumstances of physical shock, a stress of

¹ “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c).

nervous excitement may be produced which stills the reflective faculties and removes their control.” Chapin, 118 Wn.2d at 686 (internal quotation marks and citation omitted). The stressful circumstances are believed to operate to temporarily overcome the ability to reflect and consciously fabricate. State v. Dixon, 37 Wn. App. 867, 872, 684 P.2d 725 (1984). The reliability and probable truthfulness of excited utterances distinguish them from ordinary hearsay. Id.

A trial court's determination that a statement is admissible as an excited utterance is reviewed for abuse of discretion. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). A trial court necessarily abuses its discretion if it misapplies the requirements of the excited utterance rule. State v. Briscoeray, 95 Wn. App. 167, 171-72, 974 P.2d 912 (1999).

Three closely connected requirements must be satisfied for a hearsay statement to qualify as an excited utterance. Chapin, 118 Wn.2d at 686. First, a startling event or condition must have occurred. Id. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Id. Third, the statement must relate to the startling event or condition. Id.

The second requirement, that the statement must have been made while the declarant was under the stress of excitement caused by the startling event or condition, “is the essence of the rule.” Chapin, 118 Wn.2d at 687. The key to the second element is spontaneity. Id. at 688. Ideally, the statement should be made contemporaneously with or soon after the startling event giving rise to it. Id. That is because as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases. Id.

Also relevant to the second inquiry is whether the statement was made in response to a question. “The fact that a statement is made in response to a question will not by itself require the statement be excluded, but it is a factor that raises doubts as to whether the statement was truly a spontaneous and trustworthy response to a startling external event.” Id. at 690.

The ultimate inquiry in determining whether the second element is satisfied is whether the declarant had the time and opportunity between the startling event and the utterance to reflect and consciously fabricate a lie about the incident. Briscoeray, 95 Wn. App. at 174. Thus, if the record shows the declarant *did in fact* consciously falsify a portion of the statement, the second element is not satisfied and the

statement cannot qualify as an excited utterance. Id.; Young, 160 Wn.2d at 807; State v. Brown, 127 Wn.2d 749, 758-59, 903 P.2d 459 (1995).

In Brown, T.G. called 911 to report she had been raped. Brown, 127 Wn.2d at 751. When police arrived, she told them she was abducted, forced into her neighbor Brown's apartment, and then raped by four men. Id. The statements were admitted as an excited utterance. Id. at 752.

At trial, however, T.G. explained she had actually gone to Brown's apartment willingly, in order to perform fellatio in exchange for money. Id. It was not until she entered Brown's apartment that four men grabbed her and raped her. Id. T.G. had decided to lie to police about going to Brown's apartment because she did not think they would believe she was raped if she said she had agreed to perform sex for money. Id. at 753.

On review, the Washington Supreme Court held T.G.'s statement did not qualify as an excited utterance because the second element of the rule was not satisfied. The court explained, "It is thus apparent that T.G.'s testimony that she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911

call renders erroneous the trial court's conclusion that the content of her call was admissible as an excited utterance.” Id. at 759. Because T.G. plainly “had the time and opportunity between the startling event and the utterance to reflect and consciously fabricate a lie about the incident,” the statement did not qualify as an excited utterance. Briscoeray, 95 Wn. App. at 174. Even if only a portion of the statement was consciously fabricated, the requirements of the rule were not satisfied and the entire statement was inadmissible. Brown, 127 Wn.2d at 758-59.

Brown is indistinguishable from this case. The record here shows that Ms. Norvey consciously and deliberately fabricated a portion of her statement to the 911 operator, for self-serving reasons. Ms. Norvey told the operator she did not know Mr. Warner had spent the night in her hospital room and did not know he was present until 1:30 the next afternoon, when she woke up. Exhibit 2. She said she did not willingly allow him to have contact with her in violation of the no-contact order. Id. But contrary to Ms. Norvey’s assertions, the attending nurse told the operator that in fact Ms. Norvey had not been asleep all day and had willingly “allowed him to be in the room.” Id.

The nurse's statement to the 911 operator shows that Ms. Norvey was consciously and deliberately untruthful when she said she did not know Mr. Warner was in her room and did not allow him to be there. Thus, the second element of the excited utterance exception is not satisfied because Ms. Norvey plainly "had the time and opportunity between the startling event and the utterance to reflect and consciously fabricate a lie about the incident." Briscoeray, 95 Wn. App. at 174. Because a portion of the statement was consciously fabricated, the entire statement was inadmissible as an excited utterance. Brown, 127 Wn.2d at 758-59.

An error in admitting hearsay evidence is prejudicial and requires a new trial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The improper admission of hearsay evidence constitutes harmless error only if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Id.

Here, the erroneous admission of the hearsay was not harmless because it was of central significance to the State's case. Ms. Norvey testified at trial that she did not remember being assaulted that day or

calling 911. RP 93, 97-99. No one else witnessed the alleged assault. A police officer testified that he saw blood around Ms. Norvey's lips when he responded to her hospital room, but he could not say if it was fresh blood or what had caused it to be there. RP 143-44.

Thus, the State's case rested entirely upon Ms. Norvey's out-of-court statements. Those statements were inadmissible hearsay because they did not qualify as an excited utterance. The error in admitting the hearsay was not harmless and requires reversal of the conviction.

Thomas, 150 Wn.3d at 871.

E. CONCLUSION

The trial court abused its discretion in admitting the complaining witness's out-of-court statements at trial. Because those statements were virtually the only evidence that an assault occurred, their admission was not harmless and the conviction must be reversed.

Respectfully submitted this 23rd day of October, 2013.


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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

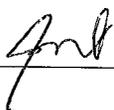
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 44722-3-II
)	
CARL WARNER,)	
)	
APPELLANT.)	

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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v.)	NO. 44722-3-II
)	
CARL WARNER,)	
)	
APPELLANT.)	

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x  _____

cc: KATHLEEN PROCTOR, DPA
PIERCE COUNTY

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