

NO. 44722-3-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CARL LOUIS WARNER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Jerry T. Costello

No. 12-1-04194-8

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**Brief of Respondent**

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

1. Whether the trial court properly admitted Ms. Norvey's statements to the 911 operator as an excited utterance when they fall within ER 803(a)(2).

B. STATEMENT OF THE CASE.

1. Procedure

On November 7, 2012, the Pierce County Prosecuting Attorney (State) charged Carl Louis Warner (Defendant) with one count of felony violation of a court order— domestic violence. CP 1. The court denied Defendant's pre-trial motion to exclude the 911 call made by the victim, Juanette Norvey, the day of the incident. 1RP 35-37<sup>1</sup>; CP 10-11. The court found that the statements made by Ms. Norvey to the 911 operator were admissible under the excited utterance exception to the hearsay rule. 1RP 37.

Trial began on February 19, 2013, before the Honorable Jerry Costello. 1RP 52. On February 26, 2013, the jury found Defendant guilty

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<sup>1</sup> The State will refer to the Record of Proceedings by the volume number followed by the page number.

as charged. CP 35; 2RP 209-10. The court sentenced Defendant to 60 months confinement with 154 days credit for time served. CP 54-55. On April 9, 2013, Defendant filed a timely notice of appeal. CP 62.

## 2. Facts

Defendant and Jaunette Norvey lived together and had a romantic relationship for approximately four years. 2RP 89. Although they were not legally married, they referred to each other as "husband" and "wife." 2RP 89. In August of 2012, a five year no-contact order was issued prohibiting Defendant from having contact with Ms. Norvey. 2RP 147-48.

On November 6, 2012, Ms. Norvey was a patient at St. Claire hospital in Lakewood. 2RP 90. She had been admitted to the hospital for a few days for treatment of a blood clot in her leg. 2RP 90-91. At 1:22 p.m. on November 6, Ms. Norvey called 911 from the hospital to report being assaulted by Defendant. 2RP 70; Exh. 2. Ms. Norvey told the 911 operator "I'm in the hospital, St. Claire hospital; my husband just beat the shit out of me." Exh. 2. She continued, saying "I'm a patient in a hospital, I have witnesses, help me please." Exh. 2. She then told the operator that "he was choking me, he hit me on the side of the head" and that she had a bloody lip. Exh. 2. Ms. Norvey told the operator the assault took place in her room, and gave the operator her room number. Exh. 2.

Ms. Norvey told the operator her husband's name was Carl Warner. Exh. 2. She proceeded to give the operator a physical description of Defendant, what he was wearing, and told the operator she observed him leave the hospital and walk northbound on Bridgeport Avenue. Exh. 2. Ms. Norvey told the operator that Defendant had spent the night in her room and that she "woke up to him choking and beating the hell out of me." Exh. 2.

When the operator asked Ms. Norvey if she and Defendant lived together, she replied that they did not because "we have a restraining order, he is not supposed to be there." Exh. 2. The operator then asked why Defendant was in the hospital with her if there was a restraining order in place. Exh. 2. Ms. Norvey explained that someone had called him the night before, after Ms. Norvey was found walking down the street, delirious due to the infection in her leg. Exh. 2. Ms. Norvey told the operator that she did not tell the hospital staff that there was a restraining order in place because she had been delirious the night before and had just woken up when Defendant attacked her. Exh. 2.

The operator then called the hospital directly and spoke to the attending nurse. Exh. 2. The nurse told the operator "I went into her room when I heard the yelling; some people have been in there and security has been in there." Exh. 2. The nurse also told the 911 operator "I don't know exactly how long [Defendant has] been there today, but he has been there today." Exh. 2.

City of Lakewood Police Officer Paul Osness was dispatched to St. Claire's following Ms. Novey's 911 phone call. 2RP 141. Officer Osness testified that he went to Ms. Novey's room, where she was visibly upset and crying. 2RP 143. Officer Osness observed blood in her mouth and around her lips, which he testified is consistent with a punch to the mouth. 2RP 144. Ms. Novey told Officer Osness that Defendant had arrived the previous evening and spent the night in her room. 2RP 144. Ms. Novey told Officer Osness that when she awoke the two began to argue until Defendant grabbed her by the neck with his left hand and punched her in the mouth with his right hand. 2RP 144. Officer Osness testified that Ms. Novey was responsive and did not have any problems answering his questions. 2RP 144-45.

City of Lakewood Police Officer Ryan Moody was also dispatched to St. Claire regarding this incident. 2RP 153. Officer Moody was driving northbound on Bridgeport Way when he encountered Defendant walking northbound, approximately four blocks away from St. Claire hospital. 2RP 153-55. Officer Moody contacted Defendant, placed him under arrest, and advised him of his Miranda rights. 2RP 156-57. Defendant indicated that he understood his rights, and wished to speak to the Officer. 2RP 157. Defendant admitted to Officer Moody that he had been at St. Claire hospital and had seen Ms. Norvey. 2RP 158. He also told the Officer that he was aware of the no-contact order but thought it had been dismissed. 2RP 158. Officer Moody also testified that when he detained Defendant he

noticed a St. Claire Hospital visitor's badge clipped to Defendant's clothing. 2RP 157-58.

Ms. Norvey testified at trial that she did not recall the events November 6, due to all of the medications she was taking at the time. 2RP 93, 97-99.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING MS. NORVEY'S STATEMENTS TO THE 911 OPERATOR AT TRIAL BECAUSE THE STATEMENTS FELL WITHIN ER 803(a)(2) EXCEPTION TO HEARSAY.

An out-of-court statement is hearsay and generally inadmissible to prove the truth of the matter asserted in the statement, except as provided by evidence rules, court rules, or statute. ER 801, 802. One exception to the hearsay rule, ER 803(a)(2), allows the trial court to admit a person's out-of-court excited utterance. A trial court may admit a statement as an excited utterance if 1) a startling event or condition occurred; 2) the declarant made the statement while under the excitement of stress of the startling event or condition; and 3) the statement related to the startling event or condition. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

"The exception is based on the idea that 'under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.'" *State v. Briscoeray*, 95 Wn. App. 167, 173, 974 P.2d 912 (1999) *citing* *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

"A later recantation does not disqualify the statement as an excited utterance." *Briscoeray*, 95 Wn. App. at 173. "If the witness later recants, the trial court does not err by weighing the witness' credibility against the evidence indicating that the statements were spontaneous and reliable." *Id.*

Appellate courts review a trial court's decision to admit a hearsay statement as an excited utterance for abuse of discretion. *Young*, 160 Wn.2d at 805.

a. A startling event or condition occurred

Two principles are relevant regarding the requirement that a startling event or condition must have occurred. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). "First, the startling event or condition that must occur for purposes of the excited utterance exception need not be the 'principal act' underlying the case." *Id.* A later startling event may trigger associations with an original trauma, recreating the stress earlier produced and causing the person to exclaim spontaneously. *Id.* at 686-87.

The second important principle regarding the requirement of a startling event or condition is that the startling nature of an event cannot be determined merely by reference to the event itself. *Id.* at 687. "What makes an event startling is its effect upon those perceiving it, and an event might be startling to some but not to others." *Id.* at 687.

In the present case, a startling event occurred when Defendant went to Ms. Norvey's hospital room—in violation of a no-contact order—and physically assaulted her immediately after she woke up. Exh. 2. Thus, the first element of ER 803(a)(2) is satisfied.

- b. Ms. Norvey made the statement while under the excitement of stress of the startling event or condition.

The key to the second element of the excited utterance exception is spontaneity. *Chapin*, 118 Wn.2d at 688. "In determining spontaneity, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it." *Briscoeray*, 95 Wn. App. at 173-74.

Ideally, the utterance should be made contemporaneously with or soon after the startling event giving rise to it. *State v. Palomo*, 113 Wn.2d 789, 791, 783 P.2d 575 (1989), *cert. denied*, 111 S. Ct. 80 (1990). Although the statement may be spontaneous, it need not be completely

spontaneous; rather, under certain circumstances, the statement may be made in response to a question. *State v. Bryant*, 65 Wn. App. 428, 433, 828 P.2d 1121 (1992). For example, in *State v. Woods*, the court upheld the admissibility of a victim's statements made in response to paramedic's questions some 45 minutes after the startling event. *State v. Woods*, 143 Wn.2d 561, 598-99, 23 P.3d 1046 (2001).

The crucial question is whether the declarant is still under the influence of the event so as to preclude any chance of fabrication, intervening influences, or the exercise of choice or judgment. *Briscoeray*, 95 Wn. App. at 173. However, the fact that the victim may have spoken to other persons in between the startling event and the statements in question does not necessarily bear on admissibility. *State v. Sunde*, 98 Wn. App. 515, 985 P.2d 413 (1999).

Here, Ms. Norvey was still under the stress of the strangulation and beating when she called 911. Exh. 2. Ms. Norvey called 911 minutes after the assault occurred, while Defendant was still walking away from the hospital. Exh. 2. Ms. Norvey was highly emotional and distressed when she called 911. Exh. 2. Her speech was hurried, she was crying and breathing heavily, and spoke in a very urgent or "excited" manner. Exh. 2. Officer Osness—who spoke to Ms. Norvey almost immediately after the 911 call— testified that she "appeared upset" and was "crying." 2RP 143.

Ms. Norvey had not spoken to others in between the time the assault occurred and the time she made her statements to the 911 operator.

Her initial statement, that "my husband *just* beat the shit out of me," was completely spontaneous, and indicated that the assault occurred recently and that she was still under the stress of the event. Exh. 2 (emphasis added). Ms. Norvey's resulting statements—which were made in response to the 911 operator's questions—were made subsequently and are thus not precluded from the excited utterance exception to the hearsay rule.

Ms. Norvey told the 911 operator that she did not know Defendant spent the night in her room because she had been delirious when she was brought to the hospital. Exh. 2. She told the operator that she woke up to him "choking and beating the hell out of me," following which Defendant left and Ms. Norvey called 911. Exh. 2. When the 911 operator later called the hospital, the charge nurse admitted that she "[did not] know how long [Defendant has] been there today, but he has been there today." Exh. 2. The nurse also told the operator that she was not aware of the no-contact order prohibiting Defendant from contacting Ms. Norvey, because Ms. Norvey had "allowed him to be in the room." Exh. 2.

Defendant argues that Ms. Norvey had deliberately fabricated a portion of her statement to the 911 operator, and thus her statements are inadmissible as an excited utterance. Brief of appellant at 9. Specifically, Defendant argues that Ms. Norvey lied when she told the operator that she did not know Defendant spent the night in the hospital room, did not know

he was present until 1:30 in the afternoon, and did not willingly allow him to have contact with her in violation of the no-contact order. Brief of appellant at 9.

Defendant relies on *State v. Brown* to argue that Ms. Norvey's statements should not be admitted as an excited utterance, 127 Wn.2d 749, 903 P.2d 459 (1995). In *Brown*, the victim called 911 and reported that she had been abducted by her neighbor Brown, forced into his apartment, and raped by four men. *Id.* at 751-53. The court admitted the victim's 911 call as an excited utterance. *Id.* At trial, the victim recanted her statement that she had been abducted, and testified that she went willingly into Brown's apartment. *Id.* The victim admitted that she called 911 only after she decided to fabricate the part of her testimony about being abducted, because she did not think the police would believe her if she admitted to going into the apartment willingly. *Id.* The victim also admitted to speaking with her boyfriend before deciding to call the police. *Id.*

Our State Supreme Court held that the trial court abused its discretion in admitting the 911 call because it had been undisputed that the victim had the opportunity to and did in fact fabricate her story. *Id.* at 757-59.

In *State v. Young*, our State Supreme Court further explained *Brown*. 160 Wn.2d at 807. The court noted that "Brown stands for the proposition that when there is undisputed evidence that a declarant fabricated her hearsay statements, the second element of an excited

utterance—that the statement was made under the influence of a startling event—is not satisfied." *Young*, at 807.

In *State v. Magers*, police were responding to a domestic disturbance at Magers' girlfriend's residence. 164 Wn.2d 174, 189 P.3d 126 (2008). Police asked the victim if Magers was inside, and she replied that he was not. *Id.* at 178. Police noticed the victim seemed scared and that she kept looking behind her. *Id.* Police asked her to step outside of her residence. *Id.* at 179. When she complied, the officer again asked if Magers was inside the home. *Id.* The victim then replied that he was, started crying, and told the officers that Magers was violent and was going to hurt her. *Id.*

Our State Supreme Court held that the fact that the victim told the police a falsehood when she denied Magers' presence in her house did not mean that the remainder of the statements were not spontaneous and truthful. *Id.* at 188. The Court held the statements fell under the excited utterance exception of the hearsay rule and that the court did not abuse its discretion in admitting them at trial. *Id.*

The present case is distinguishable from *Brown*. Here, unlike in *Brown*, Ms. Norvey did not speak to anyone else before making her statements to the 911 operator. Most importantly, as the Court explained in *State v. Young*, there is no undisputed evidence here to suggest that Ms.

Norvey fabricated her statements to make her story more plausible, like in *Brown*. Also unlike in *Brown*, Ms. Norvey did not recant or admit to making false statements. Rather, Ms. Norvey testified at trial that she simply could not recall the events of that day due to the combination of medication she was taking. Furthermore, Officer Osness' testimony regarding his interaction with Ms. Norvey was consistent with and corroborated the statements she made to the 911 operator.

This case is analogous to *Magers*. 164 Wn.2d 174. Like in *Magers*, Ms. Norvey was still under the stress of the assault when she spoke to the 911 operator. Like the victim in *Magers*, Ms. Norvey was distressed and highly emotional when speaking to the operator, yelling "help me please" as she described what was happening. Exh. 2.

The charge nurse's statement that Ms. Norvey "allowed [Defendant] to be in the room" does not bar Ms. Norvey's statements from being admitted as an excited utterance, because it does not mean that Ms. Norvey's statements were not spontaneous and truthful. Because Ms. Norvey was delirious at the time she was brought to the hospital, a rational trier of fact could infer that she made statements or exclamations at that time that she did not recall she called 911 the following afternoon.

Because Ms. Norvey was still under the influence of the assault when she called 911, and did not have time to fabricate her statement or exercise her choice or judgment, the second element of ER 803(a)(2) is satisfied.

c. The statement related to the startling event or condition

The third element of ER 803(a)(2) is that the utterance “relate to” the startling event. For purpose of 803(a)(2), an utterance may “relate to” the startling event even though it does not explain, elucidate, or in any way characterize the event. *Chapin*, 118 Wn.2d at 688. “Any utterance that may reasonably be viewed as having been about, connected with, or elicited by the startling event meets this requirement.” *Id.*

The statements made to the 911 operator undoubtedly relate to the startling events of that day, and Defendant does not argue otherwise on appeal. Therefore, the third element of ER 803(a)(2) is satisfied.

D. CONCLUSION.

The trial court did not abuse its discretion in admitting Ms. Norvey's 911 phone call as an excited utterance. Ms. Norvey's statements

fell squarely within ER 803(a)(2) exception to hearsay. For the foregoing reasons, the State respectfully requests this Court to affirm Defendant's conviction and sentence.

DATED: January 15, 2014.

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Certificate of Service:

The undersigned certifies that on this day she delivered by B 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.

1.15.14 [Signature]  
Date Signature

# PIERCE COUNTY PROSECUTOR

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