

No. 46536-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY HOWARD PATTON, JR.,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-02266-6
The Honorable Jack Nevin, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENT OF ERROR

1. The trial court erred when it allowed statements to be presented to the jury under the “excited utterance” hearsay exception.

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court err when it allowed statements to be presented to the jury under the “excited utterance” hearsay exception, without first determining whether sufficient corroborating evidence established that a “startling event” actually occurred?
2. Did the trial court err when it allowed statements to be presented to the jury under the “excited utterance” hearsay exception without first determining whether the declarant was under the stress of excitement caused by the “startling event”?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Anthony H. Patton, Jr. with one count of assault in the second degree by strangulation (RCW 9A.36.021(1)(g)), one count of tampering with a witness (RCW 9A.72.120), and two counts of violation of a no-contact order (RCW

26.50.110). (CP 6-8) The State also alleged that the crimes were domestic violence incidents (RCW 10.99.020). (CP 6-8)

The jury convicted Patton as charged. (RP 06/12/14 RP 56-57; CP 49-58)¹ The trial court accepted the State's offender score calculation, and sentenced Patton within the corresponding standard range to a total of 50 months of confinement. (07/25/14 RP 24, 31-32; CP 311, 314) This appeal timely follows. (CP 329)

B. SUBSTANTIVE FACTS

Anthony Patton and Colleen Begallia met in 2011 and began dating. (06/05/14 RP 92-93; 06/11/14 RP 78) In early June of 2013, Patton and Begallia rented a room in a house in Lakewood and moved in together. (06/05/14 RP 94-95, 96; 06/11/14 RP 80-81) But the stress of the move caused friction immediately. Hills and Patton argued constantly for several days. (06/05/14 RP 95, 98; 06/11/14 RP 81) During that time, they both ingested methamphetamine and rarely slept. (06/05/14 RP 98, 104) On the morning of June 4, 2013, their arguing turned physical. (06/05/14 RP 99)

Begallia first testified that she tried to leave their bedroom but, when Patton tried to stop her, she became hysterical and began

¹ Citations to the transcripts will be to the date of the proceeding.

yelling at him. (06/05/14 RP 104) She testified that she attacked Patton and he pushed her down. She received marks on her neck, but did not remember whether Patton tried to choke her. (06/05/14 RP 104-05) She testified that the entire incident occurred quickly and she felt light-headed, so she did not remember what happened and did not remember what she later told police about the incident. (06/05/14 RP 105)

A few days later, after a break in the trial due to Begallia's unrelated medical issue, her version of events was notably different. (06/09/14 RP 4; 06/10/14 RP 30-31) She testified that she and Patton were arguing, but also had sex just before their altercation. (06/11/14 RP 5, 9) Afterwards, as she was sitting on the bed, Patton flew at her, pushed her down, and choked her. (06/11/14 RP 4, 9) She testified that she could not breathe, and that she struggled and tried to tell Patton to stop. (06/11/14 RP 9) She testified that Patton told her he would stop if she would be quiet. (06/11/14 RP 9)

Then, according to Begallia, Patton stopped choking her and they lay together on the bed. She testified that Patton whispered to her that she was a "drama queen" and that she liked "this shit." (06/11/14 RP 10) She testified that she stood up and tried to leave and Patton tried to stop her, but she got free and left the house.

(06/11/14 RP 11-12) She walked to a nearby Texaco gas station and called the police. (06/11/14 RP 99)

Lakewood Police Officer Darrin Latimer responded to the call and found a barefoot Begallia standing by a pay phone wearing shorts and a tank top. (06/05/14 RP 64-65, 66, 67) Officer Latimer testified that Begallia appeared upset and was crying, and he noticed red marks and scratches on her neck. (06/05/14 RP 68) These marks became more visible as they talked. (06/05/14 RP 69-70)

Begallia told Officer Latimer that “when she tried to get out of bed and take the dog outside, Mr. Patton suddenly grabbed her by the throat and held her down on the bed by her throat strangling her. [She] stated she couldn’t get him to release her throat, she was struggling to breathe. She told [the Officer] it felt like five minutes had passed and she started to lose consciousness when she was finally able to push him off and run downstairs[.]” (06/05/14 RP 68-69) Begallia also told the Officer that she thought Patton was going to kill her. (06/05/14 RP 70) The Officer testified that methamphetamine can cause a person to act agitated and to exaggerate, but he did not ask Begallia whether she was under the influence of the drug. (06/05/14 RP 84-85)

The Superior Court entered a no-contact order when Patton

was charged in this case. (06/11/14 RP 13; Exh. P4) But Begallia wrote numerous letters to Patton when he was in jail awaiting trial. (06/11/14 RP 14, 17) She and Patton also spoke on the telephone several times. (06/11/14 RP 15) In those conversations, they discuss the case and Patton's defense, and allude to how Begallia might tailor her testimony to help him. (06/11/14 RP 19; Exh. P16, P17) But Begallia testified that no one, including Patton, ever told her to change her testimony or not to appear at trial. (06/11/14 RP 48)

Patton testified on his own behalf. He acknowledged that he and Begallia had been awake and taking methamphetamine for several days before the incident. (06/11/14 RP 84) Patton testified that Begallia's acts "difficult" when she ingests methamphetamine. (06/11/14 RP 81) And that morning, Begallia had been yelling and screaming at Patton, though they managed to calm down and even had sex. (06/11/14 RP 83-84)

But they began arguing again soon after they had been intimate. (06/11/14 RP 84-85) Eventually Patton got tired of the arguing and said he was going to move out. (06/11/14 RP 85) Begallia became aggressive, and started yelling and swearing and pushing Patton. (06/11/14 RP 84-86) Begallia began swinging her

fists at Patton and shoving him, so Patton grabbed Begallia by the neck only in an effort to push her off of him. (06/11/14 RP 87-88) They finally stopped tussling, and Begallia left. (06/11/14 RP 84-85) 88-89)

Patton acknowledged having telephone contact with Begallia. (06/11/14 RP 93-94) But he testified that he was not trying to alter Begallia's testimony during the conversations. Rather he knew the calls were recorded so he was trying to talk in a way that would not reveal that he was talking to Begallia and violating the no-contact order. (06/11/14 RP 92, 94-95) He wanted Begallia to tell the truth, and was not attempting to tamper with her testimony. (94-95, 108)

IV. ARGUMENT & AUTHORITIES

Although ER 801(c) generally excludes out-of-court statements offered to prove the truth of the matter asserted, ER 803(a)(2) excepts "[a] statement relating to a startling event or condition made while . . . under the stress of excitement caused by the event or condition." In this case, the State sought to present the hearsay statements made by Begallia to Officer Latimer under this "excited utterance" exception. ((06/05/14 RP 42-45) At a hearing on the matter, Officer Latimer testified that Begallia appeared to be upset and was shaking and crying when he first contacted her at the

Texaco station, and that she told him the incident had occurred about 15 minutes earlier. (06/05/14 RP 21-22, 24-25)

The trial court ruled that Begallia's statements were admissible as excited utterances, stating:

As to the excited utterance exception, I spent more than a little bit of time with the excited utterance exception in a host of different contexts over the years. While I find it's an interesting theory that something to do with substance might have caused the excitement, the issue for the excited utterance exception is not the origin of the excitement or the etiology of the excitement, it is the existence of the excitement, were they excited, were they upset. The evidence here is they complained of having just been choked, or, if you will, strangled, and you can draw that nuance later I suppose, but the point is there was a suggestion the defendant had hands around the throat of the complainant and she was pretty darned upset about it. She called 911. The matter was exacerbated by other members of the household, at least according to the complaining witness, who said, no, no, don't call 911, which one could infer at least would exacerbate the level of excitement.

I'm satisfied the totality of the circumstances do allow for the admission of that under the excited utterance exception to the hearsay rule. Spontaneity requirement is satisfied. The excitement required is satisfied. I think it has the necessary indicia of reliability and trustworthiness[.]

(06/05/14 RP 47-48) The trial court abused its discretion when it made this decision because it relied on the content of the statements alone to determine reliability, and because it ignored the requirement that the declarant be under the stress or excitement caused by the

event itself.²

The proponent of excited utterance evidence must satisfy three “closely connected requirements”: (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. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

Words alone, the content of the declarant’s statement, can establish only the third element of the excited utterance test—that the utterance relates to the event causing the declarant’s excitement. The first and second elements (that a startling event or condition occurred and that the declarant made the statement while under the stress thereof) must therefore be established by evidence extrinsic to the declarant’s bare words.

State v. Young, 160 Wn.2d 799, 809-10, 161 P.3d 967 (2007).

First, it is clear from the trial court’s oral ruling that it relied purely on the content of Begallia’s statement describing the incident when it determined that the incident occurred. The court recited no facts other than those related by Begallia that would support a conclusion that the startling event actually occurred. This was an

² A trial court’s decision to admit a hearsay statement under the excited utterance exception is reviewed for abuse of discretion. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

abuse of discretion.

Second, Patton argued below that the State had not presented sufficient proof that her excited demeanor was a result of the alleged startling event, rather than a result of her recent methamphetamine use. (06/05/14 RP 45-46) As noted above, the trial court rejected this argument, finding that the cause of the excited demeanor is irrelevant. The trial court was clearly mistaken.

The plain language of ER 803(a)(2) requires that the declarant be “under the stress of excitement **caused by the event or condition.**” (Emphasis added.) According to the advisory committee that promulgated Federal Rule of Evidence 803(2), on which Washington’s ER 803(a)(2) was modeled, the underlying theory of the rule “is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.”³

Accordingly, “the 'key determination is whether the statement was made while the declarant was still under the influence **of the event** to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or

³ 56 F.R.D. 183, ADVISORY COMMITTEE'S NOTE at 304 (1975); accord, State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995).

judgment.” State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (emphasis added) (alteration in original) (quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

The mere fact that Begallia was behaving in an excited manner is not sufficient to show that her excitement was caused by a startling event. The fact that she had been ingesting methamphetamine, which can cause a person to behave in an agitated and excitable manner,⁴ was therefore relevant to a determination of whether Begallia was under the stress and excitement of a startling event, or under the stress and excitement of an illegal drug. It was also relevant to a determination of whether Begallia’s description of events was a fabrication or an exaggeration.

The trial court failed to properly apply the rule to the facts, and failed to hold the State to its burden of establishing all three necessary conditions required for admission of an excited utterance under ER 803(a)(2).

The error was not harmless in this case because, within reasonable probabilities, it materially effected the outcome of the

⁴ Officer Latimer testified that methamphetamine can cause a person to act agitated and to exaggerate. (06/05/14 RP 84-85)

trial.⁵ The outcome of the case rested entirely on whether the jury found Begallia's version of events or Patton's version of events more credible. The hearsay statements bolstered Begallia's credibility, and also allowed the jury to hear her version a second time from a police officer. Therefore, the admission of Begallia's statements was not harmless, and Patton's convictions for second degree assault and witness tampering should be reversed.⁶

V. CONCLUSION

The trial court erred when it allowed Begallia's statements to be presented to the jury under the "excited utterance" hearsay exception without first determining whether sufficient corroborating evidence established that a "startling event" actually occurred, and by ignoring the requirement that Begallia was under the stress of excitement caused by the "startling event" when she made the statements. Accordingly, Patton's convictions for second degree assault and witness tampering should be reversed and remanded for a new trial.

⁵ The improper admission of evidence is cause for reversal if, within reasonable probabilities, the outcome of the trial would have been materially different had the error not occurred. See State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

⁶ Patton acknowledged having contact with Begallia in violation of the no-contact order (06/11/14 RP 93-94), and those convictions were not impacted by the improper admission of the hearsay statements.

DATED: January 16, 2015



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Anthony H. Patton, Jr.

CERTIFICATE OF MAILING

I certify that on 01/16/2015, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Anthony H. Patton Jr, #376089, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

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