

No. 47003-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Applegate,

Appellant.

Clark County Superior Court Cause No. 13-1-02329-6

The Honorable Judge Davis Gregerson

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 11

I. Debbie Applegate’s lengthy statement to Officer Krebs was not an excited utterance because she calmed down as she answered his questions during their interview.. 11

A. Debbie calmed down as she responded to Krebs’s questions, and he could not clarify when she made each statement. 11

B. Apart from the improperly admitted hearsay, the state presented no evidence that James tried to strangle Debbie. 15

II. The court should not have admitted Debbie Applegate’s written statement as substantive evidence because it did not qualify as a “Smith affidavit.” 16

A. Debbie’s statement lacked “minimal guarantees of truthfulness.” 17

B. Debbie was not subject to cross-examination on the content of her statement. 21

C. The court should have excluded the document because the state failed to establish the foundation for admission. 23

III. Officer Bachelder’s testimony should have been excluded where he was not qualified as an expert and his testimony was not based on personal knowledge... 24

IV. The trial court erred by ordering Mr. Applegate to pay \$2650 in legal financial obligations without inquiring into his ability to pay..... 26

CONCLUSION 29

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

Hollingsworth v. Washington Mut. Sav. Bank, 37 Wn. App. 463, 681 P.2d 845 (1984)..... 27

State v. Allen S., 98 Wn. App. 452 (1999)..... 24

State v. Blazina, --- Wn.2d ---, 344 P.3d 680 (March 12, 2015) .. 29, 30, 31

State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992) 14, 15

State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984) 15, 17

State v. Hochhalter, 131 Wn. App. 506, 128 P.3d 104 (2006)..... 16

State v. Nava, 177 Wn. App. 272, 311 P.3d 83 (2013) *review denied*, 179 Wn.2d 1019, 318 P.3d 279 (2014)..... 18

State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003)..... 19, 21, 22

State v. Olsen, 32054-5-III, 2015 WL 1809202 (Wash. Ct. App. Apr. 16, 2015)..... 17, 28

State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997) 24

State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982)... 18, 19, 20, 23, 25, 26

State v. Thach, 126 Wn. App. 297, 106 P.3d 782 (2005) 19, 20, 23, 26

Walker v. State, 121 Wn.2d 214, 848 P.2d 721 (1993)..... 27

WASHINGTON STATUTES

RCW 10.01.160 29

OTHER AUTHORITIES

ER 403 27

ER 601	26
ER 602	26, 27, 28
ER 702	26, 28
ER 801	10, 18, 22, 23, 24, 25, 26
ER 803	13, 15, 17, 18
GR 34.....	30
RAP 2.5.....	30

ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by allowing the state to introduce inadmissible hearsay evidence over James Applegate's objection.
2. The trial court erred by admitting the entirety of Debbie Applegate's hearsay statement as an excited utterance.
3. The trial court erred by admitting Debbie Applegate's written statement and yes/no answers to questions on a police department form.

ISSUE 1: A statement does not qualify as an excited utterance unless made while the declarant is under the stress of a startling event or condition. Should the court have excluded most of Debbie Applegate's statement to Officer Krebs since she calmed down as he continued to question her?

ISSUE 2: A prior inconsistent statement may not be admitted as substantive evidence unless the declarant is subject to cross-examination about the statement. Should the court have excluded Debbie Applegate's written statement where she was not subject to cross-examination regarding her statement because the prosecutor did not elicit information about its contents on direct?

4. The trial court erred by allowing Officer Bachelder to provide expert testimony over James Applegate's objection.
5. The trial court should not have admitted Bachelder's "expert" testimony without ensuring he was qualified as an expert.
6. The trial court erred by admitting Bachelder's testimony without adequate foundation.
7. The trial court erred by allowing Bachelder to relate matters about which he lacked personal knowledge.

ISSUE 3: A person who is not an expert may only testify regarding matters about which she or he has personal knowledge. Did the trial court err by admitting Officer Bachelder's "expert" testimony regarding the signs of strangulation without ensuring he was qualified as an expert?

8. The court erred by ordering Mr. Applegate to pay \$2650 in legal financial obligations absent adequate inquiry into whether he had the means to do so.
9. The court should have considered Mr. Applegate's receipt of food stamps when imposing legal financial obligations.
10. The court should have considered Mr. Applegate's financial obligations, including support of his mother, when assessing legal financial obligations.
11. The court erred by entering Finding of Fact No. 2.5 finding that Mr. Applegate had the ability to pay legal financial obligations.

ISSUE 4: A sentencing court may not assess legal financial obligations (LFOs) without making a particularized inquiry into the offender's ability to pay. Did the court err by ordering \$2650 in LFOs without making adequate inquiry into his financial circumstances where Mr. Applegate supports others and receives food stamps?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. James Applegate called 911 to report that his sister, Debbie Applegate, was out of control.

James Applegate lived with his sister, Debbie, and their elderly mother, Katherine.¹ RP 139. James helped take care of his mother. RP 139, 338. Katherine described James as her “right arm.” RP 143.

The night James called 911, Debbie returned home after being gone for three days. RP 124, 342. She “had a bloody nose,” and was all “bulled” up and angry about something when she arrived. RP 342.

Debbie came downstairs to James’s basement bedroom where he was playing poker on his computer and smoking a cigarette. RP 342-343. She was yelling and hitting him. RP 343. She “busted [him] in the nose” while shouting about her friend Gloria. RP 17.

James followed Debbie out of his bedroom, wondering what was going on with her. RP 345. He stood at Debbie’s bedroom doorway and saw Gloria inside her room. RP 345. Debbie physically jumped on James for smoking in her room. RP 345-346. After they both got up, James put out his cigarette and went upstairs. RP 346. Debbie followed him up the stairs, hitting him. RP 346.

¹ Throughout the brief, first names are used to provide clarity. No disrespect is intended.

James called 911 because Debbie was out of control and he needed help calming her down. RP 17; 274, 311, 361.

2. Officer Krebs found Debbie Applegate inside the house, ranting about a cigarette butt and scattered CDs on her floor.

When Vancouver Police Officer David Krebs came to the Applegate residence, he thought he was responding to a physical disturbance between a brother and sister, and that the brother had been assaulted. RP 24, 275. Krebs got to the home and found James Applegate standing outside. RP 9. Officer Krebs did not feel threatened by James. RP 10.

Because he wanted to be removed from the situation, James held his hands up and told Officer Krebs, "I did it, take me in" He also told Krebs "that it was the honorable thing to do because he was being a real man for taking the blame." RP 10, 197, 280, 348. Officer Krebs told James that he needed to talk to everyone involved before taking him to jail, and asked him to take a seat outside. RP 11, 167.

Krebs did not see James' injuries when he first arrived because it was "fairly dark" outside. RP 279-280. Later, he was able to see that James had red marks and abrasions on the forehead and left side of his face. RP 312. James's nose was red and swollen, and Krebs noted "the same around his mouth." RP 312.

When Krebs went inside the Applegate house, he found Debbie Applegate. She was “extremely agitated,” “moving around the house quickly,” “ranting,” “hysterical,” and “wandering all around.” RP 11-12. Debbie was pacing, talking continuously, shouting about stuff, and upset. RP 283.

The first thing Debbie said to Officer Krebs when he entered the Applegate home was, “Let me show you what he did.” RP 12. Debbie said she was upset about her CDs and her brother smoking. RP 25; 284. She took Krebs down to her bedroom and pointed out the scattered CDs and a cigarette butt on the floor. RP 12, 169.

Officer Krebs took photos of the debris. RP 284, 286. He later testified that he “had to work on getting her to calm down and focus on my questions and what direction my investigation was going to go.” RP 185.

Krebs noted that Debbie calmed down during the course of their interview. RP 39-40, 47. He spent some time with her in the basement, then went back upstairs to talk to James, and then returned to talk to Debbie some more. He may have done this several times. RP 15-16, 30, 171, 180-181. At some point during the course of Krebs’s questioning, Debbie claimed that James had tried to strangle her. RP 182. Krebs was not certain when in the conversation she said this. RP 171, 182.

Officer Krebs took photos of Debbie to document her injuries. RP 189. The photos do not clearly show any bruising. Ex. 2, 4, 7; RP 305. The redness on Debbie's clavicle was the same color as the redness in her left cheek. Ex. 2, 7, 22; RP 306. She did not show any signs of strangulation five days later when another officer spoke with her. RP 236-240.

3. At trial, Debbie Applegate was unable to remember the events of the evening because of her heavy drinking.

The state charged James Applegate with second-degree assault by strangulation. CP 1.

At trial, Debbie testified that she did not remember what happened because she "was drinking that night." RP 117.² By Debbie's account, she was "drunk."³ RP 124. Her memory of that night was affected—she had "cobwebs in [her] head the next day." RP 117.

Debbie did not recall James coming into her room that night. RP 117-118. She did not recall getting into an argument with her brother. She did not recall him wrestling with him on her bed, and did not remember

² Initially, Debbie testified that James did not come into her room that night. She then clarified that she didn't remember because she'd been drunk. RP 117-118.

³ Officer Krebs did not remember if he'd asked Debbie whether she'd been drinking that night. RP 291. In his report, he marked that Debbie was not "drunk or intoxicated." RP 48. When James called 911, he said he had been drinking. RP 352. Krebs reported that James was "giggling" and smiling when he interviewed him. RP 17. At trial, Officer Krebs testified that he observed no signs of intoxication for James Applegate that night. RP 197.

him trying to strangle her. RP 118. Nor did Debbie remember talking to law enforcement that night. RP 118.

Debbie was clear that she is “not at all” afraid of her brother. RP 129.

4. Katherine Applegate remembered that Debbie was upset that night because Debbie and James “had words.”

Katherine Applegate, James’ and Debbie’s mother, was home the night of James’s 911 call. She remembered that Debbie was “crying and screaming,” but she didn’t think much of it, because “that’s Debbie.” RP 146.

Had Katherine seen injuries on Debbie’s face, she testified that she would have been “raising Cain;” however she had no recollection of Debbie being injured. RP 140. She thought Debbie was upset because James and Debbie had “had words.” RP 162.⁴

Katherine did remember the officer “having a talk with Debbie” and “having her sign stuff.” RP 145. Katherine stated that she remembered the officer asking Debbie about “the choking,” and Debbie asking the officer how to spell it. RP 156.

5. The trial court admitted the entirety of Debbie’s statement to Krebs as an excited utterance.

⁴ Debbie acknowledged to Officer Krebs that her mother, Katherine, had not believed her complaints about her brother that night. RP 299.

Officer Krebs spoke to Debbie for about 20 minutes and obtained her “full statement.” RP 12, 15, 33. He had to get her to focus and tell him what happened. RP 12. Initially,⁵ he testified that he spoke with her for quite a while in the basement before going upstairs to talk to James. RP 15.

Later, he acknowledged that he may have gone up and down the stairs more than once.⁶ He admitted that he couldn’t separate the statements Debbie had made during his initial contact from those she made later. RP 15, 16, 30, 171, 180-181. At some point during the conversation, Debbie accused James of attempting to strangle her. RP 182. Krebs could not say for certain when she made this accusation. RP 182.

The court expressed “concerns about the foundational basis” for admitting Debbie’s statement as an excited utterance. RP 184. Despite this, the judge allowed defense counsel a standing objection and admitted the entire statement. RP 184.

⁵ At a pretrial hearing.

⁶ At the pretrial hearing, the judge believed that Krebs spoke with Debbie in the basement, then went upstairs and arrested James, then returned and spoke to Debbie again. RP 177. Based on this initial understanding, the court had admitted as excited utterances those statements Debbie made before the officer arrested James. The court made clear that any statements Debbie made “afterward in the detailed interview,” after “significant time had passed,” were inadmissible hearsay. RP 64. However, at trial, Krebs clarified that he did not re-interview Debbie after arresting James. RP 173-174.

Officer Krebs then relayed to the jury the entirety of Debbie's detailed statement. According to Krebs, Debbie said that James pushed her backwards. He said she said that they fell onto the bed, and rolled on to the other side of the bed. RP 187-188. He testified that Debbie said James held her down and started striking her head and face, and then grabbed her around the neck with both hands and strangled her for approximately 20 seconds. RP 188.

6. Debbie Applegate's written statement was admitted as substantive evidence and was read by the prosecution at closing.

The state sought to introduce a statement purportedly written by Debbie on the night of the incident. Ex. 28. When asked whether she remembered signing that document, Debbie said she did not. RP 128. When asked if she had "heard that word 'perjury' before?" Debbie responded "no." RP 128. Debbie acknowledged that her signature appeared at the bottom of the written statement. Ex 28; RP 119. Debbie also acknowledged that her handwriting appeared on the document. RP 120.

Debbie testified that she was "scattle-brained or whatever. I don't know what I wrote." RP 129. She didn't know if she'd written the document or not. In fact, she did not remember even seeing a police officer that night. RP 129.

Neither party asked Debbie about the contents of her written statement. RP 115-137. At the time she was excused, the prosecutor had not sought admission of the document. RP 137. It was not until later that the prosecutor argued that the written statement should be admitted as substantive evidence under ER 801(d)(1)(i). RP 211-231, 249-260.

Over defense objection, the trial court admitted Debbie's statement as substantive evidence. RP 260. The prosecution read from the first page of the statement at closing. RP 414.

7. The court allowed Officer Bachelder to provide expert testimony on strangulation symptoms without finding that he qualified as an expert.

Over objection, the trial court permitted Officer Matthew Bachelder to provide testimony about the "signs of strangulation." RP 234-235. Defense counsel objected that Bachelder could not be qualified as an expert. The prosecution did not seek to have Officer Bachelder qualified as an expert. Nonetheless, the court allowed him to testify about the general signs of strangulation. RP 233-235.

Bachelder told the jury that signs of strangulation included "red marks along the neck... petechiae, which is dotting of the eyes... blood

inside the eyes and also on the eyelids around the eyes, raspy voice...breathing issues...involuntary urination.” RP 235.⁷

Bechelder’s testimony echoed that of Officer Krebs, who had already testified that Debbie told him she “almost lost consciousness,” “saw spots,” and “involuntarily urinated herself.” RP 188.

Krebs later admitted these were his words, not Debbie’s. RP 293-299.

8. At sentencing, the court balanced the family’s sincere wish for James to come home with the fact that something “went haywire” and “someone got hurt.”

The jury convicted James Applegate of assault in the second degree, domestic violence. CP 40; RP 463. At sentencing, Debbie wrote a letter to the judge stating that her “stomach has been in knots since all this happened.” Victim Statement, Supp. CP. She wrote that she “misses her brother and wants him to come home.” Finally, she wrote that if she were in court, she would ask to be able to hug her brother. Victim Statement, Supp. CP.

⁷ This general testimony about strangulation bore no connection to Officer Bachelder’s personal observations of Debbie. He was assigned to do a follow-up investigation and visited with Debbie five days after James’ arrest to take photos. RP 236-237. Debbie did not complain of soreness on her neck at that time. RP 238. Officer Bachelder observed bruising only on Debbie’s left chin and her eyelid. RP 237-238. He observed no redness or marks on Debbie’s neck. RP 239.

James' mother, Katherine, wrote that James "works and provides for his family," and she "wants her son home to help her with her health needs." Victim Statement, Supp. CP.

The court noted that this "is clearly kind of a family dynamic with some dysfunction there that probably has several reasons." RP 476. The judge acknowledged Katherine and Debbie's sincerity and noted that the court wasn't usually in the "business of breaking up families." RP 476-477. The judge also observed that this appeared to be an isolated incident. RP 477.

The court didn't doubt Debbie's sincerity and wishes, noting that, "it's a difficult situation, because, again, this is a family situation...something went haywire there and somebody got hurt." The court noted that it could have been a "true catastrophe." RP 477. The court sentenced James to serve four and a half months. RP 479.

The judge also imposed \$2650 in Legal Financial Obligations. CP 44-45; RP 484.

James Applegate filed this timely appeal. CP 52.

ARGUMENT

I. DEBBIE APPLGATE’S LENGTHY STATEMENT TO OFFICER KREBS WAS NOT AN EXCITED UTTERANCE BECAUSE SHE CALMED DOWN AS SHE ANSWERED HIS QUESTIONS DURING THEIR INTERVIEW.

A. Debbie calmed down as she responded to Krebs’s questions, and he could not clarify when she made each statement.

Officer Krebs questioned Debbie for 20 minutes. RP 15, 33. He went upstairs to talk to James and then returned to the basement to talk to Debbie some more. RP 30, 180-181.

She calmed down over the course of their conversation. RP 39. Krebs was not certain when in the conversation Debbie accused her brother of trying to strangle her. RP 182. He did know that she only talked about her injuries after he directed the conversation toward that topic. RP 185-186.

Because of these problems, the trial court acknowledged “concerns about the foundational basis” for admitting her statements. RP 184. Under these circumstances, Debbie’s statements to Krebs should not have been admitted as excited utterances.⁸

1. Debbie’s lengthy statement was not spontaneous.

⁸ ER 803(a)(2) allows a court to admit hearsay statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

The excited utterance exception applies if a statement is “‘a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,’ rather than an expression based on reflection or self-interest.” *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, at 195). A hearsay statement qualifies as an excited utterance if “made while the declarant was under the stress of excitement caused by the event or condition.” *Id.*

Spontaneity is the key to this element. *Id.* at 688. Debbie’s statement to Krebs fails this requirement. The statement as a whole was not made while she was under the stress of the excitement caused by the event.

Initially, Debbie spoke only about the CDs and her brother’s smoking.⁹ RP 12, 25, 284. She didn’t mention an assault and said nothing about her injuries until Krebs’s questions led her in that direction. RP 185-186.

When a declarant responds to questioning, doubts are raised “as to whether the statement was truly a spontaneous and trustworthy response to a startling external event.” *Chapin*, 118 Wn.2d at 690. Most, if not all of Debbie’s statement came as a response to Krebs’s questions.

⁹ Her very first statement to Krebs may have been admissible as an excited utterance. However, she did not mention an assault during this first statement. RP 12-13, 25-26.

Debbie did not blurt out the ways that James had harmed her when Officer Krebs arrived. Instead, she immediately wanted to show Krebs the cigarette butt and strewn CDs. She was angry with her brother, not stressed or excited about an assault.

2. Debbie's angry and upset feelings did not justify admission of her entire statement.

Anger does not establish reliability. While anger can contribute to the excited state required by ER 803(a)(2), "the excited utterance exception should not be confused with some sort of 'angry utterance' exception." *Chapin*, 118 Wn.2d at 689.

Nor can admission of her entire statement be premised on the court's conclusion that she was "tearful," "crying," or "upset."¹⁰ *State v. Dixon*, 37 Wn. App. 867, 873-74, 684 P.2d 725 (1984). If being "upset" were sufficient, then "virtually any statement given by a crime victim within a few hours of the crime would be admissible." *Id.* Crime victims "remain upset or frightened for many hours, and even days and months, following the experience." *Id.*

Here, as in *Dixon*, Debbie's statement was a "narrative of a past, completed affair." *Id.* at 729. Even if based on angry and upset feelings, it did not qualify as an excited utterance. *Id.*; *Chapin*, 118 Wn.2d at 689.

¹⁰ RP 183-184.

3. Debbie's statement may have been the result of fabrication, intervening actions, or the exercise of choice or judgment.

A statement is not an excited utterance if it could be the result of fabrication, intervening actions, or the exercise of choice or judgment.

State v. Hochhalter, 131 Wn. App. 506, 514, 128 P.3d 104 (2006).

Debbie's statement fails this requirement as well.

Krebs remarked that Debbie wanted him to "know the pain that she had gone through." RP 48. He was able to "focus her" through his questions. He noted that she "calmed down" after first ranting about the CDs and cigarette butt. RP 29-30, 40, 47, 185.

All of these factors show that Debbie's statement was not prompted by shock or excitement. Instead, as Debbie calmed down, she exercised choice and judgment. Her statement was not an excited utterance. *Id.*

4. Krebs could not recall Debbie's words; instead, he reframed her statement using his own words.

In his testimony, Krebs used his own words, not Debbie's. He acknowledged that he could not quote Debbie for the jury. RP 293-298.

Instead of relaying Debbie's actual words, Officer Krebs said things like "involuntary urination," "strangulation," and, "losing consciousness." RP 293-298. This testimony effectively put words into Debbie's mouth and went directly to the ultimate issue at trial.

ER 803(a)(2) must be interpreted in a “restrictive manner,” to maintain the focus on “the basic elements which distinguish excited utterances from other hearsay statements.” *Dixon*, 37 Wn. App. at 873. This preserves “the real purpose of the exception and prevent[s] its application where the factors guaranteeing trustworthiness are not present.” *Id.*

Here, the required degree of trustworthiness is entirely absent. *Id.* Krebs could not even convey Debbie’s own words. Her “statement,” as relayed by him, was not an excited utterance. It should have been excluded. *Id.*

B. Apart from the improperly admitted hearsay, the state presented no evidence that James tried to strangle Debbie.

An evidentiary error requires reversal if, within reasonable probabilities, it affects the outcome of the trial. *State v. Olsen*, 32054-5-III, 2015 WL 1809202, at *6 (Wash. Ct. App. Apr. 16, 2015). In this case, the court’s error affected the outcome, because the state had no evidence besides hearsay.

The state could not prove that James attempted to strangle Debbie without the improperly admitted hearsay. Debbie had no memory of events, due to her intoxication. Her mother did not witness an assault and

did not see any injuries. Krebs's photos demonstrated very little, and did not prove that James assaulted Debbie.

There is a reasonable probability that the court's errors affected the outcome of trial. *Id.* James Applegate's conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE COURT SHOULD NOT HAVE ADMITTED DEBBIE APPLGATE'S WRITTEN STATEMENT AS SUBSTANTIVE EVIDENCE BECAUSE IT DID NOT QUALIFY AS A "SMITH AFFIDAVIT."

A sworn statement to police may not be admitted as substantive evidence under ER 801(d)(1)(i) unless it is reliable. *State v. Smith*, 97 Wn.2d 856, 858, 651 P.2d 207 (1982). Here, Debbie's "Smith affidavit" was not even minimally reliable. It should not have been admitted as substantive evidence.¹¹ *Id.*; ER 801(d)(1)(i).

Debbie did not remember writing or signing the document. RP 128-129. She said that if she did write it, she did not know what she wrote, given her "scattled" state of mind. RP 129. Although the document purports to be signed under penalty of perjury, Krebs did not witness Debbie's signature. Instead, the name "J. Beach" appears in the document. Ex 28.

¹¹ Furthermore, Debbie's complete lack of recollection precluded admission under ER 803(a)(5). See *State v. Nava*, 177 Wn. App. 272, 290, 311 P.3d 83 (2013) *review denied*, 179 Wn.2d 1019, 318 P.3d 279 (2014).

Officer Beach himself did not sign as a witness to Debbie's signature. Instead, Krebs printed Beach's name. RP 219. Beach did not testify, and the court heard nothing from him regarding the circumstances under which Debbie purportedly completed the document and signed it. RP 256.

The prosecutor did not ask Debbie about the contents of the document. RP 118-120. Nor did the state seek to admit the document while Debbie was available for cross-examination. Instead, it was admitted the day after she'd testified and been excused. RP 268.

Under these circumstances, Debbie's written statement did not qualify for admission as a *Smith* affidavit.¹² *State v. Thach*, 126 Wn. App. 297, 308, 106 P.3d 782 (2005) (citing *Smith*, 97 Wn.2d at 861–63). The prosecution failed to establish at least two essential factors.¹³

A. Debbie's statement lacked "minimal guarantees of truthfulness."

A *Smith* affidavit may not be admitted absent "minimal guarantees of truthfulness." *Thach*, 126 Wn. App. at 308. Debbie's statement suffered from several problems disqualifying it under *Smith*.

¹² The state bears the burden of proving reliability. *State v. Nieto*, 119 Wn. App. 157, 161, 79 P.3d 473 (2003).

¹³ Debbie's intoxicated state, her lack of memory, and her mother's testimony that an officer prompted her to include information about "choking", also cast doubt on a third factor, the voluntariness of the statement. *See Thach*, 126 Wn. App. at 308.

First, Debbie's lack of memory and her intoxication at the time she signed the statement suggest that it was unreliable. When she testified, she didn't remember writing or signing the statement, and had no recollection of even talking to Krebs or any other officer. RP 127-128. As she put it, she was "scattle-brained" that evening. RP 129.

Second, it is not clear she understood that the statement was to be made under penalty of perjury. The state did not provide the testimony of Officer Beach, whose name appears as the person who witnessed Debbie's signature. Nor did Beach actually sign the form as a witness; instead, Krebs wrote Beach's name on the form.¹⁴

This procedure contrasts sharply with that followed in *Smith*. In that case, the declarant signed multiple pages of her document and re-read it in the presence of a notary. The notary formally administered an oath and "subscribed the jurat and seal" to the statement. *Smith*, 97 Wn.2d at 858, 862.

Third, the layout of the police department form used here precludes a finding of reliability, because it is not clear that Debbie's "oath" applied to the entire document. Her signature attests that she signed the "foregoing" under penalty of perjury; however, nothing shows

¹⁴ In addition, Debbie testified that she hadn't heard the word perjury before, and didn't show a complete understanding of the penalties that could attach to perjury. RP 128.

what she understood that to mean. Given the context, a reasonable person could interpret the word “foregoing” several different ways. *Nieto*, 119 Wn. App. at 161.

On page one of the pre-printed document, the witness is asked to “Please describe what happened.” Ex 28. This is followed by a series of seven questions, several of which require narrative answers. Other questions require the person to circle “yes” or “no” in response to a direct question. There is no language about answering under penalty of perjury anywhere on the first page. Ex 28.

The second page is split into multiple sections. One section has additional questions, again requiring narrative and yes/no answers. Ex 28.

A separate section on page two is demarcated by a bold dotted line with bold lettered heading, “Do any of the following apply [sic] the suspect now or past?” This question is followed by a list of specific abusive behaviors, with a subsequent section requiring the person to “please explain.” Ex 28.

Finally, separated by yet another bold dotted line is a short paragraph memorializing certain facts understood by the declarant.¹⁵

¹⁵ The paragraph reads as follows: “I have written, or had this statement written for me and this statement truly and accurately reflect [sic] my recollection of this incident. The police officer has explained to me I have to certify or declare, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.” Ex. 28.

Directly after this paragraph is a line indicating that Krebs was the officer “who explained this form to me.” Ex 28. Debbie’s signature comes after a *separate* sentence certifying that “*the foregoing* is true and correct.” Ex 28 (emphasis added). The document does not clarify what is meant by “the foregoing.” Ex. 28.

This format does not satisfy the “oath” requirement of ER 801(d)(1)(i). *Nieto*, 119 Wn. App. at 161. The “nature and placement of the boilerplate language does little to aver that the statement's content is true.” *Id.*, at 162.¹⁶

Here, as in *Nieto*, it is unclear what “the foregoing” refers to. It might apply only to the paragraph that directly precedes the warning and Debbie’s signature. This paragraph states that Officer Krebs explained the form to her. Ex. 28.

Even more problematic, the “penalty of perjury” language is found only on the second page. It does not appear anywhere on the first page. The word “foregoing” bears no apparent connection to the first page of the document. Ex. 28.¹⁷ A declarant might reasonably interpret the

¹⁶ In *Nieto* the declarant wrote her statement on a pre-printed police form which included similar boilerplate “penalty of perjury” language. The warning was printed “at the bottom of the form's first page and at the top of each of the remaining pages.” *Id.*, at 161-162. The *Nieto* court found this inadequate. *Id.*

¹⁷ Even if it could be argued that the “foregoing” applied to the whole document, a declarant might not understand that the oath attached to circling “yes” or “no,” or that it applied to every narrative response to the phrase “Please describe what happened.”

“foregoing” as applying to just the second page, or even just one section of the second page.

Debbie’s statement lacked the minimal guarantees of truthfulness necessary for admission of a prior inconsistent statement as substantive evidence under ER 801(d)(1)(i). *Id.* The trial court erred by admitting the statement. *Id.*

The erroneous admission prejudiced James Applegate because the state relied entirely on hearsay to prove that he tried to strangle his sister. Accordingly, his conviction must be reversed. *Id.*

B. Debbie was not subject to cross-examination on the content of her statement.

A *Smith* affidavit should not be admitted unless the declarant is subject to cross examination regarding the statement. ER 801(d)(1); *Thach*, 126 Wn. App. at 308. The *Smith* court emphasized the importance of the jury’s role in evaluating inconsistencies between trial testimony and the written statement. *Smith*, 97 Wn.2d at 862. Here, the jury was denied the chance to evaluate the inconsistencies because the prosecutor never asked Debbie about the content of her statement.¹⁸

¹⁸ Indeed, the jury didn’t hear what was in the statement until the prosecutor read it aloud during closing argument. RP 413-415.

A true opportunity to cross examine “means more than affording the defendant the opportunity to hail the witness to court for examination.” *State v. Rohrich*, 132 Wn.2d 472, 478, 939 P.2d 697 (1997) (addressing confrontation right.) Instead, the prosecution must “elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses.” *Id.*

The prosecutor did not question Debbie about the content of her written statement, and did not move for its admission until after she had been excused. While Debbie Applegate was on the witness stand, defense counsel had no incentive to question her about the content of the statement.¹⁹

Under these circumstances, Debbie was not subject to cross-examination about her written statement. *Rohrich*, 132 Wn.2d at 478. The prosecution failed to establish the foundation of ER 801(d)(1)(i). The evidence should not have been admitted. *Thach*, 126 Wn. App. at 308; *Smith*, 97 Wn.2d at 862.

¹⁹ Furthermore, because Debbie had no memory of the document, impeachment through cross-examination regarding the document would likely have been impermissible. *State v. Allen S.*, 98 Wn. App. 452 (1999).

C. The court should have excluded the document because the state failed to establish the foundation for admission.

A prior inconsistent statement is not hearsay if made “under oath” at a “trial, hearing, or other proceeding, or in a deposition.” ER 801(d)(1)(i). The *Smith* court interpreted the rule to include some sworn statements made to the police. However, such statements must still bear indicia of trustworthiness akin to that which attaches to trial testimony.

The statement here did not have the required indicia of trustworthiness. The police did not take the proper steps to ensure that Debbie understood the serious implications of writing out her statement under oath. They did nothing to impress upon her the formality that should attend a statement given under oath. Debbie’s written statement bears little resemblance to formal testimony at a trial, hearing, or deposition.

The *Smith* court was clear that not every sworn statement given to police would be admissible: “each case depends on its facts with reliability the key.” *Smith*, 97 Wn.2d at 863. Only if the formalities are observed will such statements bear any indicia of trustworthiness.

The circumstances here were informal, the oath ambiguous, and the boilerplate language shoddy. Furthermore, the state didn’t even present

the testimony of the officer (“J. Beach”) who purportedly attended Debbie while she completed and signed the statement.

Debbie’s statement did not qualify for admission as a *Smith* affidavit. The court did not properly consider the *Smith* factors. Debbie’s statement did not meet the minimal guarantees of truthfulness essential to admission under ER 801(d)(1)(i)); *Thach*, 126 Wn. App. at 308.

Other than inadmissible hearsay, the state presented no evidence to prove that James Applegate attempted to strangle his sister. His conviction must be reversed and the case remanded for a new trial. Upon retrial, the court should exclude Debbie’s written statement. *Id.*

III. OFFICER BACHELDER’S TESTIMONY SHOULD HAVE BEEN EXCLUDED WHERE HE WAS NOT QUALIFIED AS AN EXPERT AND HIS TESTIMONY WAS NOT BASED ON PERSONAL KNOWLEDGE.

When asked about the signs of strangulation, Officer Bachelder cited redness and bruising around the neck, “involuntary urination,” and “dotting of the eyes.” RP 235-236. The court permitted this over defense objection, even though the state did not seek to have Bachelder qualified as an expert. ER 702.

Since the foundation was not laid for expert testimony, Bachelder should have been limited to testifying from his personal knowledge. ER

602.²⁰ His connection to the case involved contact with Debbie five days after the arrest. However, the court did not limit his testimony to his observations from that meeting.

ER 602 bars “testimony which purports to relate facts, but which is based only on the reports of others.” *Hollingsworth v. Washington Mut. Sav. Bank*, 37 Wn. App. 463, 681 P.2d 845 (1984). Here, Bachelder’s testimony amounted to a repetition of Krebs’s repetition of Debbie’s hearsay statements. Thus Bachelder impermissibly interpreted Officer Krebs’ description of Debbie’s statements. His testimony should have been excluded. *Id.*; ER 403; ER 602.

Officer Bachelder’s personal knowledge was limited to taking pictures of Debbie five days after the incident. RP 237-238. He observed none of the “signs” he that he testified indicated strangulation.

When the state first raised the issue in this case, the defense objected that Bachelder should not be allowed to testify as an expert. The court noted the defense’s “standing objection,” but didn’t rule: “we haven’t gotten there yet.” RP 234-235.

²⁰ER 601: “a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” See also *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993) (Expert opinions lacking an adequate foundation should be excluded.).

Despite this, the state did not ask the court to find Bachelder qualified as an expert. Instead, the prosecutor went on to ask Bachelder about signs of strangulation. RP 235-236.

Under these circumstances, the court improperly allowed Bachelder to testify beyond his “personal knowledge of the matter.” ER 602; ER 702. The court should not have permitted him to testify as an “expert” over defense objection.

The error prejudiced Mr. Applegate. The trial amounted to a credibility contest between James’s account and that set forth in Debbie Applegate’s hearsay. Bachelder’s testimony on the symptoms of strangulation tended to confirm the hearsay statements.

There is a reasonable probability that the improper admission of Bachelder’s “expert” testimony influenced the outcome of the case. *Olsen*, 32054-5-III, 2015 WL 1809202, at *6. The conviction must be reversed and the case remanded for a new trial. *Id.*

IV. THE TRIAL COURT ERRED BY ORDERING MR. APPLGATE TO PAY \$2650 IN LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY.

The court found Mr. Applegate indigent at the commencement of trial and appointed a public defender. Order Appointing Attorney, Supp. CP. At that time, Mr. Applegate had been unemployed three years and received food stamp assistance. ROR Interview Sheet, Supp. CP.

At sentencing, James didn't know if he would lose his job.²¹ RP 484. The court checked on the Judgement and Sentence that “the defendant has the ability to pay the legal financial obligations imposed herein” without further inquiry. CP 42.

The court ordered him to pay a \$500 victim assessment fee; \$100 domestic violence fee; \$200 criminal filing fee; \$250 jury demand fee; \$1000 court appointed attorney fee; \$500 fine; and \$100 for DNA testing, totaling \$2650. CP 44-45.

The court erred by ordering Mr. Applegate to pay LFOs absent any indication that he had the means to do so. The legislature has mandated that “[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3); *State v. Blazina*, --- Wn.2d ---, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court from ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* The court must consider personal factors such as incarceration and the person's other debts, including restitution. *Id.*

²¹ When the court asked James whether he had a job, James replied that he had one “as of yesterday.” RP 484.

Here, the court failed to conduct any meaningful inquiry into Mr. Applegate's ability to pay LFOs. The court only considered his financial status to note the judge's conclusion that he could work in the future. Katherine Applegate stated that James supported his family, and she needed him to care for her as well as work. Victim Statement, Supp. CP. Thus the court had information that James supported dependents, but did not engage in a full inquiry regarding the receipt of food stamps, and his responsibility to care for others.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* (“[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs”).

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, --- Wn.2d ---, 344 P.3d at 683. The *Blazina* court recently chose to review the LFO-related issue raised in this case, finding that “National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” *Id.*

The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should

follow the Supreme Court's lead and consider the merits of Mr. Applegate's LFO claim even though it was not raised below.

The court erred by ordering Mr. Applegate to pay \$2650 in LFOs absent an individualized inquiry into whether he had the means to do so. *Blazina*, --- Wn.2d ---, 344 P.3d at 685. The order must be vacated and the case remanded for a new sentencing hearing. *Id*

CONCLUSION

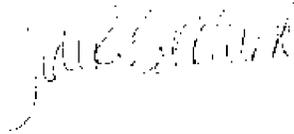
James Applegate's conviction for assault in the second degree must be reversed, and the charge remanded for a new trial. The court erred by admitting the entirety of Debbie's oral statement to Officer Krebs. The court also erred by admitting as substantive evidence her written responses on the Vancouver Police Department's witness form.

These errors were compounded by the impermissible testimony by Officer Bachelder.

If the conviction is not reversed, the case must be remanded so the sentencing court can conduct an individualized inquiry into Mr. Applegate's ability to pay the substantial LFOs in this case.

Respectfully submitted on June 3, 2015,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

James Applegate
3921 E. 18th St
Vancouver, WA 98661

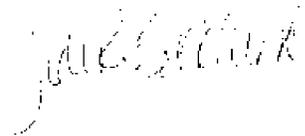
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 3, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

June 03, 2015 - 1:35 PM

Transmittal Letter

Document Uploaded: 4-470039-Appellant's Brief.pdf

Case Name: State v. James Applegate

Court of Appeals Case Number: 47003-9

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

prosecutor@clark.wa.gov