

NO. 49425-6-II

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

STATE OF WASHINGTON, RESPONDENT

v.

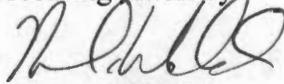
Randolph Wood, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 15-1-04065-2

Brief of Respondent

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

1. Is testimony relating to an out of court statement by a nontestifying witness hearsay when not considered by the jury for the truth of the matter asserted?
2. Has appellant demonstrated a substantial likelihood that an improper closing argument by the State affected the jury's verdict?
3. Does ER 404(b) apply to this case, given defendant's limiting instruction adopted by the court?
4. Were the out of court statements of Anna Wood testimonial for purposes of the confrontation clause?
5. Did appellant preserve a Confrontation Clause claim for appellate review?
6. Is a photograph used by a testifying investigating officer to identify a defendant moments before he committed a crime relevant and admissible evidence?
7. Is there a fruit of the hearsay rule prohibiting admission of a photograph resulting from hearsay?
8. Did appellant preserve an objection to a photograph of the admitted into evidence?
9. Did appellant timely object to the second 911 call?
10. Did the trial court properly deny appellant's motion for a mistrial?
11. Was any error in the submission of an expert witness instruction to the jury harmless?
12. Was the prosecutor's rebuttal argument objectionable?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Appellant was charged with attempting to elude a pursuing police vehicle. CP 1-2. After a pretrial evidentiary hearing, a jury trial was held and respondent was found guilty. VRP 3. Respondent timely appeals.

2. THE ER 104 HEARING

An ER 104 hearing was held prior to trial. 2 VRP 28-180. In the course of that hearing, the trial court took the testimony of Sgt. Johnson. The initial call came in at 9:21 p.m. on September 25. 2 VRP 154-55. The caller was a child who told the dispatcher that her mom's boyfriend had just attacked her mom and her mother was hurt. 2 VRP 155. Sgt. Johnson was dispatched to the caller's location at 9:24 p.m. *Id.* He arrived at 4729 124th Street Court Southwest in Lakewood at 9:30 p.m. *Id.* When he arrived, he immediately saw Anna Hall. 2 VRP 157. It was obvious to Sgt. Johnson that Ms. Hall had been in some kind of fight. *Id.* "When I walked in, I immediately saw she had some red marks on her forehead, and she also had some injuries to her mouth. It looked like it was swollen, and her upper lip was cut." *Id.* Ms. Hall's demeanor was "[u]pset. She was crying. Her skin was flushed. It was obvious that she had just been in

some sort of fight or some sort of disturbance.” 2 VRP 158.¹ She identified Randolph Wood as the person who had assaulted her. *Id.* She said that Randolph Wood was driving a dark older Infinity automobile. 2 VRP 169. The information about the vehicle went out at 9:38 p.m.² *Id.*

Right at the beginning of the conversation, Ms. Hall told the investigating officers that there had been an assault, that the assailant was Randolph Wood,³ sometime within eighteen minutes of the initial call they learned that Mr. Wood was driving a dark, older Infinity automobile,⁴ and sometime within twenty-four minutes of the initial call they first learned that the Infinity automobile was green in color.⁵

The information from Ms. Hall was informally acquired:

Q. What did [Ms. Hall] volunteer?

A. All of her information, his information, her daughter's information, and her history with Mr. Wood.

Q. So was it in response to a question? Or did she just start talking?

A. Probably a little bit of both. The names and the birthdates would be from my specific questioning. All the

¹ “But she just looked like she had been in a fight. She looked like she had been in an assault.” 2 VRP 175.

² This exact time apparently relates to when the information was rebroadcast out via CAD. 2 VRP 169-70.

³ 2 VRP 176.

⁴ 2 VRP 169.

⁵ Ms. Hall provided the color information within six minutes later. *See* Plaintiff's exhibit 2, page 2, system time 21:44:27 and 3 VRP 232. This was confirmed at 9:45 by apparent reference to Department of Licensing records. *See* Plaintiff's exhibit 2, page 2, system time 21:45:50.

other information could have been a combination of just her volunteering that and me asking specific questions.

2 VRP 176. The conversation took place while Ms. Hall was seated in a chair in her apartment. 2 VRP 164.

Shortly after Sgt. Johnson arrived, two other officers left to make an area check. 2 VRP 163. They were unable to locate Mr. Wood. 2 VRP 160-61.

The emergency caused by Mr. Wood's behavior was ongoing. During the initial call to 911, the victim Ms. Hall told her daughter to come inside and lock the door "cause he was coming back."⁶ Furthermore, a couple hours after the initial call, police received another call indicating that Mr. Wood had returned to the apartment. 2 VRP 161. Ms. Hall said that it sounded like he was in the apartment breaking things. *Id.*

The trial court ruled that Ms. Hall's statements saying that Mr. Wood had been at the residence and that Mr. Wood had assaulted her were admissible as excited utterances. The court further ruled that those statements were nontestimonial within the meaning of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). 3 VRP 195-96. The court alternatively ruled that the statements were

⁶ Plaintiff's exhibit 2, page 1, system time 21:22:00 – 21:22:04 of the CAD report entered as an exhibit during the evidentiary hearing.

admissible for explaining the reason why the officers were looking for Mr. Wood. 3 VRP 196. Further clarification as to the admissibility of specific statements was not sought by either party at this time. 3 VRP 196-201.

Defense counsel also unsuccessfully argued that a photograph used by Sgt. Johnson to help him identify Mr. Wood should not be admitted because that photograph was obtained by Sgt. Johnson as the result of Ms. Hall's hearsay statement. 3 VRP 199.

3. FACTS INTRODUCED AT TRIAL

Sgt. Michael Johnson was a Lakewood Police Officer on September 25, 2015. 3 VRP 221-23. On that day, at about 9:20 p.m. he responded to the Carlisle Court Apartments. 3 VRP 225. There he contacted Anna Hall. 3 VRP 229 -230. After his conversation with Ms. Hall he developed probable cause to arrest Randolph Wood for a misdemeanor. 3 VRP 229-230. Using a database available on his computer, Sgt. Johnson was able to bring up a photograph of Mr. Wood on a color monitor. 3 VRP 230. That photograph was admitted, without objection,⁷ 3 VRP 230-31. Sgt. Johnson testified, without objection, that

⁷ The trial court asked respondent's counsel "Any objection?" Respondent's counsel replied: "No, your honor." 3 VRP 231.

Ms. Hall told him that Mr. Wood had left in a green 90s Infinity vehicle.

3 VRP 232.

Sgt. Johnson left the scene a little bit after 10:00 p.m. that night. 3 VRP 232. At about 12:50 a.m., he was called back to the scene. 3 VRP 232-33. Exhibit 2 was a map used in aid of Sgt. Johnson's testimony. 3 VRP 226. Sgt. Johnson saw a car make a quick turn into the LaDobe apartment complex. 3 VRP 238. He drove into the complex to find the vehicle. *Id.* He saw a green Infinity car parked in the middle of a square parking lot, not in the middle of a stall. 3 VRP 239. The Infinity's lights were off and there was one person inside. 3 VRP 241. That person was "kind of slunched down in his seat, like he was hiding." 3 VRP 241. As Sgt. Johnson's headlights hit the vehicle, it started to move. 3 VRP 241. At that time Sgt. Johnson got a good view of the driver and recognized him as Randolph Wood, the person in the computer database picture he had pulled up earlier that night, and the defendant seated in the courtroom. 3 VRP 241-42.

Sgt. Johnson tried to position his vehicle in front of the Infinity, to block him in, but the Infinity evaded him. 3 VRP 243, 244. It passed his car, driver's side to driver's side, at a distance of about two to three feet. 3 VRP 243.

Sgt. Johnson saw the Infinity make a left-hand turn onto Pacific Highway. 3 VRP 245. By then other patrol cars, with lights and sirens on, had arrived in the area. *Id.*

Sgt. Johnson documented the defendant driving at 90 miles per hour in a 35 mile per hour zone. 3 VRP 247-48. It was a clear night with light traffic. 3 VRP 248. The vehicle never stopped or attempted to stop. *Id.* It travelled down Pacific Highway until it made a right turn at the t-intersection with Gravelly Lake Drive, and then a right turn onto Nyanza. 3 VRP 248-49. Sgt. Johnson stated that he never saw the defendant slow down on Nyanza. 3 VRP 250. The defendant crashed at the t-intersection of Nyanza and Gravelly Lake. 3 VRP 250. The defendant successfully fled the scene, despite containment efforts and an extensive dog track attempt. 3 VRP 251.

Sgt. Brown saw the Infinity pull onto 47th St. 3 VRP 292-93. In the course of making that turn, the Infinity lost control, went off into a gravel lot, then came to a stop. 3 VRP 293. Sgt. Brown turned around and got behind the driver with all of his lights activated and his siren activated. 3 VRP 294. The Infinity was moving on 47th at well over the 25 or 35 mile per hour speed limit. 3 VRP 295. Sgt. Brown was in the lead position among the officers involved in the pursuit. 3 VRP 296. Sgt. Brown testified that he paced the Infinity down Pacific Highway (a 35

mph zone) and Nyanza (a 35 mph zone) at 90 miles per hour. 3 VRP 297, 298-99. The vehicle went straight through the t-intersection, into the woods. 3 VRP 301. “There was a big puff of smoke about the time – dust about the same time I saw the break [sic] lights go, and that was the vehicle colliding with the curb. And then the vehicle disappeared into the woods, and everything went black.” 3 VRP 304. The vehicle had crashed into a tree. *Id.* Both airbags had deployed. *Id.* The investigating officers searched the area “for quite a long time,” but could not find the defendant. 3 VRP 306.

C. ARGUMENT.

1. THE LIMITING INSTRUCTION

a. The Limiting Instruction

The following limiting jury instruction was agreed to by the State and defendant and became the law of the case:⁸

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of witness testimony regarding statements made by Anna Hall and may be considered by you only for the purpose of understanding why law enforcement officers were called to the Carlyle Court Apartments, and were provided the name Randolph Wood. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

⁸ The limiting instruction was presented by the defense (CP 33, 36). The instruction was agreed upon. 3 VRP 322-325.

CP 44. *State v. Robinson*, 92 Wn.2d 357, 359, 597 P.2d 892, 893 (1979); *State v. Reid*, 74 Wash.2d 250, 444 P.2d 155 (1968); *State v. Queen*, 73 Wash.2d 706, 440 P.2d 461 (1968). This Court can only depart from the law expressed in this instruction when application of the law expressed in this instruction would be a “manifest injustice.” *Greene v. Rothschild*, 68 Wash.2d 1, 414 P.2d 1013 (1966). Respondent cannot identify a manifest injustice in this case.

The agreed upon limiting instruction only permitted—and authorized—argument relating to (1) why law enforcement officers were called to the Carlyle Court Apartments, and (2) why law enforcement officers were provided the name of Mr. Wood.

b. The Limiting Instruction and the Closing Argument

In closing argument, the prosecuting attorney contravened the jury instruction when it made the following argument:

You can also reasonably infer from the evidence that the defendant knew that the police were behind him to arrest him on a misdemeanor charge, and that was the reason that he was trying to flee from the police.

5 VRP 350. This argument contravened the limiting instruction because the State asked the jury to use Ms. Wood’s statement to infer motive to flee. The trial court, when presented with this proper objection was presented with two choices: (a) sustain the objection and address any

presented remedies, or (b) overrule the objection and modify the limiting instruction to the jury.⁹ The trial judge overruled the objection, but was not asked to modify the jury instruction, and did not modify the instruction *sua sponte*.

Given that the objection was appropriate, the limiting instruction was the law of the case,¹⁰ and the prosecutor's argument contravened the limiting instruction, the necessary conclusion is that trial court erroneously overruled defendant's objection. Respondent asserts that this error was harmless, and that argument is presented later in this brief.

c. The Limiting Instruction and Its Preclusive Effect.

The agreed upon limiting instruction precludes the State from arguing on appeal that any of Ms. Hall's statements can be justified as excited utterances.

Conversely, the agreed upon limiting instruction—presented by defendant—precludes defendant from arguing on appeal that there was anything wrong with the jury considering Ms. Hall's out of court statements “for the purpose of understanding why law enforcement

⁹ The law of the case doctrine was not applicable at this point in time because the “case” was still in progress, the case had not yet gone to the jury, and the trial court retained the power to modify the jury instructions. CrR 6.15(f).

¹⁰ The State asserts that it was the law of the case because although the trial court possessed the authority to modify the limiting instruction, it did not do so.

officers were called to the Carlyle Court Apartments, and were provided the name Randolph Wood.” CP 44. Respondent does not assert that this preclusive effect extends to issues surrounding the admissibility of particular evidence, but it fully applies to evidence properly admitted, including evidence admitted without objection. The doctrine of invited error compels this result. *See generally State v. Momah*, 167 Wn.2d 140, 153-54, 217 P.3d 321 (2009).

d. The Limiting Instruction, The Confrontation Clause, and Two Statements by Ms. Hall

The limiting instruction, which the jury is presumed to follow,¹¹ had a prophylactic effect on two out-of-court statements made by Ms. Hall which were admitted into evidence and argued to the jury: (1) Ms. Hall’s (sanitized) statement to the investigating officer that defendant had committed a misdemeanor (3 VRP 229-230) (hereinafter the “misdemeanor” statement), and (2) Ms. Hall’s later statement that defendant had returned to the scene (3 VRP 232-33) (the “he’s returned” statements). The limiting instruction plainly instructs the jury not to consider that evidence for the truth of the matter asserted, and removed that evidence from the scope of the Confrontation Clause. *In re Theders*, 130 Wn. App. 422, 432-33, 123 P.3d 489 (2005); *In re Hacheny*, 169 Wn.

¹¹ “Juries are presumed to follow the court’s instructions, absent evidence to the contrary.” *State v. Arredondo*, 188 Wn.2d 244, 264, 394 P.3d 348, 359 (2017).

App. 1, 10 (at fn. 9), 288 P.3d 619 (2012); *Crawford v. Washington*, 541 U.S. 36, 59 (at fn. 9), 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citing *Tennessee v. Street*, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)). Alternative Confrontation Clause arguments relating to the admissibility of these statements are presented below.

e. The Limiting Instruction, The Confrontation Clause, and the Third Statement by Ms. Hall.

A third out of court statement was also presented at trial: Ms. Hall's statement that the defendant had left the scene in a green Infinity automobile (3 VRP 232) (the "green Infinity" statement). That statement was clearly used for the truth of the matter asserted--to prove that the defendant left in the green Infinity, the car that Sgt. Johnson was looking for and discovered. 5 VRP 356-57. However, the admission of that statement, and all reference to it, entered the record below without objection. Furthermore, that statement is not challenged in Appellant's Brief. Defendant presents no suggestion that the jury did not follow the limiting instruction that he proposed.¹² Any objection to that statement, or objection to argument relative to it, has been waived.¹³

¹² Absent evidence to the contrary, juries are presumed to follow the jury instructions. *State v. Arredondo*, 188 Wn.2d at 264.

¹³ Respondent presents an alternative Confrontation Clause argument relative to the "green Infinity" statement below.

2. ALTERNATIVELY, DEFENDANT'S CLAIM OF ERROR PREDICATED UPON THE CONFRONTATION CLAUSE IS NOT WELL TAKEN.

Ms. Hall did not testify at trial. 3 VRP. Sgt. Johnson testified to three out of court statements that Ms. Hall made during the course of his investigation: (1) that Ms. Hall told him that defendant had committed a misdemeanor (3 VRP 229-230) (the "misdemeanor" statements); (2) that the defendant had left the scene in a green Infinity automobile (3 VRP 232) (the "green Infinity" statements); and (3) that the defendant had returned to the scene (3 VRP 232-33) (the "he's returned" statements).

- a. Defendant has waived any claim of Confrontation Clause error based on the "green Infinity" statement.

Prior to trial, defendant objected to all of Ms. Hall's statements.

CP 14-18; 2 VRP 28-180. The trial court ruled as follows

Thank you very much. The Court is going to allow for limited purpose some of these statements that have been made by the law enforcement officer -- let me make sure I have his -- Michael Johnson.

The Court's finding that at the time it wasn't -- *some of the statements* that were made were an excited utterance.

Officer Johnson, who's had nine years experience, came upon -- responded to the call, found Ms. Hall was very upset, was crying, her face was flushed. He inquired of her and, you know, found out that it was a Mr. Wood that had been there and had assaulted her.

So, as a result of that, they had -- even though we're not getting into all of the details about what transpired during

the course of additional questioning of Ms. Hall, that information is going to be allowed in, and the Court is finding that it is not barred by Crawford as being testimonial.

It is also provided for -- and it's consistent with *State v. Moses* for the non-hearsay purpose as to why the law enforcement officers were looking for the defendant, Mr. Wood. So for those purposes and those reasons, those statements will be allowed to come in.

2 VRP 195-96.

It is clear, at this point, that the Court had made a confrontation clause ruling on the “misdemeanor” statements. That error was preserved for appeal. However the Court did not rule one way or the other with regard to the Confrontation Clause’s applicability to the “green Infinity” statement and the “he’s returned” statement. Accordingly, it was incumbent upon the defendant to timely object to the admissibility of the “green Infinity” statement in order to preserve his Confrontation Clause objection.¹⁴

At trial, Sgt. Johnson testified that Ms. Hall had told him that the defendant had left the scene in a green Infinity automobile. 3 VRP 232. This testimony was admitted without objection.¹⁵ *Id.* That statement is not addressed in Appellant’s Brief.

¹⁴ The State is not making the waiver argument with respect to the “he’s returned” statement, because—unlike the “green Infinity” statement, it is not clear that the defendant waived that argument.

¹⁵ The “green Infinity” statement was also mentioned in the State’s opening statement without objection. 3 VRP 203-04.

Defendant waived his confrontation clause objection to the “green Infinity” and “he’s back” statements by failing to make a timely objection at trial.

Accordingly, a trial court cannot reasonably be required to sua sponte raise a confrontation clause objection where defense counsel has determined that no such objection should be interposed or that cross-examination is unnecessary. Such a requirement would impose an impermissible burden on the attorney-client relationship protected by the Sixth Amendment. Because the failure to raise a confrontation clause objection, if error, must be defense counsel's error alone, it is appropriate that the burden of exercising the right to confrontation is placed squarely upon the defendant.

State v. O’Cain, 169 Wn. App. 228, 245, 279 P.3d 926, 934 (2012).

- b. Alternatively, the admission of each of Ms. Hall’s statements satisfied the confrontation clause.

“Testimonial” excited utterances of a nontestifying witness are barred by the Confrontation Clause unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. *State v. Ohlson*, 162 Wn.2d 1, 10, 168 P.3d 1273 (2007) (citing *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). Nontestimonial excited utterances of a nontestifying witness are not barred by the Confrontation Clause. *State v. Ohlson*, 162 Wn.2d at 10-11.

A conversation can contain both testimonial and nontestimonial statements. *State v. Koslowski*, 166 Wn.2d 409, 419, 209 P.3d 479 (2009) (citing *Davis*, 547 U.S. at 828). “[A] conversation which begins as an interrogation to determine the need for emergency assistance” can “evolve into testimonial statements.” *Michigan v. Bryant*, 562 U.S. 344, 365, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (citing *Davis*, 547 U.S. at 828). Trial courts are tasked with determining when a transition from testimonial to nontestimonial occurs and excluding those portions of a statement that have become testimonial. *Bryant*, 562 U.S. at 365-66.

Determining whether or not a statement is testimonial for purposes of the Confrontation Clause requires an objective examination of the interrogation’s “context.” *Bryant*, 566 U.S. at 365. The ultimate issue is whether the “primary purpose” of the interrogation is to “establish or prove past events potentially relevant to later criminal prosecution,” *Bryant*, 566 U.S. at 366 (citing *Davis*, 562 U.S. at 826).

In a domestic violence case, the court should focus “on the threat to the victims and assessed the ongoing emergency from the perspective of whether there was a continuing threat to *them*.” *Bryant*, 566 U.S. at 363.

The [*Davis*] Court adopted four factors that help to determine whether the primary purpose of police interrogation is to enable police assistance to meet an ongoing emergency or to establish or prove past events: (1) whether the speaker is speaking of events as they are

actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation.

State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (citing *Davis*, 562 U.S. at 827.

- i. The statements of Ms. Hall were contemporaneous or near contemporaneous.

The “misdemeanor” statement was near contemporaneous.

Investigating officers in this case arrived quickly.¹⁶ Right at the beginning of the conversation, Ms. Hall told them that defendant assaulted her. 2 VRP 176.

The “green Infinity” statement was also near contemporaneous. The call came out at 9:21 p.m., Sgt. Johnson arrived at 9:30 p.m., and the information was out to dispatch by 9:38 p.m. 2 VRP 154-55, 169.

Ms. Hall’s “he’s returned” statement that defendant had returned to the apartment was a contemporaneous statement about what was happening as she was talking to the 911 operator. 2 VRP 161.

¹⁶ The call came in at 9:21 p.m., and Sgt. Johnson arrived at 9:30 p.m. 2 VRP 154-55, 169.

- ii. A reasonable listener would have recognized that Ms. Hall was facing an ongoing emergency.

An emergency presented itself from the first 911 telephone call when Ms. Hall's daughter called to report that her mom's boyfriend had just attacked her mother and her mother was hurt. 2 VRP 155. These facts were corroborated when Sgt. Johnson arrived. 2 VRP 155-161. Ms. Hall's reluctance to prosecute—with its fear component—became apparent later in the initial contact:

Q. How did her demeanor change over time, if at all?

A. It went from a little bit reluctant to fill out the handwritten statement, which I initially asked her to complete as I sat in my car; during the time which I thought she would have been filling out, she stopped. She just was standing inside or sitting inside the apartment. I went in and asked her if she had changed her mind, and she just -- she basically said yes. She started talking about his family, talking about him and what they would potentially do if she was to cooperate with my investigation. So she went from being a little bit cooperative to just not wanting to be involved.

2 VRP 160. That reluctance to prosecute did not dim the nature of the emergency, however. Two hours later Ms. Hall reported that defendant had returned to her apartment (and was apparently breaking things).¹⁷ Throughout this second emergency, fear and a need for immediate

¹⁷ Plaintiff's exhibit 2, page 1, system time 21:22:00 – 21:22:04 of the CAD report; 2 VRP 161.

protection overbore her expressed reluctance to play a role in the prosecution of defendant.

- iii. The nature of the interrogation, in relevant part, was directed toward the resolution of an emergency.

As noted above, Ms. Hall was not particularly eager for prosecution, but she had been beaten and she both needed and sought protection. The “who did it” was established at the beginning of the conversation. 2 VRP 169-70. That information was necessary to seek and find the assailant. The color and make of the car the assailant was driving was developed just a few minutes later and was necessary for the same purpose. Plaintiff’s exhibit 2, pages 1-2. 2 VRP 169-70. The “he’s returned” statement was not the product of interrogation at all.

The officers first arriving at the scene had to “determine the need for emergency assistance.” *Bryant*, 562 U.S. at 365. Their primary purpose was not, at that time, to establish or prove past events potentially relevant to later criminal prosecution. Their purpose was to determine whether an assault happened and to get the information needed to protect

the victim from future assault.¹⁸ One of the first things they needed to do was figure out who did what.

At the same time, Ms. Hall remained quite concerned that the defendant might come back and assault her again. Ms. Hall's fear was evident from the very beginning. During her daughter's 911 call, she called her back inside and told her to lock the door because she was afraid of defendant's return.¹⁹ Later on, she called to report that the defendant had returned again to the scene. 2 VRP 161.

In this instance determining the reason for Ms. Hall's present fear required inquiring into the basis for that fear "[I]t is not inconsistent to speak of past events in conjunction with an ongoing emergency and, in appropriate circumstances, considering all of the factors the Court identified, the fact that some statements are made with regard to recent past events does not cast them in testimonial stone." *Koslowski*, 166 Wn.2d at 422 n.8.

¹⁸ The risk of future attack was real. During the initial phone call, the victim was afraid that defendant was coming back. Plaintiff's Exhibit 2, page 1, system time 21:22:00 – 21:22:04 of the CAD report entered as an exhibit during the evidentiary hearing. Defendant returned to the apartment a couple of hours later that night and was apparently breaking things. 2 VRP 161.

¹⁹ Plaintiff's exhibit 2, page 1, system time 21:22:00 – 21:22:04 of the CAD report.

- iv. The interrogation of Ms. Hall was informal.

Ms. Hall was interrogated immediately after the assault in her apartment, seated in a chair. 2 VRP 164. The interrogation was informal:

Q. What did [Ms. Hall] volunteer?

A. All of her information, his information, her daughter's information, and her history with Mr. Wood.

Q. So was it in response to a question? Or did she just start talking?

A. Probably a little bit of both. The names and the birthdates would be from my specific questioning. All the other information could have been a combination of just her volunteering that and me asking specific questions.

2 VRP 176.

The “he’s returned” statement was not the product of police interrogation. Ms. Hall called the police. 2 VRP 161.

- c. The out of court statements of Ms. Hall admitted into evidence did not offend the Confrontation Clause

Taking all the factors into consideration, the trial court properly found that “misdemeanor” statement did not offend the Confrontation Clause. The record establishes also that the “green Infinity” and “he’s returned” statements, also did not offend the Confrontation Clause.

3. DEFENDANT'S EVIDENTIARY ARGUMENTS ARE NOT WELL FOUNDED.

- a. Defendant waived any claimed evidentiary objections to the "he's returned statement."

The "he's returned" statement was referenced in the State's opening statement without objection. 3 VRP 204.

Officers then were called back to the scene in the early morning hours -- I think it was after midnight, maybe just before 1:00 in the morning, on September 26th. And Officer Johnson again responded.

Ms. Hall had called to indicate that the defendant had returned. So officers respond. And as they were responding to the area, they learned that he had again left the -- the defendant left the area.

3 VRP 204.

After defense counsel concluded her opening statement she sought a mistrial. 3 VRP 216-17. That motion was denied. 3 VRP 218.

Defendant then objected, citing hearsay as basis of the objection. 3 VRP 220. Defendant also argued "that just goes beyond what we talked about, what we agreed what the Court ruled." The State expressed its intention:

It had been the State's intent just simply to admit evidence that they got a call at whatever time it was, 12:50 in the morning, that Randolph Wood had returned; this was the timing of the call, they responded to it, and that was it.

3 VRP 220. The trial court stated: "The Court's going to allow that as it is background information." 3 VRP 220.

No final ruling on defendant's hearsay objection was made at this time. The trial court, when it made its ruling, had no way of knowing how the State proposed to present the challenged evidence. For all that was known to the trial court at that time, the State could use the same CAD evidence used in the pretrial motion²⁰ to cover the second layer of the hearsay problem and rely upon Ms. Hall's statement as an ER 803(a)(1) present sense impression to cover the first layer—or something else entirely. A final hearsay ruling was simply not possible at that time, under those circumstances. This is apparent from the trial court's ruling: ““The Court's going to allow that as it is background information.” 3 VRP 220. “Background information” is not an exception to the hearsay rule and was non-responsive to defendant's objection. No final hearsay ruling was made in response to defendant's objection. Defendant in this instance was obligated to wait and see how the State proposed to present its evidence before he could object to the presentation.

Ms. Hall's telephone call to police dispatch informing them that defendant had returned to her location was related at trial by Sgt. Johnson. 3 VRP 235. The prosecution completed the direct examination of the witness without objection. 3 VRP 232-255. Defendant conducted a

²⁰ See Plaintiff's Exhibits 1 and 2 admitted in the pretrial hearing.

substantial amount of cross-examination²¹ and declined an invitation for a break where an objection could have been made.²² When the lunch break came, defendant made a sort-of objection, but asked for no relief. 3 VRP 271-73. The court voiced its concern at the untimely objection. 3 VRP 272-73.

So I do appreciate your objection now. It's -- there's nothing the Court can do about it at this point unless there's something that you can tell me that the Court should be doing about it. But it's happened already.

3 VRP 273. Defendant agreed: "But you are right that the ship moved -- the ship sailed and moved on. But I appreciate that." *Id.*

Defense counsel then questioned Sgt. Johnson about the very same statements that she had earlier sought to exclude:

Q. Hello again, Officer. This morning, when you were answering questions for the State, I think the language was used by you, received a second phone call in response to being sent back to Carlisle Court. Was it a telephone call that you received that sent you back? Or was that radio communication?

A. Radio communication.

Q. When you made reference to things that Anna Hall said -- with respect to going back in the early morning hours to the area of the apartment complex, when you said "Anna said," you didn't have a conversation with her before you went through the LaDobe parking lot; did you?

²¹ 3 VRP 255-270.

²² 3 VRP 268.

- A. That's correct.
- Q. That's correct that you didn't?
- A. Correct. I did not have a conversation with her prior to driving through the apartment complex parking lot.
- Q. And so when you say that "Anna said," you're relying on information that you received from dispatch.
- A. Correct.

3 VRP 276-77.

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.

(internal quotation marks, braces, and citations omitted) *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615, 623 (1995).

Defendant waived his hearsay objection to the "he's returned" statement by failing to present a timely hearsay objection at trial. *State v. Smith*, 155 Wn.2d 496, 501-02, 120 P.3d 559 (2005). "Hearsay evidence admitted without objection may be considered by the trier of fact or the appellate court for its probative value." *In re Marshall*, 46 Wn. App. 339, 343, 731 P.2d 5 (1986); *Harter v. King County*, 11 Wash.2d 583, 598,

119 P.2d 919 (1941); *State v. Whisler*, 61 Wn. App. 126, 139, 810 P.2d 540 (1991). This is something the trial court could have dealt with had defendant made a timely objection.

b. The “misdemeanor” statement was relevant and admissible for a non-hearsay purpose.

Sgt. Johnson’s first identification of defendant just before the eluding commenced was not a few seconds’ chance encounter with an unexpected face. 3 VRP 241-42. It was the result of a particular search for a particular person, with the aid of a photograph of that person. *Id.* The State, with the beyond a reasonable doubt burden, sought to make that search plausible to the jury. Providing the jury with a logical reason why Sgt. Johnson was out looking for the defendant with the aid of a photograph tended to make it more likely that Sgt. Johnson actually was out there looking for the defendant with the aid of a photograph. Admission of the “misdemeanor” statement was relevant.

The “misdemeanor” statement was also relevant for a non hearsay purpose. It proved, per defendant’s limiting instruction, “why law enforcement officers . . . were provided the name Randolph Wood.”²³ That, in turn, enabled the jury to understand why the officers used Randolph Wood’s photograph to find and identify him.

²³ CP 44.

The potential prejudicial impact of the “misdemeanor” testimony was slight to begin with and non-existent after defendant’s limiting instruction was provided to the jury.²⁴

However, the State did misuse the “misdemeanor” statement, and a careful analysis of potential prejudice from that misuse is necessary. Argument regarding prejudice is addressed in the following section.

4. THE STATE’S MISUSE OF THE “MISDEMEANOR” STATEMENT DID NOT PREJUDICE THE DEFENDANT.

We know from the ER 104 hearing that there was a reason why the officers were called to Ms. Wood’s residence, and also why they were provided the name Randolph Wood: Ms. Wood said she was assaulted by Mr. Wood. 2 VRP 158. This was sanitized down at trial to Ms. Wood giving the officers probable cause to arrest Mr. Wood for an unspecified “misdemeanor.” 3 VRP 229-30.

The State, in closing argument, made the following statement:

You can also reasonably infer from the evidence that the defendant knew that the police were behind him to arrest him on a misdemeanor charge, and that was the reason that he was trying to flee from the police.

²⁴ The jury was presumed to follow that instruction. *Arredondo, supra*. Contrary to defendant’s second assignment of error, ER 404(b) does not apply in this case because Ms. Hall’s statements were not introduced for the truth of the matter asserted—they were only introduced to explain why the officers were called to the scene and were given defendant’s name. The limiting instruction proposed by defendant establishes this. CP 44. This isn’t much of a substantive argument, because the potential for unfair prejudice must still be addressed. ER 403.

5 VRP 350. This argument contravened the limiting instruction because Ms. Wood's statements were used to infer defendant's motive to flee.²⁵ It was improper argument.

A defendant alleging prosecutorial misconduct must show both improper conduct and prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). In this case, defendant has established improper conduct, but defendant has failed to show prejudicial effect. To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury's verdict. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 481–82, 965 P.2d 593 (1998). In determining whether a prosecutor's remarks require a new trial, this court must view them in the context of the total argument, the issues in the case, the evidence addressed in argument, and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994).

In this case, the State improperly used Ms. Hall's statements only in the context of its effort to demonstrate "intent to elude." 5 VRP 349. The improper inference was used only to argue "the reason that [defendant] was trying to flee from the police." 5 VRP 350. This argument directly pertained to the element requiring the State to prove that

²⁵ The trial court overruled the objection (5 VRP 350), but the instruction was the law of the case.

“that the defendant willfully failed or refused to immediately bring the vehicle to a stop.” CP 47.

The evidence that defendant willfully failed or refused to immediately bring the vehicle to a stop in this case was overwhelming, and unchallenged.²⁶ It was established by the 90 mph chase and a (transiently) successful getaway. 3 VRP 297, 298-99; 3 VRP 306. It was further buttressed by pre-eluding evasiveness: (a) dodging Sgt. Johnson in the parking lot (3 VRP 243-44); (b) speeding very fast down 47th Street (3 VRP 295); and (c) running off the road when confronted with the t-intersection at 47th (3 VRP 292-93). Evidence tending to show why the defendant fled was merely cumulative.

Contrary to defendant’s argument, the State did not argue that “the reason that [defendant] was trying to flee from the police²⁷” or “why [defendant] was trying to flee²⁸” related somehow to the identity of the eluding driver. Appellant’s Brief at 24-25; 5 VRP 338-60 (State’s Closing Argument). Defendant argues that the State attempted to prove identity with the challenged statement because “Mr. Wood had a reason to flee the

²⁶ Defendant’s closing argument commenced with the following statement: Someone crashed a car in the woods in Lakewood on September 26th early in the morning after being chased by multiple police cars. The State has proven that. That’s what the evidence shows. What the State has not proven and what the evidence doesn’t show is who was driving that car.

²⁷ 5 VRP 350.

²⁸ *Id.*

police; therefore the fact that the eluding vehicle was fleeing is circumstantial evidence that Mr. Wood was driving.” Appellant’s Brief at 24-25. First: The State did not make that argument.²⁹ See 5 VRP 338-60. Second: The inference is logical, but extremely attenuated, given the facts of this case.³⁰ Third: The State, perhaps recognizing its mistake, explicitly asked the jury to follow the limiting instruction, in no uncertain terms. 5 VRP 359-60.

The State’s evidentiary misuse of the “misdemeanor” statement did not give rise to a substantial likelihood that the misuse affected the jury verdict.³¹

5. THE DEFENDANT’S PHOTOGRAPH WAS PROPERLY INTRODUCED INTO EVIDENCE.

a. Admission of the photograph was proper

In this case, Sgt. Johnson identified the defendant twice: Once, at the scene, when he compared the picture of the person from the computer database with the man in the green Infinity automobile, and again in court.

²⁹ Toward the beginning of its closing argument, the State noted that identity was the “core issue” in the case. 5 VRP 343-44. However, the State specifically stated that it would defer addressing that issue until after presenting some of the issues that were “a little easier to address.” 5 VRP 344. At 5 VRP 350, the State made its impermissible motive argument. Only at 5 VRP 352, did the State commence discussing identity evidence. At VRP 356, the State referred to Ms. Hall’s statements, but only in a manner compliant with the limiting instruction. CP 44

³⁰ Reason to flee doesn’t do much to distinguish defendant’s identity from the remainder of the motoring public out and about on the night of September 25, 2015.

³¹ Defendant, without any support from the record, has expanded “misdemeanor,” into “domestic violence allegation.” Appellant’s Brief at 21.

3 VRP 241-42. Both identifications are relevant. Both identifications were admitted into evidence without objection. 3 VRP 241-42.

Defendant argued, *in limine*, that the photograph used by Sgt. Johnson to make his first identification of defendant ought to have been suppressed because it was the result of a hearsay statement. 3 VRP 199. The trial court properly rejected this argument. There is no recognized “fruit of the hearsay” or “fruit of the inadmissible hearsay” doctrine.³²

Sgt. Johnson testified that he used a photograph of Mr. Wood from a database to identify the defendant as he saw him driving on September 25, 2015. 3 VRP 241-42. That was sufficient foundation for admissibility of the photograph of defendant. ER 401. Evidence of *why* he retrieved the photograph provides further context, but was not required to establish the evidentiary foundation of the photograph.

b. Defendant’s objection to the database photograph was either waived or abandoned.

At trial, the judge asked defendant whether defendant had any objection to the admission of the database photograph. 3 VRP 231. Defense counsel stated: “No, your honor.” 3 VRP 230-31. This exchange establishes two things: (1) the trial court had not made a final evidentiary ruling on admissibility of the photograph because it remained

³² The law encourages law enforcement to take advantage of hearsay when investigating criminal cases. *See State v. Chenoweth*, 160 Wn.2d 454, 465, 158 P.3d 595, 601 (2007).

open to hearing objections; and (2) defense counsel advised the court that defendant had no objections.

Either defendant waived his *in limine* objection³³ by failing to renew it³⁴ or defendant abandoned the objection by telling the trial court he had no objection to the admission of the photograph.

6. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PROVIDING AN “EXPERT WITNESS” JURY INSTRUCTION.

“[R]eview of jury instructions is guided by the familiar principle jury instructions are sufficient if they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” (internal quotation omitted) *Cox v. Spangler*, 141 Wn. 2d 431, 442, 5 P.3d 1265, 1271 (2000), opinion corrected, 22 P.3d 791 (2001). A trial court’s choice of jury instructions will not be disturbed on review except upon a clear showing of abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

Defendant timely objected to Jury Instruction 11 on the basis that no expert testimony was permitted in the case. 3 VRP 323. No expert

³³ 3 VRP 199.

³⁴ *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615, 623 (1995).

opinion testimony was presented in this case. Some lay opinion testimony was presented.³⁵ Jury Instruction 11 stated:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

CP 51 (WPIC 6.51).

Jury Instruction 11 is a cautionary instruction which does not include the phrase "expert witness." Its terms carefully address both the expert and non-expert alike, and make it very clear that the jury alone decides what weight, if any, to give the witness' testimony. *State v. Ortiz*, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992) (holding that jury decides the weight of the evidence). The entire focus of Jury Instruction 11 is to guard against the over probative effect of expert testimony. While it can be error to refuse to give an expert witness instruction when an expert

³⁵ Q. Is there anything about Nyanza, maybe because -- due to incline or anything -- that would prevent a driver from noticing emergency vehicles behind him?

A. No. There are some slight curves in the road to where, if you're far enough behind, you wouldn't be able to see a car; but for the most part, it is a long, level, straight road.

3 VRP 250. Also, there was opinion testimony as to speed. 3 VRP 247-48, 297, 298-99.

witness testifies, giving the instruction out of a surfeit of caution is harmless.

Defense counsel was able to make effective use of Jury Instruction 11 in closing argument:

Now, Instruction No. 11 is the expert witness instruction. And that, I suspect, you'll probably read again and do with what you will. But it's important to note that neither of the officers were qualified as experts and neither of the officers have any special training, education, or experience that causes them to have better vision, better memory, better recall, than any other -- any other person. They did not -- the officers' opinion isn't relevant. The facts, what he has to provide in his testimony, is what is relevant to this case. So, again, any type of certainty or conviction doesn't make -- doesn't make it any more valid.

5 VRP 377. Jury Instruction 11 is not a basis for error in this case.

7. THE STATE'S "TRAINED OBSERVER" ARGUMENT WAS FAIR REBUTTAL, AND PRESENTED NO LIKELIHOOD OF UNFAIR PREJUDICE.

Defense counsel challenged Sgt. Johnson's identification testimony in closing argument:

Especially since he had looked at this photograph over the past month and likely sometime in the last nine months, it's impossible for him -- it's just unreasonable for him to really be that sure. And so it makes one think that he's overstating this confidence because a guy you saw for a few seconds ten months ago when you've seen hundreds of people during the course of your job, a number of whom would fit the general description that is contained in this case, it's just not reasonable, and it -- it makes the identification weaker rather than stronger.

5 VRP 375-76. The State responded in rebuttal:

Ms. Bjork stated that the officers are not expert witnesses, they don't have extra training that make them have super memory; but what they are is trained observers, and that matters. These are not lay witnesses where they glance at a car going by and they're in an emotional state; maybe they were just a victim of a crime. Those things can play a role in it. They're trained observers.

5 VRP 386. This was fair rebuttal. Sgt. Johnson had nine years experience as a law enforcement officer, had been to the basic law enforcement academy, and had 700 hours with a training officer where he got "exposure to the type of calls we go [sic] on a day-to-day basis." 3

VRP 222. It is commonly known that police officers observe as part of their job—it is what happened in this case. Based on this limited factual predicate, Sgt. Johnson could be classified (albeit somewhat weakly) as a "trained observer." However in the context of the argument presented, "trained observers" was used to distinguish the mindset of the detached police observer from an emotionally engaged observer. Perhaps the State could have better used the words "disinterested," or "experienced," to make the same point, but the sense and sting of the argument would have been the same.

Defendant never objected to this argument at trial. 5 VRP 386-89. “Failure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. Brown*, 132 Wn.2d 529, 561, 940 Wn.2d 546 (1997). The State’s argument was neither flagrant nor ill-intentioned—and defendant does not even argue that it was. Appellant’s Brief at 32-33.³⁶ A curative instruction to the jury could have clarified any potential for misunderstanding. If this court finds that the argument constituted prosecutorial error, any such error was harmless.

8. DEFENDANT’S MOTION FOR A MISTRIAL
WAS NOT WELL TAKEN.

Defendant made a motion for a mistrial before any evidence was presented in the case: “I have to ask for a mistrial because that’s several layers of hearsay, and the jury’s heard it.” 3 VRP 217. This objection was not well taken because an opening statement is always multiple layers of hearsay, is not evidence, and is not subject to a hearsay objection.

³⁶ Appellant expressly claims prosecutorial misconduct (Assignment of Error 121, Appellant’s Brief at 2) but does not address the appropriate legal standard.

D. CONCLUSION.

Admission of Ms. Hall's out of court "misdemeanor" statement did not offend the Confrontation Clause. The "misdemeanor" statement was relevant and admitted for a non-hearsay purpose. Its admission did not prejudice defendant. The State misused that statement to infer motive to flee, but that misuse did not result in reversible error.

Admission of Ms. Hall's out of court "green Infinity" statement was never objected to, has not been referenced on appeal, and was neutralized by the limiting instruction. Any error predicated upon that statement has been waived. Alternatively, the Confrontation Clause did not bar admission of that statement, and defendant waived a Confrontation Clause objection.

Admission of Ms. Hall's "he's returned" statement was never timely objected to, or any prior objection was waived. The Confrontation Clause did not bar admission of that statement.

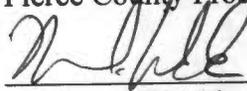
The photograph argument lacks merit, the "expert witness" instruction did not result in prejudice, and the State's rebuttal argument was fair.

Defendant did not receive a perfect trial, but he received a fair trial.

The judgment below should be affirmed.

DATED: July 21, 2017.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ 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.

7-21-17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 21, 2017 - 2:25 PM

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