

NO. 50133-3-II

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

STATE OF WASHINGTON, RESPONDENT

v.

PAUL DEREK GOODIN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Shelly Speir
No. 16-1-03762-5

BRIEF OF RESPONDENT

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

1. Did the trial court abuse its broad evidentiary discretion when it admitted a testifying witness' prior inconsistent statement pursuant to ER 801(d)(1)?
2. Does a verdict form erroneously submitted to the jury result in reversible error when the verdict rendered on that form is, properly, not incorporated in the judgment and sentence.

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, Paul Goodin (hereinafter defendant), timely appeals a guilty verdict.

2. Facts

a. Ms. Gardner's Testimony

Michelle Gardner testified. 2 RP 134. Ms. Gardner testified that the defendant was her ex-boyfriend. 2 RP 135. On September 20, after checking on defendant's mother, Ms. Gardner went to sleep at defendant's mother's house. 2 RP 138, 141. She woke up to defendant digging around (by her pillow) asking her for her keys. 2 RP 138-39. She asked him why, and defendant said he wanted to get his tobacco out of the car. 2

RP 139. She gave her keys to him and drifted back off to sleep. *Id.* She woke up a couple minutes later, went to the door, and saw a car (not hers) driving away. *Id.*

Ms. Gardner responded by calling defendant with her telephone and telling him: "Bring me my keys right now." 2 RP 139. Defendant hung up on Ms. Gardner. 2 RP 140. After taking two other phone calls, the content of which was not testified to, Ms. Gardner called defendant and told him: "Get your friends out of my house . . . and bring me my keys." 2 RP 140. Defendant hung up on Ms. Gardner again. 2 RP 140.

"Like two hours later," after telephone calls and "fights and arguments" on the phone" defendant returned to his mother's house. 2 RP 141. Ms. Gardner saw the defendant while she was standing on "the corner where he was walking to bring me my keys." 2 RP 141. Ms. Gardner walked to defendant's mom's house, like seven houses away, and said "I want my keys, and I want my sweatshirt. I'm leaving. I'm done with this. I have to leave." 2 RP 141-42. Ms. Gardner was expressing her desire to be done with defendant and to discontinue the relationship. 2 RP 142. This was an argument. 2 RP 143. Ms. Gardner told defendant:

"Do not close the door. Just give me my stuff. If you try to close the door, I'm going to scream." And he said, "Okay. Okay. Hold on." He handed me my keys and then he walked over by the couch, and he took off my hoodie and then laid it on the couch. He wouldn't bring it to me. So I

said, "Bring me my sweatshirt right now." And he wouldn't. So I reached over around the coffee table, I grabbed my sweatshirt, and I went to walk away. As I was walking out, he came running behind me and when I turned around, he was coming through the yard. So I hurried up. I jumped in my car. I locked all the doors and I seen that he was playing around with a pocket knife that he had.

2 RP 142-43. Ms. Gardner testified that the knife had a dark red color. 2 RP 143. She first saw the knife when she was between her car and his mother's apartment and the defendant was coming through a little grassy area—about fifteen feet away. 2 RP 144. Defendant held the knife and came at her. 2 RP 144. "He had the knife pointed at me as he was walking the whole time. He, like, was holding it like this and it was like this and he was coming at me." 2 RP 144. Ms. Gardner felt scared. 2 RP 144. When asked what she thought defendant was going to do with the knife, Ms. Gardner said: "Maybe like pop my tire at first, like pop my tire so I can't leave so I would have to talk to him. Or try to do something to my car so it wouldn't work so I'd have to talk to him." 2 RP 144. When Ms. Gardner got inside her car, defendant said "If you call the police, bitch, I will kill you and your unborn baby." 2 RP 145. At first, Ms. Gardner didn't know what he meant, but after looking at his face she became scared. 2 RP 145-46. Ms. Gardner testified that defendant told her (and that she wrote in her statement) "Bitch, I will kill you and make sure your unborn baby dies too." 2 RP 147.

When asked if she thought that the defendant was going to hurt her, Ms. Gardner responded: "I didn't know because I never seen the look." 2 RP 146. Ms. Gardner testified that she did not remember making the statement contained in Exhibit 1A: "I believe he is going to hurt or kill me and my unborn baby or have someone else do it to me." 3 RP 147.

Ms. Gardner acknowledged that she wrote a statement "after they had him arrested and he was in a cop car." 2 RP 147; 2 RP 154; Exhibit 1A. Ms. Gardner reviewed that statement about two hours prior to testifying. 2 RP 147. Ms. Gardner acknowledged her signature on the statement and the "under penalty of perjury" language above her signature. 2 RP 154. Ms. Gardner did not remember writing parts of the statement. 2 RP 147. Perhaps the best way to summarize Ms. Gardner's testimony about the accuracy of her statement is her statement: "So I don't -- I don't know. I know he would never do it, but I don't -- I don't remember how I felt that night. I was just scared and I wanted to get away." 2 RP 149. Ms. Gardner testified that the statement was made voluntarily, that it was not coerced, and that it was truthfully made. 2 RP 155. The prosecutor gave her the statement to review.¹ 2 RP 154.

¹ The record presented does not clearly demonstrate that she reread the document at this point in the trial. 2 RP 154.

b. Officer Feldman's Testimony

Tacoma Police Officer Jordan Feldman testified. 3 RP 186. On September 21, 2016 Officer Feldman was on patrol. 3 RP 189. Officer Feldman was dispatched to 8913 Forest Road No. 3 at 2:30 a.m. 3 RP 191. He arrived at 2:39 and contacted Michelle Gardner. 3 RP 192.

The first thing Officer Feldman noticed was that Ms. Gardner was "really scared." *Id.* "She was trembling, talking fast, she just looked worried. It's hard to describe somebody who looks – she just looked scared." 3 RP 193. Officer Feldman said that Ms. Gardner that defendant "essentially threatened her with a knife and said that he was going to kill her." *Id.* Officer Feldman said that Ms. Gardner described defendant's knife as "a red handled knife with a black blade." 3 RP 195.

Defendant was taken into custody at 2:57. 3 RP 196. Shortly after that he made a statement to Officer Feldman: "He essentially said that the victim was lying; that they had broken up and her calling the police was her way of punishing him." 3 RP 195-96.

Officer Feldman described the process he used to fill out the form:

Q. Describe the procedure that you go through in terms of handing that document to the victim.

A. When I do it, I give the statement to the victim or whoever's writing the statement. I explain the top part is just administrative information, like their name. There's a a [sic] little statement block and then there's all the lines. So I just explained from top to bottom how to fill out the form.

Q. Part of that form includes a block making reference to truthful statements, is that something that you direct attention to the victim or witnesses who fill out that statement?

A. Yes. Usually that's reserved for people who are being accused of some sort of crime, but it's something that we make them aware of.

Q. Do you also make aware of the people filling out the forms to read the forms and then sign?

A. Absolutely.

3 RP 197. This testimony was related to the form that Ms. Gardner filled out, Exhibit 1A. 3 RP 198.

The salient inconsistent statement in Exhibit 1A is this: "I believe he is gonna hurt or kill me and my unborn baby or have someone do it for him. I am packing up going to hide at a friends for a few days. asap."

Exhibit 1A, Page 2; Appellant's Brief at 5.

The trial court admitted Ms. Gardner's sworn statement. 3 RP 202.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN EVIDENTIARY MATTERS WHEN IT ADMITTED MS. GARDNERS PRIOR INCONSISTENT STATEMENT PURSUANT TO ER 801(d)(1).²

To determine whether a statement is admissible, the trial court considers the *Smith* factors. *State v. Nelson*, 74

² The State agrees with defendant that, within reasonable probabilities, the outcome of the trial would have been materially affected had Ms. Gardner's statement not been admitted at trial. See *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139, 1144 (1980).

Wn.App. 380, 387, 874 P.2d 170, *review denied*, 125 Wn.2d 1002, 886 P.2d 1134 (1994). Those factors are: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

State v. Thach, 126 Wn. App. 297, 308, 106 P.3d 782, 788 (2005) (citing *State v. Smith*, 97 Wn.2d 856, 863, 651 P.2d 207 (1982))³.

The inconsistent statement at issue in this case relates to Ms. Gardner's belief: "I believe he is gonna hurt or kill me and my unborn baby or have someone do it for him. I am packing up going to hide at a friends for a few days. asap." Exhibit 1A, Page 2; Appellant's Brief at 5.

- a. Ms. Gardner voluntarily made her narrative statement.

Ms. Gardner testified that she voluntarily made her narrative statement. 2 RP 155. Officer Feldman testified that it was her own statement. 3 RP 198.

³ *Smith* was expressly reaffirmed in *State v. Otton*, 185 Wn.2d 673, 374 P.3d 1108 (2016).

- b. Ms. Gardner's statement included "minimal guaranties" of trustworthiness.

Preparing and signing a statement "under penalty of perjury" constitutes "minimal guaranties of trustworthiness." *State v. Thach*, 126 Wn.App. at 308. In this case, the trial court found:

I would note that Ms. Gardner testified that she gave her statement voluntarily. [2 RP 155] She did acknowledge that she saw the box that contains the oath. [2 RP 154] She acknowledged that she signed Exhibit 1A, [2 RP 154] and she was here available for cross-examination and trial. So I do think there are minimal guarantees of truthfulness.

(citations to the record added) 3 RP 202. Officer Feldman testified that he went over the form with Ms. Gardner and that he made her aware of the "block making reference to truthful statements." 3 RP 197. Ms. Gardner testified that she saw the box containing the oath (2 RP 154) and that she signed right below that oath. 2 RP 154; Exhibit 1A. Since Ms. Gardner wrote the statement herself (2 RP 147, 154), it is clear that she can read and write. Ms. Gardner also testified under oath at trial that her statement was truthful. 2 RP 155. This evidence conflicts with Ms. Gardner's trial testimony that she did not "understand" that she was writing her statement under penalty of perjury. 2 RP 155. The trial court was obligated to resolve that conflict when the state moved to admit Ms. Gardner's statement pursuant to ER 801(d)(1). ER 104. The trial court implicitly resolved this factual conflict about "understanding" in favor of the state, as

evidenced by the trial court's stated reliance: "She did acknowledge that she saw the box that contains the oath. She acknowledged that she signed Exhibit 1A..." This case is analogous to *Thach*.

State v. Nieto, 119 Wn. App. 157, 164, 79 P.3d 473 (2003) held that under the facts presented in that case, the trial court could not "reasonably infer" that the witness "knowingly signed under the 'penalty of perjury' language." *State v. Nieto*, 119 Wn. App. at 164. This case presents no such situation. Here, the trial court—with the opportunity to observe Ms. Gardner's demeanor and manner of testimony—acted well within its broad discretion in evidentiary matters.⁴

State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003) also presented another circumstance which is not present in this case: In *Nieto*, the "under penalty of perjury" statement in the oath section of the witness' statement was ambiguous. 119 Wn.2d at 162. Such failure is fatal to ER 801(a)(1) admissibility,⁵ but is not present in this case.

In this case, like *State v. Nelson*, the statement was voluntarily made under oath. *State v. Nelson*, 74 Wn. App. 380, 388, 874 P.2d 170 (1994), 2 RP 155. However, the formality surrounding the execution of

⁴ "A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion." *Sintra, Inc. v. Seattle*, 131 Wn.2d 640, 662–63, 935 P.2d 555, 567 (1997).

⁵ *State v. Sua*, 115 Wn. App. 29, 48, 60 P.3d 1234 (2003).

the statement in this case is somewhat less than the formality surrounding the execution of the statement in *Nelson*. But this case also presents clear evidence that the level of formality at the time of execution was sufficient because Ms. Gardner—under oath and at trial (where formality is at its apex)—acknowledged the truthfulness of that statement. *State v. Nelson*, 74 Wn. App. at 388, 2 RP 155.⁶

Another indicia of reliability is the fact that Ms. Gardner's statement could have been supplementally admitted as a past recollection recorded pursuant to ER 803(a)(5).⁷ Ms. Gardner testified that she wrote her statement truthfully. 2 RP 155. Ms. Gardner wrote her statement at the scene shortly after the incident.⁸ However at trial, Ms. Gardner testified that she did not "remember how she felt that night." 2 RP 149. Ms. Gardner testified that she had reviewed her statement about two hours prior to her testimony. 2 RP 147. However that opportunity to read the statement was plainly insufficient to refresh her recollection. 2 RP 146-49. It is hard to see how a near-contemporaneous, truthfully made statement which expressed a fear that the witness could not remember at

⁶ *Nelson* also held that a RCW 9A.72.085(1) compliant sworn statement, Exhibit 1A is in this case, was an adequate sworn statement. *State v. Nelson*, 74 Wn. App. 389-90.

⁷ A past recollection recorded is only read into the record. ER 803(a)(5). Since the written statement at issue in this case was admitted into evidence, the State is not seeking to justify its admissibility on an alternative basis, just that it could have been admitted on this supplemental basis.

⁸ Ms. Gardner's statement was made when defendant was "in a cop car." 2 RP 147. Officer Feldman was dispatched at 2:33 and defendant was arrested at 2:57. 3 RP 207.

trial was “untrustworthy” for evidentiary purposes when it could also have been admitted as an ER 803(a)(5) hearsay exception.

- c. The statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause.

Officer Feldman testified to his procedure in obtaining victim statements in domestic violence cases. 3 RP 196-97. He used two forms: the DV supplemental report (3 RP 196) and the handwritten statement form (3 RP 197). He stated the reasons for proceeding in this fashion:

It's essentially the victim's -- it's one thing for me to write a report, but it's another thing to have the victim handwrite a statement in their own words and their own writing, so that's their opportunity to do that. So it's got their basic information and then a front and a back side with lines where they can just write their version of the events.

3 RP 197. The procedure applied in this case falls within the third *Smith* factor:

The third factor is whether the statement was taken as a standard procedure in one of the legally permissible methods for determining the existence of probable cause. *Smith*, 97 Wash.2d at 862, 651 P.2d 207. The *Smith* court listed those four methods as: “(1) filing of an information by the prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) filing a criminal complaint before a magistrate.” *Smith*, 97 Wash.2d at 862, 651 P.2d 207 (citations omitted) (quoting *State v. Jefferson*, 79 Wash.2d 345, 347, 485 P.2d 77 (1971)).

State v. Thach, 126 Wn. App. at 308-09.

- d. Ms. Gardner was subject to cross examination when giving the subsequent inconsistent statement.

This element is plainly met, as Ms. Gardner testified at trial. 2 RP 134-169.

2. DEFENDANT'S ARGUMENT THAT AN ENHANCEMENT VERDICT FORM SHOULD BE "STRICKEN" IS NOT WELL TAKEN.

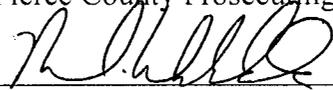
The State agrees that the pregnancy enhancement verdict form for the felony harassment charge should not have been submitted to the jury because felony harassment is not a "violent offense" within the meaning of RCW 9.94A.535(3)(c). However, that determination is not included in the judgment and sentence. CP 409-23. This case is in the same procedural posture now as it would have been had the trial court recognized the mistake in submitting that one verdict form before sentencing. Any further argument is moot, as defendant presents no argument that the trial court on remand would be bound by the earlier mistake.

D. CONCLUSION.

The *Smith* factors are amply met in this case. Ms. Gardner's statement was properly admitted pursuant to ER 801(d)(1). Defendant's complaint over verdict form submission is moot.

DATED: October 13, 2017

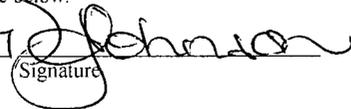
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Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efile}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.

10/13/17 
Date Signature