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NO. 52057-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JAMES MILLS, JR.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Ray Kahler, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly admitted hearsay under the excited utterance exception.

2. The court's reliance on improperly admitted hearsay to find appellant guilty requires reversal.

Issues pertaining to assignments of error

1. Appellant was charged with second degree assault and felony harassment. The trial court admitted statements made by the alleged victim to police following the incident, based on testimony that she appeared scared and upset. Where the evidence shows that she was able to and did reflect on her circumstances and take deliberative action before making these statements, did the court err in finding the statements qualified as excited utterances?

2. Where the court, following a bench trial, relied on improperly admitted hearsay in finding appellant guilty of second degree assault and felony harassment, must those convictions be reversed?

B. STATEMENT OF THE CASE

Appellant James Mills, Jr., was charged in Greys Harbor County with domestic violence second degree assault and felony harassment, as well as interfering with reporting domestic violence. CP 1-3. He waived

his right to a jury trial and proceeded to bench trial before the Honorable Ray Kahler. CP 37.

At trial, Jessica Elhardt testified that she and Mills had dated a few years earlier and in January 2018 they were considering reestablishing their relationship. 1RP<sup>1</sup> 12. On January 6, she had agreed to pick Mills up from a friend's house and give him a ride. 1RP 12. He was agitated when she arrived, and as they were driving Mills screamed at her and called her names. 1RP 13-14. Elhardt said that at one point he grabbed her throat and squeezed, and another time he used his head to push her head against the driver's side window, then he grabbed the steering wheel and tried to drive into oncoming traffic. 1RP 14-15. She was scared, and it was difficult to maintain control of the car. 1RP 16.

Elhardt said that Mills choked her for just a few seconds. 1RP 17. When the prosecutor asked if that affected her ability to breathe, she responded,

I just remember being just terrified and scared, and I actually – all the events are just – I'm so upset about being here that they're – it's all running together now that I remember. I remember it because I wouldn't be scared otherwise.

1RP 17-18. Elhardt testified that each of these actions she described happened three or four times as she was driving. 1RP 18.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—3/6/18; 2RP—3/5/18, 3/7/18, and 3/23/18.

The prosecutor then asked Elhardt if Mills had ever said he would kill her. She responded that she did not recall that, but it must have happened because she told the officer it did. 1RP 18. Even after reviewing the police report from that evening, however, she testified that she did not remember the events of the night very clearly. The most she could say was she believed she was truthful when she told the officer what happened. 1RP 18-21.

Elhardt testified that she tried to call 911 at one point, but Mills took her phone away. 1RP 23. She then pulled into a casino parking lot in an attempt to get help. 1RP 24. She saw a tribal officer as she pulled in and flagged him down, yelling to get his attention. 1RP 24-25. When she stopped her car, the officer ordered Mills to get out and sit on the curb. 1RP 25.

Before talking to the officer, Elhardt decided to move her car to the parking garage. Her car had been stolen from that casino before, and she did not want to leave it unattended for any period of time, so she took it to the top of the parking garage and hid it. 1RP 26. Then she walked back to where the officer was and eventually spoke to him. 1RP 26-27. She gave a written statement as well. 1RP 43. Then a Grey's Harbor officer was called in, and when he arrived, she repeated her story to him. 1RP 27-28.

A few days later Elhardt noticed a slight discoloration under her right eye where Mills had hit her with his head, and she took a picture of it. 1RP 29-30. She said she also had some fingerprint bruising on her neck where her jaw hurt, but she did not take a picture of that. 1RP 32-34.

Chehalis Tribal Police Officer Chance Sicilia was patrolling the casino parking lot at 3:17 a.m. when Elhardt pulled in yelling for help. 1RP 38-39. Elhardt stayed in the car while Sicilia ordered Mills out of the car and had him sit on the curb. 1RP 40. Sicilia talked to Mills for a time, trying to get his side of the story. 1RP 40. After a few minutes, though, Mills took off running. Sicilia chased after him, and eventually Mills stopped and put his hands up. 1RP 41. Sicilia handcuffed Mills and placed him in his patrol car. 1RP 41-42. He then spoke to Elhardt. 1RP 42.

Sicilia described Elhardt as pretty shaken up and really nervous. 1RP 42. When he started to testify as to what she said, defense counsel raised a hearsay objection. 1RP 42. The State argued Elhardt's statements qualified as excited utterances, and the court overruled the objection. 1RP 42.

Sicilia then related what Elhardt had told him, including that Mills had grabbed her around the throat and tried choking her, and that she was in fear for her life when she thought they were going to crash and die.

1RP 42-43. The prosecutor asked Sicilia whether Elhardt said anything about any threats made against her, and he responded, "I believe she said something along the lines of he said he wanted to kill her and he didn't care if he went to prison that night." 1RP 43. After Sicilia spoke to Elhardt, he took a written statement from her. 1RP 43. He also took some photos of a bump under her right eye and some slight redness on her neck. 1RP 44.

Once he was done interviewing Elhardt, Sicilia contacted Greys Harbor Deputy Dan Wells. 1RP 46. Wells received the call around 4:00 a.m. and arrived at the casino around 4:20 or 4:30. 1RP 48-49. Mills was handcuffed in Sicilia's car, and Elhardt was standing outside. Sicilia briefed Wells on the situation, and then Wells spoke to Elhardt. 1RP 49.

Wells testified that Elhardt was still scared when he spoke to her, but she was more confident than she appeared when she testified. 1RP 50. She had no confusion or problems telling him what had happened. 1RP 50. He said he could tell she was scared by her reaction. She would look at the car where Mills was sitting, and it was clear she had feelings for him. 1RP 50.

When the prosecutor asked Wells what Elhardt had said, defense counsel objected that the statements were hearsay and did not qualify as excited utterances because Elhardt had had time to park her car and had

already given a statement. 1RP 50-51. The court disagreed and overruled the objection, based on testimony about Elhardt's demeanor. 1RP 51.

Wells testified that Elhardt said Mills had called her names, used his head to push her head against the window, threatened to kill her, and choked her twice. 1RP 53. Wells said he asked her if she was able to breathe, and she said there was a period of about 15 seconds when she was unable to. She started to panic and then struck Mills with her elbow to get him off of her. 1RP 53-554. Wells asked her how it made her feel when Mills threatened to kill her when she was being choked, and she said she believed she was going to die. 1RP 54.

The court found Mills guilty of all three counts. CP 41-46.

C. ARGUMENT

1. THE COURT IMPROPERLY ADMITTED ELHARDT'S HEARSAY STATEMENTS AS EXCITED UTTERANCES.

Hearsay is not admissible at trial except as specifically provided by the rules of evidence, court rules, or statute. *State v. Chapin*, 118 Wn.2d 681, 685, 826 P.2d 194 (1992); ER 802. An out of court statement is admissible as an exception to the hearsay rule if it qualifies as an excited utterance: “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2).

The excited utterance exception is based on the idea that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” *Chapin*, 118 Wn.2d at 686 (internal quotation marks and citation omitted). The stressful circumstances are believed to operate to temporarily overcome the declarant’s ability to reflect and consciously fabricate. *State v. Dixon*, 37 Wn. App. 867, 872, 684 P.2d 725 (1984). The reliability and probable truthfulness of excited utterances distinguish them from ordinary hearsay. *Id.*

A trial court’s determination that a statement is admissible as an excited utterance is reviewable for abuse of discretion. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007). A trial court necessarily abuses its discretion if it misapplies the requirements of the excited utterance rule. *State v. Briscoeray*, 95 Wn. App. 167, 171-72, 974 P.2d 912 (1999).

Three closely connected requirements must be satisfied for an out of court statement to qualify as an excited utterance. *Chapin*, 118 Wn.2d at 686. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by that event or condition. And third, the statement must relate to the startling event or condition. *Id.*

The second requirement, that the statement must have been made while the declarant was under the stress of excitement caused by the startling event or condition, “is the essence of the rule.” *Chapin*, 118 Wn.2d at 687. The key to this element is spontaneity. *Id.* at 688. Ideally, the statement should be made contemporaneously with or soon after the startling event it describes. *Id.* This is because as the time between the event and the statement lengthens the opportunity for reflective thought arises and the danger of fabrication increases. *Id.* 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).

The court below indicated that it found Elhardt’s statements to Officers Sicilia and Wells to be excited utterances because they were made within a couple hours of the incident and she still appeared scared, upset, and shaking. CP 44.

It is not enough that the declarant is upset, distraught, or tearful when making the statement, however. *Dixon*, 37 Wn. App. at 873-74. If being upset were sufficient, “virtually any statement given by a crime victim within a few hours of the crime would be admissible[.]” *Id.* There must also be some indication that the statements were spontaneous reactions to the startling event. *Id.*

In *Dixon*, police responded to a call where they found the victim upset and distraught, somewhat hysterical, in tears, and having a hard time breathing. *Dixon* 37 Wn. App. at 869. Over a period of two hours the officers made efforts to calm the victim down and at the same time took a written statement about the details of the crime. *Id.* at 869-70. The trial court admitted the statement as an excited utterance, but the Court of Appeals held that the statement lacked the required spontaneity. Other than the victim being upset, nothing indicated that her ability to “reason, reflect, and recall pertinent details was in any way impeded.” *Id.* at 874.

Here, as in *Dixon*, the circumstances indicated Elhardt had recovered sufficiently that she was able to reason and reflect, even though she was still upset. Elhardt testified that before she spoke to either officer, she decided to move her car to the top level of the parking garage to hide it, because it had been stolen from that casino before, and she did not want to leave it on the road unattended. 1RP 26. Only after making that decision and acting on it did she return to the area to speak to Sicilia. 1RP 26-27. She gave a detailed statement of what happened and then a written statement. 1RP 27, 42-43. She also repeated the details to Wells when he arrived. 1RP 52-54. Wells testified that she appeared confident and had no confusion or problems telling him what had happened. 1RP 50.

Contrary to the court's conclusion, these circumstances do not demonstrate a declarant who is so overcome by the stress of the incident that she was unable to reflect on the situation. Because Elhardt was capable of reason and reflection, it is possible her statements could be the result of fabrication, intervening actions, or the exercise of choice or judgment. The statements lack the reliability necessary to qualify as excited utterances, and the court erred in admitting them.

2. THE COURT'S RELIANCE ON THE IMPROPERLY ADMITTED HEARSAY WAS PREJUDICIAL AND REQUIRES REVERSAL.

The court found Mills guilty of second degree assault by strangulation. CP 44; RCW 9A.36.021(1)(g). Strangulation means "to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe[.]" RCW 9A.04.110(26).

Although Elhardt testified Mills choked her, she did not say he obstructed her blood flow or ability to breathe. The only evidence that Mills obstructed her breathing came from Wells, who testified Elhardt said she was unable to breathe for about 15 seconds on one of the occasions he choked her. 1RP 53; CP 44. This hearsay was critical to the court's conclusion that Mills was guilty of second degree assault, and its

admission was not harmless. The assault conviction must therefore be reversed.

The court also relied on improperly admitted hearsay to find Mills guilty of felony harassment. CP 44-45. To convict Mills of that offense, the State had to prove he threatened to kill Elhardt. RCW 9A.46.020(2)(b). Elhardt did not remember Mills threatening to kill her. 1RP 18. The only evidence of a threat came from her hearsay statements to Sicilia and Wells, and the court relied on this hearsay in concluding Mills was guilty of felony harassment. 1RP 43, 53; CP 44. Improper admission of Elhardt's hearsay statements was therefore prejudicial, and the felony harassment conviction must be reversed.

D. CONCLUSION

The court relied on improperly admitted hearsay in finding Mills guilty of assault and harassment, and those convictions must be reversed.

DATED October 2, 2018.

Respectfully submitted,



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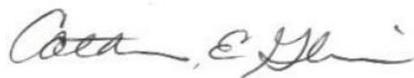
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Today I caused to be mailed copies of the Brief of Appellant in  
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Clallam Bay, WA 98326-9723

I certify under penalty of perjury of the laws of the State of Washington  
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Catherine E. Glinski  
Done in Manchester, WA  
October 2, 2018

**GLINSKI LAW FIRM PLLC**

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