FILED
Court of Appeals
Division II
State of Washington
11/29/2018 9:34 AM

NO. 52057-5-II

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

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STATE OF WASHINGTON,
Respondent,

v.

JAMES MICHAEL MILLS, JR.,
Appellant.

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

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THE HONORABLE RAY KAHLER , JUDGE

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# BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

**I. RESPONSE TO ASSIGNMENTS OF ERROR ..... 1**

**II. COUNTERSTATEMENT OF THE CASE..... 1**

**III. ARGUMENT..... 7**

**1. The Court Properly Admitted Ms. Elhardt's Hearsay Statements As Excited Utterances. ..... 7**

*(a) The Court's decision focused on whether the hearsay statements were "made under stress of the startling event or condition," and the evidence supporting that test ..... 8*

*(b) Ms. Elhardt made her statements to police sufficiently soon after the event so as to be considered made under the stress of the event ..... 10*

*(c) Ms. Elhardt's demeanor demonstrates she made her hearsay statements while under the continuing stress from the assaults..... 11*

*(d) Ms. Elhardt's statements have greater indicia of reliability than those in cases relied upon by the Appellant..... 14*

*(e) No evidence suggests that Ms. Elhardt fabricated her hearsay statements or that they were caused by intervening actions ..... 16*

**2. Even If The Hearsay Statements Were Improperly Admitted, Any Error Was Harmless As Overwhelming Evidence Supports The Conviction For Assault In The Second Degree..... 19**

**IV. CONCLUSION ..... 23**

## TABLE OF AUTHORITIES

### Cases

*State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992) ..... 10, 11, 15
*State v. Dixon*, 37 Wn. App. 867, 684 P.2d 725 (1984) ..... 14, 15
*State v. Flett*, 40 Wn. App. 277, 699 P.2d 774 (1985)..... 10, 11, 12, 16
*State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985) ..... 20
*State v. Ohlson*, 162 Wn.2d 1, 168 P.3d 1273 (2007)..... 8
*State v. Pruitt*, 1 Wn. App.2d 1033 (Div. II, Nov. 28, 2017)..... 18
*State v. Reed*, 168 Wn. App. 533, 278 P.3d 203 (2012) ..... 20
*State v. Strauss*, 119 Wn.2d 401, 832 P.2d 78 (1992) ..... 8, 10, 11
*State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970 (2004) ..... 8
*State v. Thomas*, 46 Wn. App. 280, 730 P.2d 117 (1986)..... 10, 17
*State v. Villareal-Cruz*, 174 Wn. App. 1003 (Div. I, Mar. 11, 2013)..... 12
*State v. Williamson*, 100 Wn. App. 248, 996 P.2d 1097 (2000)..... 9
*State v. Young*, 160 Wn.2d 799, 161 P.3d 967 (2007)..... 8, 11, 16, 17

### Statutes

RCW 9A.04.110..... 20
RCW 9A.08.010..... 20
RCW 9A.36.021..... 20

### Evidence Rules

ER 801 ..... 7
ER 802 ..... 8
ER 803 ..... 8

## I. RESPONSE TO ASSIGNMENTS OF ERROR

1. Did the trial court properly admit hearsay statements under the excited utterance exception when those statements came shortly after an assault occurred, about said assault, and when the declarant showed officers that she was still under the stress of the assault? Yes.

2. If the aforementioned hearsay statements were not plainly admissible, did the trial court abuse its discretion in admitting the hearsay statements? No.

3. Even if the trial court erred in admitting the hearsay statements, was the error harmless given the overwhelming other evidence of Assault in the Second Degree presented at trial? Yes.

## II. COUNTERSTATEMENT OF THE CASE

The State charged Appellant James Mills, Jr. in Grays Harbor County Superior Court with Assault in the Second Degree—Domestic Violence, Felony Harassment—Domestic Violence, and Interference with the Reporting of Domestic Violence. CP 1-3. He waived his right to a jury trial, so the parties proceeded to a bench trial before the Honorable Ray Kahler. CP 37. The Appellant objected to testimony regarding hearsay statements made by Jessica Elhardt, the victim in this case, to officers. 1RP 42, 50. However, the trial court ruled that, based on the case law cited

in the State's brief regarding what qualifies as an excited utterance as well as the "testimony about her demeanor," the statements were admissible as excited utterances. 1RP 42, 51.

Ms. Elhardt testified that the Appellant was her ex-boyfriend; they had dated from 2013 until 2014 and, at the time of the assault, they had been considering reestablishing their relationship. 1RP 11-12. On January 6, 2018, Ms. Elhardt picked up the Appellant from a friend's house in Malone, Washington, which is in Grays Harbor County. 1RP 12-13. When she arrived, the Appellant was angry that Ms. Elhardt was late. 1RP 13. Upon noting his bad mood, she immediately told him to get out of the car, but the Appellant refused and told her "You're not leaving me. You're not leaving me here." 1RP 13-14. Ms. Elhardt did not feel she had a choice, so she decided to keep driving with him in the vehicle and try to find somewhere along the way to drop him off. 1RP 14.

While Ms. Elhardt drove, the Appellant screamed at her and called her names. 1RP 14. She testified that the Appellant grabbed her throat and squeezed, grabbed the steering wheel and drove them completely into the other lane, as well as used his own head to smash the left side of her head against the driver's side window. 1RP 14-16. The Appellant committed each of these assaults at least three or four times all the way through the

drive to Rochester. 1RP 18. Ms. Elhardt could not remember if there was any oncoming traffic the first time the Appellant grabbed the steering wheel and swerved them into the oncoming traffic lane, but Ms. Elhardt recalled that at one point she saw the headlights of a car coming over a small bridge on Highway 12. 1RP 16. Ms. Elhardt testified that she was scared and that it was difficult to drive and maintain control during the assaults. 1RP 16. She remembered screaming, being afraid, and "just begging him to calm down and redirect him." 1RP 17. Ms. Elhardt stated that she was scared for both of them because, while she knew he was upset, she had never seen him upset to that degree before. 1RP 17.

Ms. Elhardt testified that the Appellant choked her for "a few seconds." 1RP 17. She was unable to answer whether the choking affected her ability to breathe because she was very upset to be in court reliving that trauma, which meant "it's all running together now that I remember." 1RP 17-18. Similarly, Ms. Elhardt was unable to answer whether the Appellant threatened to kill her, stating that "[t]o be honest, I don't recall that in my memory, but it must have happened because I told the officer that and I wrote that in my statement." 1RP 18. When asked whether looking at the statement would refresh her recollection, Ms. Elhardt replied that it might, but she was just upset and did not want to be there.

1RP 18. She testified that she did not remember the events of that night as clearly because she has "spent two months trying to forget it all." 1RP 21. However, Ms. Elhardt did testify that she took the threat of the Appellant's words and actions "very seriously because he was not in the right frame of mind that night" and her attempts to "redirect him" were unsuccessful. 1RP 23. She felt that she had no control over the situation. 1RP 23-24.

Ms. Elhardt testified that she had her phone in her hand and either dialed or began to dial 9-1-1. She also remembered telling the Appellant she was going to call the police. 1RP 21-22. The Appellant then took her phone; she did not know what had happened to it after that. 1RP 22.

Since she knew that the Lucky Eagle Casino was open late, Ms. Elhardt decided to drive there to try to get help or find someone the Appellant knew who could take him. 1RP 24. Ms. Elhardt saw Officer Chance Sicilia with Chehalis Tribal Police Department and "just drove straight at him" and yelled "help" to him, because she "knew that that was safety right there if [she] could get to him." 1RP 24-25. She testified that Officer Sicilia ordered the Appellant to sit on the curb and wait. 1RP 26. There is only one entrance in to the casino area and the road only has enough room for two cars wanting to come in and come out. 1RP 25. Ms. Elhardt was apprehensive about leaving her car unattended because her car

has been stolen at that casino before, so she parked it at the top of the parking garage. 1RP 25-26. That took roughly five to ten minutes, at which point Ms. Elhardt returned to where Officer Sicilia was and spoke to him. 1R 26-27. The Appellant took off running while she spoke to Officer Sicilia and eventually was detained in the patrol vehicle. 1RP 26.

Ms. Elhardt testified that she relayed everything that had happened since they left Malone to Officer Sicilia. 1RP 27. She also relayed everything to another officer, Deputy Dan Wells of the Grays Harbor County Sheriff's Office, who arrived later. 1RP 27-28.

Ms. Elhardt testified that she suffered a black eye that appeared a couple days later, which hurt and exhibited a reddish type discoloration under her right eye. 1RP 28. She took a photograph of the black eye two days after the assault, and sent it to the police. 1RP 29. The black eye did become a little darker than how it appears in the photograph, and lasted a little less than a week. 1RP 29-31. Ms. Elhardt also testified that the area underneath her jawline hurt, and that she noticed some yellow greenish type fingerprints along the right side of her jaw about four days after the assault. 1RP 32-33.

Officer Chance Sicilia testified that, while patrolling the parking lot of the Lucky Eagle Casino on January 6, 2018, at 3:17 a.m., he

observed a silver Honda driving quickly towards his vehicle. 1RP 39. Ms. Elhardt shouted out the window "Please help me. Please arrest this man, he just assaulted me." 1RP 39. Officer Sicilia spoke to the Appellant first and later noticed a strong odor of intoxicants coming off his breath. 1RP 39, 40. Ms. Elhardt returned and spoke with Officer Sicilia. 1RP 26. While Officer Sicilia spoke with her, the Appellant tried to run, and Officer Sicilia detained him in his patrol vehicle. 1RP 41-42.

When Officer Sicilia spoke to Ms. Elhardt, he observed that she "was pretty shaken up" and "really nervous." 1RP 42. Officer Sicilia observed her "physically shaking." 1RP 43. He testified that Ms. Elhardt told him what had happened, including that she was in imminent fear of her life and believed that, because the Appellant had been jerking the steering wheel of her car while they were going fifty to sixty miles per hour, they were going to crash and die. 1RP 42-43. Officer Sicilia also testified that Ms. Elhardt stated that the Appellant told her he wanted to kill her and that he did not care if he went to prison that night. 1RP 43. He took photographs of a little red bump underneath Ms. Elhardt's right eye as well as some slight redness around her neck area. 1RP 44.

Deputy Dan Wells testified that he responded on scene at approximately 4 a.m., after the Appellant had been detained in Officer

Sicilia's patrol vehicle. 1RP 49. While he spoke with Ms. Elhardt, Deputy Wells noticed her continually looking at the patrol car that the Appellant was in. *See* 1RP 50. Deputy Wells testified that, based on his observations of her reactions, "it was obvious that she was still scared," even though "this is a little while after everything had happened." 1RP 50. Ms. Elhardt told Deputy Wells that the Appellant threatened to kill her and said that he would go to prison for that. 1RP 53. After Deputy Wells asked her if she was able to breathe when the Appellant strangled her, Ms. Elhardt said that there was a period of about 15 seconds where she was unable to breathe. 1RP 53. She said that she began to panic and used her elbow to strike the Appellant. 1RP 53. When Deputy Wells asked how it made her feel when the Appellant threatened to kill her when he had choked her and swerved the steering wheel towards oncoming cars, Ms. Elhardt said twice that she believed that she was going to die. 1RP 54.

## III. ARGUMENT

### 1. The Court Properly Admitted Ms. Elhardt's Hearsay Statements As Excited Utterances.

Hearsay is a statement other than one made by the declarant while testifying at trial which is offered as evidence to prove the truth of the matter asserted. ER 801. Hearsay is not admissible except as provided by

the Rules of Evidence. ER 802. One exception to the rule allows hearsay that is 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(2). The admission of evidence under the excited utterance hearsay exception is reviewed for abuse of discretion. *State v. Young*, 160 Wn.2d 799, 806, 161 P.3d 967 (2007); *State v. Strauss*, 119 Wn.2d 401, 832 P.2d 78 (1992). A trial court's ruling, regarding excited utterances, thus, will not be disturbed unless a reviewing court "believes that no reasonable judge would have made the same ruling." *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970, 986 (2004).

*(a) The Court's decision focused on whether the hearsay statements were "made under stress of the startling event or condition," and the evidence supporting that test*

Excited utterances are admissible if the following requirements are satisfied: (1) a startling event or condition occurred; (2) the declarant made the statement under the stress of the startling event or condition; and (3) the statement related to the startling event or condition. *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007). Here, the Appellant does not dispute the first or the third factors—a startling event occurred when the Appellant assaulted Ms. Elhardt, and the statements at issue related to

that startling event. The relevant factors in determining whether a statement qualifies as excited utterance under the second element include the passage of time, the declarant's spontaneity, the declarant's emotional state, and the declarant's opportunity to reflect or fabricate a story. *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000).

The State argues that, considering those factors, the testimony from the declarant and the police officers shows that Ms. Elhardt made her hearsay statements under the stress of the startling event—the assaults. Officer Sicilia testified that Ms. Elhardt "was pretty shaken up" and "really nervous" as she described the Appellant's actions, to the point where she was physically shaking. 1RP 43-44. Deputy Wells testified that during his interview with Ms. Elhardt, she seemed preoccupied with where the Appellant was, demonstrating the continuing stress of the event. *See* 1RP 50. Given this testimony, as well as the obvious ongoing stress Ms. Elhardt continued to experience as she testified (corroborating, in a very demonstrative way during the bench trial, the stress to which the officers testified), the trial court reasonably found that the test to determine whether a hearsay statement constitutes an excited utterance had been satisfied.

*(b) Ms. Elhardt made her statements to police sufficiently soon after the event so as to be considered made under the stress of the event*

While "the key to the second element is spontaneity" because "ideally, the utterance should be made contemporaneously with or soon after the startling event giving rise to it," this does not mean that any later statements cannot be considered excited utterance. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). The "passage of time between a startling event and the declarant's statement is a factor" in determining whether a statement qualified as an excited utterance. *Strauss*, 119 Wn.2d at 416. However, "the passage of time alone … is not dispositive." *Id.* In *Strauss*, the victim's statement to an officer more than three hours after a sexual assault was properly found to be an excited utterance because she still showed signs of being upset and in shock. *Id.*; *see also State v. Thomas*, 46 Wn. App. 280, 284, 730 P.2d 117 (1986) (statements made after six to seven hours qualified as excited utterance); *State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985) (statement made seven hours after a sexual assault was properly admitted as an excited utterance).

In the case at hand, the amount of time that passed between Ms. Elhardt freeing herself from the Appellant and her telling Officer Sicilia what had happened is only five to ten minutes. 1RP 26-27, 39. When Deputy Wells arrived about forty minutes later, Ms. Elhardt relayed her

account to him as well, and he also observed her to be under the stress of the situation. 1RP 27-28, 49-50. Given that other cases have found that statements made up to seven hours later are admissible, this fact that the statement to Deputy Wells came some time after her statement to Officer Sicilia does not automatically preclude the admissibility of those latter statements. It is notable that, while more time passed before Ms. Elhardt could tell Deputy Wells what had occurred, her account was identical to the account she gave Officer Sicilia, indicating the statements to be just as reliable as those given earlier.

*(c) Ms. Elhardt's demeanor demonstrates she made her hearsay statements while under the continuing stress from the assaults*

"An excited utterance derives its reliability mainly from the heightened emotional state of the declarant as a result of the startling event." *Young*, 160 Wn.2d at 812-13. Thus, "it is the event's effect on the declarant that must be focused upon." *Chapin*, 118 Wn.2d at 687. A statement may still be made while under the stress of excitement caused by a startling event if the declarant is under continuing stress from that event, as experienced and exhibited by the victim. *See Strauss*, 119 Wn.2d at 416-17; *Flett*, 40 Wn. App at 287.

In *Flett*, the Court found that hearsay statements were properly admitted as excited utterance despite occurring seven hours after the

sexual assault. 40 Wn. App. at 287. That seven-hour period encompassed the "continuous process" of stress related to the startling event, which included the sexual assault itself, the victim's original request for medication, as well as the stress of contact with the defendant's wife just prior to the statement. *Id.* Similarly, a victim's statement to police five hours after a sexual assault qualified as excited utterance when the victim had been continuously suffering the stress of the assault, and demonstrated the ongoing stress when it came time to make a statement. *State v. Villareal-Cruz*, 174 Wn. App. 1003 (Div. I, Mar. 11, 2013) (unpublished)[1]. After the detective in *Villareal-Cruz* explained the interview process, he asked the victim if she knew why he was there that day; in response, the victim immediately started crying and relayed what had happened. *Id.* The *Villarael-Cruz* Court found that the victim's "behavior demonstrated that she was still under the effect of this traumatic event" and "continuous process of stress" due to initially arriving at school upset, leaving school early at least in part due to her emotional state,

[1] Per G 14.1, this decision is not precedential, but may be considered persuasive authority.

appearing visibly distraught when she returned home, and crying before telling the detective what had happened. *Id.*

Here, just like in *Villareal-Cruz,* Ms. Elhardt relayed what had happened to police while in a continuing state of stress from a traumatic event. Ms. Elhardt testified to being terrified as she was strangled, head-butted, and forcibly swerved into the oncoming traffic lane multiple times. Her fear was amplified by her inability to "redirect" the Appellant's anger and feeling lack of control over a volatile and dangerous situation. *See* 1RP 14-16, 18, 23-24. Her heightened emotional state led her to drive straight towards Officer Sicilia, yelling that she needed help. *See* 1RP 24-25. The Appellant was removed from the vehicle and sat on the curb, but Ms. Elhardt had to move her car. *See* 1RP 245. She was anxious and, fearing that her car would be stolen again, parked it somewhere she thought was safe, which was one of the few things she had control over at that moment. *See* 1RP 25-26. However, when she returned after five to ten minutes to speak to Officer Sicilia, he observed that she was still "pretty shaken up," to the point of physically shaking, as well as "really nervous." 1RP 42. At one point, the Appellant tried to run away, which also caused Ms. Elhardt anxiety as well. *See* 1RP 26. Even when Deputy Wells arrived forty minutes later, he noted that she was exhibiting reactions such as

looking over at the car where Officer Sicilia had detained the Appellant as they spoke. 1RP 50. Based on his observations, Deputy Wells believed that "it was obvious that [Ms. Elhardt] was still scared." 1RP 50.

Additionally, Ms. Elhardt testified that she was unable to recall some of the details because "it's all running together" due to trauma and spending "two months trying to forget it all." 1RP 18, 21. This supports the officers' testimony regarding how shaken and traumatized she had appeared when she spoke to them. Reliving it on the stand caused Ms. Elhardt such distress and, in the intervening time, she had actively tried to forget what the Appellant had done to her. Both Ms. Elhardt's testimony as well as the officers' observations of her demeanor demonstrate that Ms. Elhardt was more than just upset. She was still scared and under the continuing stress from the earlier assaults and threats. Nothing at that point had been resolved, and the person who had hurt her, who had already tried to run once, was still all too close by.

*(d) Ms. Elhardt's statements have greater indicia of reliability than those in cases relied upon by the Appellant*

Ms. Elhardt's statements are also factually distinguishable from the cases the Appellant relies upon. *State v. Dixon* concerned a four-page written statement that was admitted into evidence under the excited utterance exception. 37 Wn. App. 867, 871, 684 P.2d 725 (1984). This

statement included several lines that were added after it was initially written, accompanied by an explanation that the declarant had remembered these details later. *Id.* at 873. Since this statement was obtained after officers spent two hours calming the declarant down, as well as contained a substantial amount of details that were added after she initially relayed the events of what happened, this did not qualify as an exited utterance. *Id.* at 871, 874. Here, the State did not seek to admit a fully formed written statement. Both officers testified that Ms. Elhardt was shaken, shaking, nervous, or scared when she told them what had happened. 1RP 42-43, 50. Additionally, unlike the declarant in *Dixon*, Ms. Elhardt provided her statement upon initial questioning by officers five to ten minutes and forty minutes after she yelled for help, rather than after two hours of being calmed down into a less excited state.

Similarly, in *Chapin*, the trial court found that the victim was unlikely to still be in an excited state when he made the hearsay statement. *Chapin*, 118 Wn.2d at 689. This is because, earlier in the day, prior to making his statement, the victim "had been calm and engaged in his usual activities" at the nursing home, which "increased the danger of fabrication." *Id.* This is distinguishable from present case because there was no such period where Ms. Elhardt resumed her daily activities as

normal prior to making her statements. She took up to ten minutes to park her car somewhere safe, then immediately had to return to deal with the fact that she had just been assaulted by someone she cared about. *See e.g.*, *Flett*, 40 Wn. App. at 279 (finding the victim's hearsay statement was admissible seven hours after the sexual assault, even though she went in to work later that morning, because enough of her behavior supported the fact that she was still operating under the stress of that trauma).

As a result, the record shows that Ms. Elhardt made her statements while she was still operating under the continuing stress and trauma of the assaults and threats.

*(e) No evidence suggests that Ms. Elhardt fabricated her hearsay statements or that they were caused by intervening actions*

The "key determination" of whether a statement qualified as excited utterance is whether the statement was made "while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." *Young*, 160 Wn.2d at 808. In accordance with that important factor, Washington courts have allowed statements made several hours after startling events "where there were no intervening influences that might have rendered them unreliable." *Thomas*, 46 Wn.

App. at 284 (statements made after six to seven hours qualified as excited utterance).

In *Young*, the victim called 9-1-1 to report that she had been sexually assaulted, but then later told the responding officer that she had been abducted, forced into the apartment, then sexually assaulted. 160 Wn.2d. at 807. The victim recanted her statement regarding the abduction and admitted that this aspect had been fabricated. *Id.* However, even then, "the trial court did not err by weighing the witness's credibility against the evidence indicating that the [earlier 9-1-1] statements were spontaneous and reliable." *Id.* at 808. The *Young* Court held that, even if part of the declarant's statement is later found to be fabricated, it could still find that the "earlier statements were reliable because of [the victim's] emotional state at the time, the lack of opportunity for her to fabricate, and the other witness' knowledge of and experience with [the victim]." *Id.* To make this determination, the trial court "assessed the witnesses during the hearing, both for their own credibility and their reliability in evaluating [the victim]." *Id.* at 818. Similarly, this Court upheld a hearsay statement as excited utterance last year even when "there is uncontroverted evidence that part of [the victim's] statement was false [because] there is no evidence in the record that demonstrates [the victim] consciously

fabricated her story." *State v. Pruitt*, 1 Wn. App.2d 1033 (Div. II, Nov. 28, 2017).[2] The *Pruitt* Court held that the trial court did not abuse its discretion in admitting the hearsay statements because "there was no evidence of conscious or willful fabrication." *Id.*

Here, there is no evidence of fabrication. Ms. Elhardt took five or ten minutes to park her car before speaking with Officer Sicilia. 1RP 26-27. However, based on the testimony regarding her demeanor as she spoke to the officers, she was still scared, nervous, shaken, and upset even after she did so. 1RP 42-43, 50. Simply taking up to ten minutes to park her car would not automatically provide her with the opportunity to fabricate the events willfully or consciously. Unlike in *Young* or *Pruitt*, there was no evidence presented at trial showing that Ms. Elhardt recanted or fabricated any aspect of her statement. Ms. Elhardt did testify that she was unable to recall some of the details because "it's all running together" due to trauma and spending "two months trying to forget it all." 1RP 18, 21. Ms. Elhardt also testified that, even though she no longer had an independent recollection of certain details, "it must have happened because I told the

[2] Per GR 14.1, this decision is not precedential, but may be considered persuasive authority.

officer that and I wrote that in my statement." 1RP 18. As evidenced in *Young* and *Pruitt*, even the explicit recantation or fabrication of one set of statements does not necessarily mean that all of that declarant's hearsay statements are unreliable. Here, the trial court "found Ms. Elhardt to be a credible witness" specifically because she "did not guess or speculate about things she did not remember [and] was forthright in acknowledging what she could not remember." CP 42. It is well within the trial court's purview to weigh the credibility of her hearsay statement by considering her actual testimony, as well as observations by other witnesses as to her demeanor and emotional state, in determining whether that hearsay can be relied upon. In the present case, the court unequivocally believed based on the evidence that the hearsay statements were reliable.

As a result, there is no evidence that Ms. Elhardt's hearsay statements were the product of conscious or willful fabrication and the trial court did not abuse its discretion in relying upon these statements.

**2. Even If The Hearsay Statements Were Improperly Admitted, Any Error Was Harmless As Overwhelming Evidence Supports The Conviction For Assault In The Second Degree**

To determine if an error was harmless (even of constitutional magnitude), the appellate court considers whether it "is convinced beyond a reasonable doubt that any reasonable [finder of fact] would have reached

the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). This Court will look toward the "overwhelming untainted evidence." *Id.* at 426. As a result, this Court looks "only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id.*

A person is guilty of Assault in the Second Degree if he assaults another by strangulation or suffocation. 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). Therefore, a factfinder may convict a defendant by finding that the assault actually obstructed blood flow or breathing by compressing the victim's neck *or* the defendant "compressed [the victim's] neck with the intent to cause this result." *State v. Reed*, 168 Wn. App. 533, 575, 278 P.3d 203 (2012). A person acts with intent when he acts "with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

Here, the Appellant contends that Ms. Elhardt's hearsay statements to Officer Sicilia regarding the Appellant choking her, as well as to

Deputy Wells that that she had been unable to breathe for about fifteen seconds, constitute the only evidence to support the assault conviction. However, there was overwhelming evidence that the Appellant compressed Ms. Elhardt's neck with the intent to obstruct her blood flow or ability to breathe even without these hearsay statements. Ms. Elhardt herself testified that the Appellant "grabbed [her] throat and squeezed" as well as choked her for "a few seconds." 1RP 14, 17. The Appellant did this "at least three or four times." 1RP 18. Additionally, there was physical evidence supporting Ms. Elhardt's testimony regarding the strangulation. Officer Sicilia, who Ms. Elhardt contacted soon after the assault, observed slight redness around her neck area. 1RP 44. The Court admitted and considered the photographs Officer Sicilia had taken that night, showing the redness on Ms. Elhardt's neck. 1RP 44-45. Ms. Elhardt testified that the area underneath her jawline hurt, and that some yellow and greenish fingerprint bruises appeared along the right side of her jaw about four days after the assault. 1RP 32-33. This is consistent with Deputy Wells' testimony regarding physical signs of assault, which he based on his twenty-nine years in law enforcement, including working as the regional instructor for the criminal justice training commission on domestic violence. 1RP 47. Deputy Wells testified that injuries do not always

appear immediately, and that it sometimes "takes two or three days for them to come out so you can see them or for them to darken up to a point where they're the most obvious." 1RP 46, 55. Therefore, there was overwhelming evidence that the Appellant grabbed Ms. Elhardt's throat and squeezed even without the hearsay.

Additionally, there was overwhelming evidence presented at trial that the Appellant had grabbed Ms. Elhardt's neck with the intent to strangle her. Ms. Elhardt testified that the Appellant had choked her, head-butted her, and jerked the steering wheel three or four times each. 1RP 14-16, 18. At least once, the Appellant steered them into the oncoming traffic lane when another car had been approaching. 1RP 16. The fact that the Appellant had grabbed her throat and squeezed that many times, as well as placed her life in danger by nearly steering her into oncoming traffic and head-butting her, all constitute overwhelming evidence that the Appellant had harbored deadly motivations when he assaulted Ms. Elhardt that night. That includes an intent to obstruct Ms. Elhardt's airflow and ability to breathe.

As a result, even without the hearsay statements, there was overwhelming evidence that the Appellant committed Assault in the

Second Degree. Any error in admitting those statements was harmless and not grounds for reversal.

## IV. CONCLUSION

Based on the facts and argument above, the State respectfully requests that this Court affirm the trial court's ruling admitting Ms. Elhardt's hearsay statements as excited utterances, or that the court did not abuse its discretion in so admitting the statements. Alternatively, the State respectfully requests this court find that if the trial court abused its discretion and erred in admitting Ms. Elhardt's statements, it review the evidence of guilt presented during trial and find overwhelming evidence supports the finding of guilt, so as to render the error harmless, and thus affirm the conviction of the Appellant.

DATED this 29th day of November, 2018.

Respectfully Submitted,

BY:_____

JESSICA J. SHEN
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WSBA # 49756

## GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

## November 29, 2018 - 9:34 AM

## Transmittal Information

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