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Court of Appeals  
Division III  
State of Washington

33419-8-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUAN C. BARAJAS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF GRANT COUNTY

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APPELLANT'S BRIEF

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#### A. ASSIGNMENTS OF ERROR

1. The court abused its discretion in admitting hearsay testimony under the excited utterance exception.
2. The evidence was insufficient to support the unlawful imprisonment conviction.

#### B. ISSUES

1. The court admitted an officer's testimony as to the alleged victim's prior statements. The State presented evidence of a distressing event that had intervened between the event about which the hearsay statements were made and the time the statement was made to the officer. The declarant testified that before she spoke to the officer a third person persuaded her to lie to the officer about the intervening event. Were the hearsay statements admissible as excited utterances?
2. The police officer testified the alleged victim had told him that, after the defendant put her in a headlock and grabbed her wrists, she put her daughter in her car and drove away. Was the evidence sufficient to support finding the

defendant restrained the movements of the alleged victim in a manner that substantially interfered with her liberty?

### C. STATEMENT OF FACTS

Mr. Barajas was tried on charges of first degree burglary, second degree assault, unlawful imprisonment, bribing a witness, and intimidating a witness. (CP 11-12) A jury acquitted him of burglary and assault but returned guilty verdicts on the imprisonment, bribery and intimidation charges. (CP 176-77, 185)

Ms. Guzman told the jury that she had been dating Mr. Barajas from before November 2013 until June 2014. (RP 56-57) Before that she had borne the daughter of her former husband, Alvaro Ramos Diaz. (RP 57) In March 2014 Ms. Guzman had an argument with Mr. Barajas. (RP 58) Ms. Guzman testified she had told Mr. Guzman to leave but he did not. (RP 60) She put her daughter in her car and left. (RP 61) She acknowledged that she had told a police officer that Mr. Barajas had chased her out of the house. (RP 62)

Ms. Guzman said that she left her home in Ephrata and drove to her estranged husband's home in Quincy. (RP 89-90) Ms. Guzman testified that she had told officers that after she arrived in Quincy Mr. Barajas had driven a car towards Mr. Ramos but she explained:

A. I was actually manipulated into saying that he was. So yes, I did say it to the cops, but I felt threatened at the time by my daughter's dad, which is Alvaro Ramos, into saying something like that. But it never happened.

(RP 90-91)

Mr. Ramos testified that Ms. Guzman called him several times starting around 11:30 pm to tell him she was returning to his house with their daughter. (RP 98) According to Mr. Ramos, she was crying while she was talking with him and she was still crying when she arrived at his house. (RP 98, 118) He asked her to call 911 but she said she did not want to cause problems so Mr. Ramos placed the call. (RP 118)

Mr. Ramos told the jury he saw Mr. Barajas's jeep parked at a stop sign about 100 feet away. (RP 118) According to Mr. Ramos, he walked into the middle of the road and Mr. Barajas began slowly approaching in his jeep. (RP 118) Mr. Ramos testified Mr. Barajas suddenly sped up and drove at him, and after Mr. Ramos jumped out of the way Mr. Barajas again tried to hit him with the jeep. (RP 119)

Apparently Mr. Barajas left at some point and a few minutes later Officer Bushy arrived. (RP 126)

Officer Bushy testified that he spoke with Mr. Ramos for about fifteen minutes before he interviewed Ms. Guzman. (RP 134-35) She was

still crying. (RP 135) According to Officer Bushy, Ms. Guzman said that when she told Mr. Barajas to leave he grabbed her in a headlock. (RP 136) The officer observed and photographed bruises on Ms. Guzman's arm. (RP 137-38) Officer Bushy reported that Ms. Guzman said when she tried to leave Mr. Barajas grabbed her arms or wrists and she then managed to leave the house and took her daughter with her. (RP 139)

#### D. ARGUMENT

##### 1. HEARSAY STATEMENTS WERE NOT ADMISSIBLE AS EXCITED UTTERANCES.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible as evidence except as provided by the rules of evidence, other court rules, or statute. ER 802. Under ER 803(a)(2), a statement is not excluded as hearsay if it is an utterance "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

For a statement to qualify as an excited utterance, three conditions must be satisfied: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under stress of

the excitement of the startling event or condition; and (3) the statement must relate to the startling event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The court reviews for abuse of discretion a trial court's decision to admit a hearsay statement as an excited utterance. *State v. Young*, 160 Wn.2d 799, 805, 161 P.3d 967 (2007); *Chapin* at 688-89.

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* at 686 (quoting 6 John H. Wigmore, *Evidence* § 1747, at 195 (1976)).

The “key determination” in deciding whether to admit a statement offered under this rule is whether the declarant made the statement while still under the influence of the startling event, such that it could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995).

In *Brown*, admitting the evidence was error because the victim's testimony “that she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call renders erroneous the trial court's conclusion that the content of her call was admissible as an excited utterance.” *Brown* at 759.

In *State v. Dixon*, 37 Wn. App. 867, 684 P.2d 725 (1984), this court held that a detailed written statement taken just hours after the event did not qualify as an excited utterance even though the victim was crying and upset. *Dixon*, 37 Wn. App. at 873-74. In *Dixon*, the time lapse was just over an hour. “If any statement given by a crime victim hours after the crime could be admitted simply because the victim is upset while making the statement, the hearsay rule would be significantly undermined.” *See Dixon*, 37 Wn. App. at 873-74.

According to Officer Bushy, Ms. Guzman said Mr. Barajas put her in a headlock. But evidence showed that following this event she got in a car and drove to the home of her former husband in Quincy, and after she arrived she purportedly witnessed another event, namely Mr. Barajas’s attempt to run Mr. Ramos down with his car. But according to Ms. Guzman, while they were waiting for the officer to arrive, Mr. Ramos threatened her and persuaded her to tell the officer about this alleged vehicular assault. Thus, Ms. Guzman either had time to fabricate a story about a vehicular assault, or she was under the influence of the excitement of actually witnessing the assault. However upset she may have been at the time she spoke with Officer Bushy, the record is wholly inadequate to support the inference she was still under the influence of the events preceding her drive to Quincy rather than witnessing the assault of Mr.

Ramos, or being threatened by Mr. Ramos, or inventing the story of the attempted assault.

The allegation that the defendant put Ms. Guzman in a headlock or otherwise restrained her was inadmissible hearsay.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT FINDING THE DEFENDANT GUILTY OF UNLAWFUL IMPRISONMENT.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas* at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

A person is guilty of unlawful imprisonment if he knowingly restrains another. RCW 9A.40.040(1). “Restrain” means to restrict a person’s movements without consent and without legal authority in a

manner that interferes substantially with that person's liberty. RCW 9A.40.010(1). Restraint is without consent if it is accomplished by physical force or intimidation. RCW 9A.40.010(1)(a). "Substantially" means a real or material interference with liberty, as opposed to a petty annoyance, slight inconvenience, or imaginary conflict. *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff'd*, 92 Wn.2d 357, 597 P.2d 892 (1979).

That the victim had an available avenue of escape and did actually escape from a temporary restraint is a defense to a charge of unlawful imprisonment. See *State v. Washington*, 135 Wn. App. 42, 50, 143 P.3d 606 (2006). The defense would not be available if " 'the known means of escape . . . present[s] a danger or more than a mere inconvenience'" or if there is a potential escape route but the victim does not believe she can leave or is fearful of trying to escape. *State v. Kinchen*, 92 Wn. App. 442, 452 n.16, 963 P.2d 928 (1998); see *State v. Allen*, 116 Wn. App. 454, 466, 66 P.3d 653 (2003).

Here, the only evidence of imprisonment was Officer Bushy's testimony that Ms. Guzman claimed Mr. Barajas put her in a headlock or grabbed her wrists. There is no evidence that such restraint was prolonged or that Ms. Guzman was unable to leave. Even if the hearsay testimony about wrist-grabbing or a headlock were admissible, the evidence shows

she was not in fact substantially restrained but, rather, was able to take her daughter to her car and drive away.

If the hearsay evidence had been excluded, there would be no evidence whatsoever to support the charge of unlawful imprisonment.

#### E. CONCLUSION

The conviction for unlawful imprisonment should be reversed and the matter should be remanded for sentencing on the remaining charges.

Dated this 29th day of January, 2016.

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