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Court of Appeals
Division III
State of Washington

No. 33419-8-III

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Respondent,

v.

JUAN CORTEZ BARAJAS,

Appellant.

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

A. The trial court abused its discretion in admitting hearsay testimony under the excited utterances exception.

B. There was insufficient evidence to support the unlawful imprisonment conviction.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Can the appellate court review the excited utterances statements when no objection was made below?

B. Was there sufficient evidence for the trial court to conclude the statements to Officer Bushy by Ms. Guzman were excited utterances?

C. Was there sufficient evidence to establish unlawful restraint when it was clear that Mr. Cortez Barajas refused to let Ms. Guzman leave?

III. STATEMENT OF THE CASE

On March 4, 2014 Maria Guzman had custody of her daughter and was at her home in Ephrata, WA. RP 89, 97. Also present was her boyfriend at the time, Juan Cortez Barajas. RP 136. Ms. Guzman's estranged husband, Alvaro Ramos Diaz, sent her a picture of their daughter. *Id.* Mr. Cortez Barajas started calling Ms. Guzman names. *Id.* She told him to leave. *Id.* He refused. *Id.* Ms. Guzman tried to leave and

Mr. Cortez Barajas grabbed her in a head lock. RP 137. She also had bruises on her forearms. RP 138. She told Mr. Cortez Barajas to let her go. *Id.* She tried to get him off of her, and he grabbed her arms or wrists. RP 139. Ms. Guzman finally managed to leave with her daughter. She was in a hurry because Mr. Cortez Barajas was chasing her. She placed her daughter in the front seat as quickly as she could, despite having a car seat in the back for her. RP 139. Mr. Cortez Barajas came out and kicked the front passenger window, leaving mud and smudge marks on it. *Id.* Ms. Guzman was afraid that the window was going to break and that her daughter would be injured. RP 141.

Ms. Guzman managed to drive away and headed towards her husband's house in Quincy, WA. *Id.* Mr. Cortez Barajas followed in his Jeep. *Id.* On the way to Quincy she called Mr. Ramos Diaz. RP 98. She was crying and scared. *Id.* She said she barely got out of the house and was unable to get her daughter in a car seat. RP 116-17. She also said that Mr. Cortez Barajas was following her. RP 117. Mr. Ramos Diaz hung up and called 911. *Id.* Ms. Guzman arrived at Mr. Ramos Diaz's home about 15 minutes later. *Id.* When she arrived Ms. Guzman was crying, showing all different emotions and was generally upset. RP 118. Mr. Ramos Diaz looked down the street and saw Mr. Cortez Barajas in his Jeep. Mr. Cortez Barajas drove his Jeep at Mr. Ramos Alvarez, just

missing him. RP142-143. He then went down the street, did a u-turn and came at Ms. Guzman's car with the child inside, almost hitting them. *Id.*, RP 119. Officer Bushy arrived at Mr. Ramos Diaz's home within a couple of minutes of when Mr. Cortez Barajas drove off. RP 126. Ms. Guzman was still crying and emotional. *Id.*

Officer Bushy talked to Ms. Guzman about 15 minutes after he arrived. RP 134. Ms. Guzman was in a bedroom crying and did not want to see the officer for a few minutes. RP 135. When she did talk to Officer Bushy she was still crying and very scared. *Id.* She told Officer Bushy the story relayed above. RP 135-143.

After the events of March 4, 2014, but before trial, Mr. Cortez Barajas contacted Mr. Ramos Diaz and offered him money and made threats to get him not to testify. RP 123-25. One of these phone calls was recorded and provided to the prosecutor's office. *Id.*

The case proceeded to trial. Ms. Guzman admitted to telling Officer Bushy the story relayed above, but contended it did not happen that way. RP 59-62. Mr. Ramos Diaz relayed what Ms. Guzman told him during the phone call Ms. Guzman made on the way to his house. The defense objected to that testimony as hearsay. RP 99. The State responded that the statements were excited utterances under ER 803(a)(2). The State made an offer of proof. During the offer of proof the State also

indicated that it would rely on the excited utterance exception for the statements to Officer Bushy. RP 100-105. The court overruled the objection based on the excited utterance rule as to the phone call, but did not make a ruling as to Officer Bushy's testimony, as it was not before him yet. RP 107.

Officer Bushy testified as described above to the story relayed to him by Ms. Guzman. RP 139-141. Notably there was no objection to Officer Bushy's testimony as to what Ms. Guzman had told him. The jury returned verdicts of guilty as to unlawful imprisonment, bribing a witness and tampering with a witness, and not guilty as to the crimes of burglary in the first degree and assault second degree. RP 204-05.

IV. ARGUMENT

A. The statements to Officer Bushy were admissible.

1. The statements were not objected to.

ER 103(a) states that "error may not be predicated upon a ruling which admits or excludes evidence unless... (a) in the case the ruling is one admitting evidence, a timely objection...is made, stating the specific grounds of the objection..." There were two sets of statements made by Ms. Guzman that were admitted through other witnesses, one to Mr. Ramos Diaz over the phone during the chase from Ephrata to Quincy, which was objected to but overruled, and is not appealed, and one made to

Officer Bushy, which was not objected to, and thus cannot be appealed.

While the State indicated it intended to rely on the excited utterance exception during Officer Bushy's testimony if an objection was raised, the issue was never raised, the trial court never had a chance to rule on it, and thus the issue is not now reviewable.

2. Legal Standard

Under the excited utterance exception to the hearsay rule, an out-of-court statement is admissible if it relates 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); *State v. Briscoeray*, 95 Wn. App. 167, 173, 974 P.2d 912, *review denied*, 139 Wn.2d 1011, 994 P.2d 848 (1999). An excited utterance requires three preliminary factual findings: (1) a startling event or condition, (2) a declarant under the stress of a startling event or condition, and (3) a connection to the startling event or condition. *State v. Sharp*, 80 Wn. App. 457, 461, 909 P.2d 1333 (1996).

Spontaneity is crucial. *Briscoeray*, 95 Wn. App. at 173. The trial court should consider the passage of time between the startling event and the utterance. But the passage of time alone is not dispositive. *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992).

Other cases include *State v. Flett*, 40 Wn. App. 277, 287, 699 P.2d 774 (1985), where a statement made seven hours after a rape was admissible due to a finding of "continuing

stress" between the rape and the statement, and *Strauss*, 119 Wn.2d at 416, where the statements of a child who had been raped, made three and a half hours after the rape, were admissible as excited utterances as the child was plainly distressed. *See also State v. Thomas*, 46 Wn. App. 280, 284, 730 P.2d 117 (1986) (not abuse of discretion to admit statement as excited utterance where statement made six to seven hours after event). Here, while an estimated one and a half hours elapsed between the murder and the statement to Azevedo, given the case law, this is not such a length of time as to preclude the admission of the statement.

State v. Thomas, 150 Wn.2d 821, 855, 83 P.3d 970 (2004). *See also State v. Guizzotti*, 60 Wn. App. 289, 803 P.2d 808 (1991).

(Rape victim who was hiding for seven hours still under stress of the event.)

Other considerations include the declarant's emotional state and whether the declarant had an opportunity to reflect on the event and fabricate a story. *Briscoeray*, 95 Wn. App. at 173-74. The statement need not be completely spontaneous and may be in response to a question. *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969).

A later recantation does not disqualify the statement as an excited utterance. *Briscoeray*, 95 Wn. App. at 173. But if the witness had an opportunity to, and did fabricate a lie after the startling event and before making the statement, the statement is not an excited utterance. *State v. Brown*, 127 Wn.2d 749, 757-58, 903 P.2d 459 (1995).

Hearsay rulings are reviewed under an abuse of discretion standard. “Where the trial judge is required to assess body language, hesitation, or lack thereof, manner of speaking, and all the other intangibles that go into the evaluation which cannot be reflected on a written record, the trial judge is entitled to absolute deference.” *State v. Karpenski*, 94 Wn. App. 80, 103, 971 P.2d 553 (1999). For the excited utterance exception, the trial judge must make a preliminary finding based on a preponderance of evidence that the declarant was still under the influence of the event at the time the statement was made. ER 104(a); *Karpenski*, 94 Wn. App. at 102-03.

3. The statements to Officer Bushy were excited utterances and admissible.

Mr. Cortez Barajas argues that the events in Ephrata and the events in Quincy were separate startling events, and thus Officer Bushy’s interview of Ms. Guzman was not related to the events in Ephrata. This misconstrues the facts. They were all part of one continuing event where Ms. Guzman was assaulted and restrained in Ephrata, followed to Quincy, during the trip which she called her husband in a panic looking for help, and then almost saw her husband run over and her child hit in a car. This is all part of one continuing startling and stressful event, not separate events. *See Thomas*, 150 Wn.2d at 855 fn. 5.

Mr. Cortez Barajas also contends that Ms. Guzman had an opportunity to reflect and make up a story in league with Mr. Ramos Diaz, relying on her testimony at trial. Brief of Appellant at 6-7, citing RP 90-91. However, Ms. Guzman's testimony at trial was not credible. Mr. Ramos Diaz testified that the officers showed up about two minutes after the attack by Mr. Cortez Barajas using his car. Officer Bushy testified that he spent the fifteen minutes before talking to Ms. Guzman talking to Mr. Ramos Diaz and he saw no one else at the scene. RP 134-35. During this time Ms. Guzman was alone in a room with her young daughter crying. There was simply no time for Mr. Ramos Diaz and Ms. Guzman to come up with a story between the two of them. Ms. Guzman testified at trial that Mr. Cortez Barajas did not kick her window, which was belied by the physical evidence on the car, as well as Mr. Ramos Diaz and Officer Bushy's testimony. The trial court also made observations of Ms. Guzman's physical responses to questions that would lead someone to question her credibility. RP 78.

This demonstrates why an objection is required and an abuse of discretion standard is used. There is clearly evidence to support an excited utterance exception. Mr. Cortez Barajas argues the evidence does not support it. It is up to the trial judge, who hears the testimony and weighs the evidence to decide the issue by a preponderance of the evidence

standard after an objection. There was no objection here, thus the issue was not preserved. Even if there was, the statements were clearly an excited utterance.

B. There was sufficient evidence to show unlawful restraint.

Well-settled standards govern challenges to sufficiency of evidence. Whether sufficient evidence supported a conviction turns on whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Whether the State has met its burden of production is a question of law appellate courts review de novo. *State v. Werneth*, 147 Wn. App. 549, 552, 197 P.3d 1195 (2008).

Reviewing courts must defer to the trier of fact “on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821,874-875, 83 P.3d 970 (2004). “Credibility determinations are for the trier of fact and are not subject to review.” *Id.* at 874.

The case cited by Mr. Cortez Barajas, *State v. Washington*, 135 Wn. App. 42, 50, 143 P.3d 606 (2006), is factually close to this case, on point, and supports the State’s position there was sufficient evidence for

an unlawful imprisonment conviction. “Washington ordered Harmoni into the car. She got in but left the door open. He told her to shut the door. She tried to leave, but he grabbed her by her clothes and pulled her back inside. Clearly, she was restrained.” *Id.* at 50. The court rejected the argument that she had means of escape. “We reject Washington’s argument that Harmoni was not restrained because she had a means of escape. The fact that the car was inoperable and the doors were not locked does not mean Harmoni had a means of escape, given that when she tried to leave the car in the first place, Washington physically forced her back inside.” *Id.* at fn. 1.

This case is materially identical. When Ms. Guzman tried to leave Mr. Cortez Barajas put her in a headlock. RP 136-37. He also grabbed her wrists and arms to prevent her from leaving. RP 138. She was restrained at that point. She could not simply turn around and walk out a different door. All unlawful imprisonments are temporary, otherwise the victim would still be imprisoned and not come to trial. There is no magical amount a time a person must be restrained for the restraint to be sufficient for the crime. In addition, at the time Ms. Guzman was restrained she did not have a means of escape. The fact that Mr. Cortez Barajas eventually let her go is not the same thing as having a means of escape while she was

being restrained. There was sufficient evidence to convict Mr. Cortez Barajas of the crime of unlawful imprisonment.

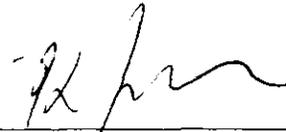
V. CONCLUSION

There was more than sufficient evidence to conclude that the statements made to Officer Bushy were excited utterances. An objection was required if Mr. Cortez Barajas wanted the trial court to weigh any countervailing evidence. Regardless, it was clear that the statements were excited utterances. In addition, there was more than sufficient evidence for a reasonable juror to conclude that Mr. Cortez Barajas unlawfully restrained Ms. Guzman. The trial court should be affirmed in all respects.

DATED this 22nd day of April, 2016.

Respectfully submitted,

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