

34769-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY TYLER MARTIN, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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LAWRENCE H. HASKELL  
Prosecuting Attorney

Brian C. O'Brien  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent/Appellant

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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## **I. APPELLANT'S ASSIGNMENT OF ERROR**

Mr. Martin's attorney provided ineffective assistance by failing to argue the correct legal theory for the admission of evidence critical to the defense.

## **II. ISSUE PRESENTED**

Was the hearsay statement allegedly heard by the defendant admissible under the excited utterance hearsay exception?

## **III. STATEMENT OF THE CASE**

Gary Eskridge met Patricia Walpole while at the Northern Quest Casino late in the evening on August 30, 2015. RP 26-27. The two talked and played various gambling machines. RP 26. They exchanged phone numbers and went their separate ways. RP 27. Early the next morning, around 5:20 a.m., Mr. Eskridge received a text message from Ms. Walpole asking if he was still up and if Ms. Walpole could come to his room. RP 27. Mr. Eskridge replied yes and sent his room number. RP 28. There was a knock on Mr. Eskridge's door a few minutes later. *Id.* When he looked out the peep hole he observed a young lady who was not Ms. Walpole. *Id.* He could not see Defendant Martin and Mr. Perrin, two males who had flattened themselves against the exterior hallway wall outside the view of the peep hole. RP 107-08. This was depicted in the security video. RP 108.

As Mr. Eskridge opened the door and talked briefly to the lady, Martin and Perrin rushed into the room. RP 28-29. They shoved Mr. Eskridge up against the wall. *Id.* Defendant Martin held Mr. Eskridge while Perrin hit him. RP 27, 37. Perrin demanded money. RP 27. Perrin went to the nightstand, picked up items belonging to Mr. Eskridge, and disconnected the hotel's telephone; Martin continued to hold Mr. Eskridge up against the wall. RP 27, 37. When Mr. Eskridge called for help, Martin shoved him onto the ground in between the bed and the wall; Martin and Perrin then exited the room. RP 27, 37-38. Mr. Eskridge tried to get up, but his ankle was broken and his nose was bloody from being punched. RP 30-31. His watch, cell phone, truck keys and pants were taken during the robbery. RP 31. He spent the next three days in the hospital. RP 31.

Defendant Martin testified that he and his codefendants went up to Mr. Eskridge's room that morning to "talk" to Mr. Eskridge about the text messages he had sent to Ms. Walpole. RP 105.

The defendant was charged and convicted of first degree robbery and first degree burglary. CP 1, 66, 67. He had three prior felonies and was sentenced to a standard range sentence of 60 months. CP 108-09.

#### IV. ARGUMENT

##### A. THE HEARSAY STATEMENT ALLEGEDLY HEARD BY THE DEFENDANT WAS NOT ADMISSIBLE UNDER THE EXCITED UTTERANCE HEARSAY EXCEPTION.<sup>1</sup>

During defendant's testimony, defense counsel attempted to elicit testimony that the defendant had heard codefendant Perrin ask Mr. Eskridge, "What were you going to do to my momma?" RP 108, 173. The court sustained the state's hearsay objection to the evidence. RP 108.

Defense counsel argued that the statement was admissible under the res gestae exception to the hearsay rule, but did not argue that the testimony was admissible under that rule's closely related hearsay cousin, the excited utterance exception to the hearsay rule, ER 803(a)(2).<sup>2</sup> Defendant now claims that his counsel was ineffective for failing to introduce the statement under the excited utterance exception to the hearsay rule and that he was prejudiced thereby. Am. Br. of Appellant at 5-8.

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<sup>1</sup> The excited utterance exception under ER 803(a)(2) provides that 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 is not excluded by the hearsay rule, even though the declarant is available as a witness.

<sup>2</sup> The res gestae doctrine evolved into several present day hearsay exceptions, usually identified as the present sense impression, the excited utterance, and statements of present bodily condition, mental states, and emotions. *See State v. Pugh*, 167 Wn.2d 825, 839-40, 225 P.3d 892 (2009), citing 2 Kenneth S. Broun, MCCORMICK ON EVIDENCE § 268, 245-46 (6th ed. 2006).

Three closely connected requirements must be satisfied for a hearsay statement to qualify as an excited utterance. 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 the event or condition. Third, the statement must relate to the startling event or condition. *State v. Chapin*, 118 Wn.2d 681, 686-88, 826 P.2d 194 (1992). An appellate court reviews a trial court's decision whether to admit a hearsay statement as an excited utterance for abuse of discretion. *State v. Ohlson*, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007).

Here, the statement “[w]hat were you going to do to my momma?” fails to satisfy the requirements for a hearsay statement to qualify as an excited utterance. That codefendant Perrin was irate or “excited” does not qualify his statement as an excited utterance. Codefendant Perrin was upset *before* going up to the room, as he apparently got upset when he read the text message to Ms. Walpole. It is questionable whether an adult male reading a text message qualifies as a startling event, under the excited utterance exception, especially where the recipient of the text, Ms. Walpole, was not upset.<sup>3</sup> Nor would seeing Mr. Eskridge qualify as a startling event.

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<sup>3</sup> Prosecutor: You never saw what was texted, did you, sir?

Defendant Martin: I did not.

As Perrin went to Mr. Eskridge's room voluntarily, it is not established the statement was made while he was under the stress of excitement caused by the reading of a text message. In fact, Mr. Perrin drove back from a gas station to the hotel, presumably parked the car, entered the hotel and walked to the victim's hotel room to, in the defendant's words,<sup>4</sup> *confront* Mr. Eskridge regarding the text messages. RP 103, 120. The existence of a continuing state of excitement such that the utterance is made without reflection is not supported by the record, and is belied by the established facts that the two men admittedly drove back from a gas station and then concealed themselves against the wall in the hotel hallway before entering the hotel room, uninvited,<sup>5</sup> giving them time for reflection regarding the text messages(s) and what they were going to do. The key

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Q: Did Ms. Walpole appear upset?

A: No, not particularly.

RP 122.

<sup>4</sup> Prosecutor: Mr. Perrin and Ms. Walpole were there and you knew to confront Mr. Eskridge about the cell phone text according to your testimony?

Defendant Martin: Confront I suppose if you could use that word.

RP 120.

<sup>5</sup> RP 120.

determination in deciding whether a statement qualifies as an excited utterance is often “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.*” *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001) (emphasis added).

Under these facts there was no error in the trial court’s decision not to allow the hearsay statement allegedly made by the codefendant into evidence and trial counsel was not ineffective for failing to raise an “excited utterance” argument seeking the admission of this one statement.

To establish ineffective assistance of counsel, Mr. Martin must show that his attorney’s performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). The first element of the *Strickland* test is met by showing that counsel’s performance was not reasonably effective under prevailing professional norms. The second element is met by showing a reasonable probability that, but for counsel’s unprofessional errors, the result of the trial would have been different. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). “There is a strong presumption that trial counsel’s performance was adequate, and exceptional deference

must be given when evaluating counsel’s strategic decisions.” *Id.* This Court need not inquire further if the defendant fails to establish either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

First, defendant cannot show that the trial court would have admitted the statement under the argument that it was an excited utterance. As state above, the hearsay statement would not be admissible under the excited utterance exception to the hearsay rule.

Second, defendant’s claim of prejudice is unsupported. There is no reasonable probability that had the codefendant’s statement “What were you going to do to my momma?” been introduced into evidence that the outcome of the trial would have been different. The argument made that the statement establishes the defense theory that “the parties intended only to address the texting issue, not to commit a crime”<sup>6</sup> fails to account for the defendant’s concealment preceding his confessed uninvited entry<sup>7</sup> into the room, or Mr. Martin’s complicity in the robbery by holding the victim against the

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<sup>6</sup> Am. Br. of Appellant at 8.

<sup>7</sup> Prosecutor: You’re walking into a stranger’s room at that time uninvited, aren’t you, Mr. Martin?

Defendant Martin: At that time, yes.

wall, while his belongings were taken, and then pushing the victim to the floor when he called for help.<sup>8</sup>

The defendant fails to establish either necessary prong in his ineffective assistance of counsel claim. Therefore, the claim must fail.

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<sup>8</sup> Prosecutor: And when the stockier man went off, Mr. Perrin went off in your room to get items of your belongings, was Mr. Martin still holding you up against the wall?

Mr. Eskridge: Yes.

...

Prosecutor: As Mr. Martin held you to the ground and Mr. Perrin, the stockier man, went into the room, when did - - when were you pushed to the ground? How long was it before you were pushed to the ground?

Mr. Eskridge: When I started yelling for help, as I was watching them, I mean, it's seconds. I watched him. He was moving over, and I saw him pull, and that's when I got shoved to the ground.

Prosecutor: Was that by Mr. Martin?

Mr. Eskridge: Yes.

RP 37-38.

**B. UNLESS THE DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT’S ORDER OF INDIGENCY WAS ENTERED, RAP 14.2 PROVIDES THAT THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT HIS APPEAL.**

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis Added).

The trial court determined the defendant to be indigent for purposes of his appeal on September 28, 2016, CP 101-02, based on a declaration provided by the defendant. CP 98-100. The State is unaware of any change in the defendant’s circumstances. Should the defendant’s appeal be

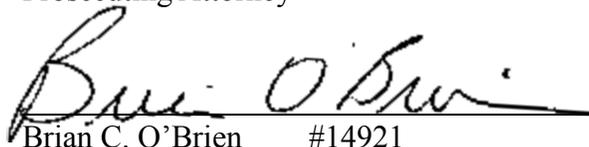
unsuccessful, the Court should only impose appellate costs in conformity with RAP 14.2 as amended.

## V. CONCLUSION

The asserted statement of the codefendant regarding his reaction to an alleged text message did not qualify as an excited utterance. The defendant fails to establish either necessary prong in his ineffective assistance of counsel claim. The judgment of the lower court should be affirmed.

Dated this 10 day of April, 2017.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

Brian C. O'Brien #14921  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

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v.

JEFFREY T. MARTIN,

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NO. 34769-9-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 10, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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skylarbrettlawoffice@gmail.com

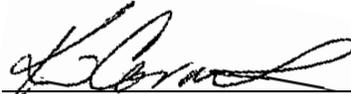
Lise Ellner  
liseellnerlaw@comcast.net

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(Date)

Spokane, WA

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