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NO. 32112-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES DOUGLAS OHLSON,

Appellant.

FILED  
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COURT OF APPEALS  
DIVISION II

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APPELLANT'S PETITION TO REVIEW

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A. Identity of Petitioner

Mr. James Ohlson asks this court to accept review of the Court of Appeals decision to terminate and review designated Part B of the Petition.

B. Court of Appeals Decision

The opinion of the Court of Appeals, Division II, affirming Mr. Ohlson's conviction for two counts of assault in the Second Degree. A copy of the decision is in the Appendix at Pages A-1 through A-20.

C. Issues Presented For Review

Under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2nd 177 (2004), and the Sixth Amendment of the United States Constitution, is an excited utterance per se nontestimonial statements?

D. Statement of the Case

Mr. Ohlson was charged by an Amended Information of one count of malicious harassment and two counts of assault in the second degree. (RP 2) Following jury trial, Mr. Ohlson was found not guilty of the charge of malicious harassment and guilty of the two counts of assault in the second degree. (RP 212) (CP 1)

The first witness presented at trial was L.F.. (RP 61) L.F. testified as follows. On the afternoon of April 16, 2004 L.F. was waiting outside of Lions Field with a friend for a ride home. (RP 62-63) L.F. waited with a friend named D.L. (RP 63.85) L.F. reported observing Mr. Ohlson driving towards her in his car. (RP 66) L.F. contacted law enforcement on her cellular phone to report the incident. (RP 69) The tape recording of the 911 call was played for the jury. (RP 70)

Officer Crystal Gray next testified for the prosecution. (RP 89) Officer Gray contacted L.F. and D.L.. (RP 90) Officer Gray reported that L.F. and D.L. appeared to be upset and shaken up. (RP 91) Officer Gray further testified that L.F. was shaking. (RP 91) She had a conversation with L.F. and D.L.. (RP 91) During that conversation, L.F. and D.L. reported what had occurred. (RP 91) The prosecution solicited testimony from Officer Gray regarding the statements made by both L.F. and D.L.. (RP 91-92) Defense counsel objected on hearsay grounds. (RP 91-92). The trial court allowed the admission of the statements under the excited utterance exception to the hearsay rule. (RP 92) The prosecution inquired of the Officer as to the

statements of both individuals. (RP 91-92) Officer Gray reported comments attributed to both L.F. and D.L.. (RP 92)

**E. Argument Why Review Should be Granted**

The case of Crawford v. Washington, *supra*, left courts to determine whether a statement is testimonial, and therefore admissible. The Supreme Court has accepted review of the case of State v. Davis, 154 Wn.2d 291, 111 P.3d 844, 126 S.Ct. 547 (2005). That case will be heard with Hammond v. Indiana, 829 N.E. 2d 444 (2005), *certiorari granted by* 126 S.Ct. 552 (2005) and also in Davis, *certiorari granted by* 126 S.Ct. 552 (2005). These two cases address the issue of the admissibility of excited utterances under Crawford v. Washington, *supra*.

As the opinion of the Court of Appeals in this matter, a division between the Court of Appeals exist on this issue. Division I has found that a per se rule determining excited utterances cannot be testimonial and is not appropriate in the case of State v. Walker, 129 Wn.App. 258, 269, 118 P.3d 935 (2005). However, in the case of State v. Ohlson, in Court of Appeals Docket No. 32112-2-II, the court adopted a per se rule declaring that excited utterances cannot be

testimonial in nature. It is now necessary for the Supreme Court of this State to resolve the conflict between the divisions.

Hearsay is defined as an out of court statement offered into evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is generally inadmissible. ER 802 A statement made out of court is admissible as an excited utterance under a three part test. First, a startling event must have occurred. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). Secondly, the statement must relate to a startling event or condition, ER 803(a)(2); State v. Williamson, 100 Wn.App. 248, 257-56, 996 P.2d 1097 (2000); State v. Briscoeray, 95 Wn.App. 167, 173, 974 P.2d 912 (1999). Thirdly, the statement must be made while the declarant was under the influence of the startling event. *Id.* The standard of review for challenging the court's admission of a statement as an excited utterance is abuse of discretion. State v. Woods, 143 Wash 2d 561, 594, 23 P.3d 1046 (2001); State v. Young, 99 P.3d 1244 (2004)

In the case at hand, the court allowed into evidence the conversation Officer Gray had with D.L. over the objection of the defendant. (RP 91-92) D.L. did not testify at trial. Officer Gray testified

as what both L.F. and D.L. told her. (RP 92-93) Officer Gray used the word "they" to convey what both L.F. and D.L. told her. (RP 92-93)

The court's decision to allow Officer Gray testify as to what L.F. and D.L. told her was an abuse of discretion. In this case, there was insufficient evidence presented to support the admissibility of the statements as an excited utterance.

The first test for admissibility of a statement as an excited utterance was met in this case as to the statement of L.F.. According to L.F., she felt that Mr. Ohlson was driving toward her on the sidewalk. (RP 66-67). However, no testimony was provided directly from D.L. to indicate that a startling event occurred from his perspective.

The third test for admissibility of D.L.'s statements is not met in this case. There was no evidence presented indicating that D.L. was under the influence of the startling event at the time statements were made. Officer Gray testified as to the demeanor of L.F.. Officer Gray testified that L.F. was shaking. The only reference to D.L.'s demeanor was a reference to both individuals in general terms. "So they were pretty shaken up." (RP 91)

Furthermore, Officer Gray did not directly attribute any statements to D.L.. Officer Gray testified as to what both D.L. and L.F. told her in general terms. It is not possible to determine exactly what D.L. told Officer Gray from the testimony provided.

The evidence did not support a conclusion that D.L. was under the influence of the event at the time the statement was made. D.L. did not testify as to his condition at the time the statements were made. There was insufficient evidence of D.L.'s demeanor presented to support the admissibility of the statements as an excited utterance. The evidence does not clearly indicate that D.L. was under the influence at the time the statements were made. Without such evidence, the decision to admit the statements attributed to D.L. was an abuse of discretion.

Even if the court determines that D.L.'s statements were admissible as excited utterances, the court must also determine if a violation of the confrontation clause occurred in this case. A violation of the confrontation clause may occur even if the statement is admissible under a hearsay exception. California v. Green, 399 U.S. 149, 155-156, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) The Sixth Amendment of the Constitution provides in relevant part;

In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.

U.S. Const. amend. VI Under the case of Washington v. Crawford, 541 U.S. 36, 124 S.Ct. 1354, 158 L.ed2d 177 (2004), admission of testimonial statements that are not subject to cross examination by the defense is a violation of the Sixth Amendment Confrontation Clause. An exception to this rule occurs in the event the witness was unavailable at trial and the defense had an opportunity to question the witness prior to trial. State v. Powers, 99 P.3d 1262 (2004) WL 2436373 (Wash.App. Div.2) quoting Washington v. Crawford, 541 U.S. at –, 124 S.Ct. at 136

Under the case of Washington v. Crawford, *supra*, testimonial statements include pretrial statements made by the declarant who had a reasonable expectation that the statements would be used in a prosecution. Washington v. Crawford, *supra*, See also State v. Powers, 99 P.3d at 1263

The case of Washington v. Crawford, *supra*, changed the court's analysis in determining the appropriateness of admitting statements. The analysis has shifted from determining whether or not the statements fit within an exception to the hearsay rule to determining if the statements were testimonial in nature. Subsequent

to the Washington v. Crawford, *supra*, case, if the court determines that the statements were testimonial in nature, the declarant does not testify, and no prior opportunity for cross examination of the declarant was provided, the statements should not be admitted. Washington v. Crawford, *supra*.

In the case of State v. Powers, 99 P.3d 1262 (2004), the court held that the admission of a 911 tape was a violation of the Sixth Amendment Confrontation Clause. In that case witness, T.P., made the call into 911 but did not testify at trial. The court found that 911 call made was not a call for help but rather made to report the defendant's behavior. State v. Powers, 99 P.3d at 1266. The 911 call was in a question and answer format. *Id.* The court held that the 911 call under these circumstances was testimonial in nature. *Id.* The court found the admission of the 911 tape created a violation of the Confrontation Clause and reversed the conviction. State v. Powers, 99 P.3d at 2266-7.

The case of State v. Orndoff, 122 Wn.App. 781, 95 P.3d 406 (2004) also provide some insight into the application of Washington v. Crawford, *supra*. In the Orndoff case only one of the two victims testified at trial. The trial court allowed the victim, Mr. Norby, to testify

as to statements made by the other victim, Ms. Coble. Ms. Coble made the statements in controversy directly to Mr. Norby during the event. These statements related to observations made by Ms. Coble, Ms. Coble's attempt to contact 911, and Ms. Coble's demeanor. Ms. Coble did not testify at trial. The court held that Ms. Coble's statements were not testimonial in nature. The court found that Ms. Coble had no reasonable expectation that the statements would be used prosecutorially. In furtherance of the position the statements were not testimonial in nature, the court noted that the statements were not made in response to police questioning. State v. Orndoff, 122 Wn. App. at 784

The admission of D.L.'s statements in this case created a violation of the Sixth Amendment's Confrontation Clause. The statements of D.L. were testimonial in nature. D.L. did not testify at trial nor was any record made indicating that D.L. was unavailable. Consequently, no exception to the Confrontation Clause exists.

The statements attributed to D.L. are clearly testimonial in nature. D.L. spoke to Officer Gray. (RP 90-93) Officer Gray was on duty when she questioned D.L.. (RP 89-90) Officer Gray arrived at the scene in the patrol car using patrol lights and sirens. (RP 90)

Officer Gray had a conversation with D.L. regarding what had transpired at the scene. (RP 91-92) D.L. must have had a reasonable expectation that the statements made to Officer Gray would be used in a prosecution. Mr. Ohlson did not have an opportunity to cross-exam D.L. Even if the court determines that the statements from D.L. were admissible as an excited utterance, the statements do not meet the requirements of the Confrontation Clause. Under the case of Washington v. Crawford, *supra*, the statements attributed to D.L. should not have been admitted. In the absence of D.L.'s testimony at trial, the admission of D.L.'s statements created a violation of Mr. Ohlson's Sixth Amendment right to confrontation.

This case is similar to the case of State v. Powers, *supra*. The conversation between Officer Gray and D.L. was similar to a 911 call. D.L. reported what had happened to law enforcement. (RP 91-93) Mr. Ohlson was not in the area at the time Officer Gray had the conversation with D.L. as Mr. Ohlson was home at that time. (RP 73-76) D.L.'s statements to Officer Gray could not be construed as a cry for help. As in the case of State v. Powers, *supra*, the statements made by D.L. were testimonial in nature and the admission of those statements violated Mr. Ohlson's Sixth Amendment rights.

This case is distinguishable from the facts in the case of State v. Orndoff, *supra*. In the Orndoff case the declarations of the nontestifying witness were found not to be testimonial in nature. The statements of controversy in the Orndoff case were not made to law enforcement. The statements were made to another victim of the incident at the time the incident was occurring. In contrast, the facts of the case at hand are vastly different. Here, the statements were made to a law enforcement officer. Additionally, the statements were made after the incident had occurred. D.L.'s declarations are unquestionably testimonial in nature. The admission of Mr. Litt's statements without his appearance at trial and without the opportunity to cross-exam D.L.. in violation of Mr. Ohlson's Sixth Amendment right.

The recent case of State v. Mason, 2005 WL 880105 (2005) sets forth a test for determining if a statement is testimonial in nature. In that case, the court described a three part test to be used in determining if a statement is testimonial. *Id.* These factors include:

- 1) whether the declarant initiated the statement; 2) the formality of the setting; 3) the declarant's purpose in making the statement.

State v. Mason, 2005 WL 880105 at 4

In that case the court determined that the statements made by the declarant were made while in peril with the purpose of getting help. For that reason the court determined that the statements were not testimonial. Specifically the court stated as follows:

We further hold that statements made while in peril for the purpose of seeking protection, rather than for the purpose of bearing witness, are not testimonial and thus not subject to Crawford's cross-examination requirement.

*Id.* at 4

In the case at hand, the application of the factors outlined in the Mason case to the facts in the case at hand suggests that the statements made by D.L. were testimonial. First for consideration is the fact that D.L. did not initiate contact with law enforcement. L.F. initiated contact with law enforcement by placing a call to 911. (RP 69) Officer Gray stated that D.L. and L.F. made statements to her. (RP 92)

Mr. Ohlson respectfully disagrees with the decision from the Court of Appeals. The Court of Appeals relied on the case of Hammon v. State, supra, which has been accepted for review by the Supreme Court of the United States. The Court also cited the cases of People v. Corella, 122 Cal.App. 4<sup>th</sup>, 461, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct.

App. 2004) and Lopez v. State, 88 So.2d 693, 698 (Fla. Dist.Ct.App. 2004) as support for determining that excited utterances cannot be testimonial. However, many courts have criticized the holdings of those two cases, and have determined that a per se rule is not appropriate. Spencer v. State, 162 S.W.3d 350 (Tex.App.-Hous. (14 Dist.) 2005); State v. Warsmae, 701 N.W.2d 305 (Minn.App. 2005); State v. Parks, 211 Ariz.19, 116 P.3d 639 (Ariz.App. Div.1 2005)

F. Conclusion

This Court should grant review of the Court of Appeal's decision.

DATED this 23rd day of January, 2006.

Respectfully submitted,



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WSBA #25200  
Attorney for Appellant

## DECLARATION OF MAILING

I, Jeanne L. Hoskinson, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Petition for Review in the above-captioned case hand-delivered or mailed as follows:

**Original of Petition to Review of Appellant mailed to:**

Supreme Court  
Temple of Justice  
P.O. Box 40929  
Olympia, WA 98504-0929

**Copy of Petition to Review of Appellant emailed to:**

Supreme Court  
Temple of Justice  
Supreme@courts.wa.gov

**Copy of Petition to Review of Appellant mailed to:**

Clerk of the Court  
COURT OF APPEALS, DIVISION II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

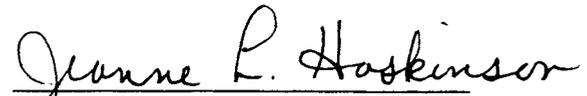
**Copy of Petition to Review of Appellant mailed to :**

Mr. Randall Sutton  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS-35  
Port Orchard, WA 98366

**Copy of Petition to Review of Appellant Mailed to:**

James D. Ohlson  
c/o Ruth Ohlson  
944 Yoder Lane  
Bremerton, WA 98311

DATED this 24<sup>th</sup> day of January, 2005, at Port Orchard,  
Washington.

  
JEANNE L. HOSKINSON  
Legal Assistant

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DIVISION II

05 DEC 28 AM 9:15

STATE OF WASHINGTON  
BY lp  
DEPUTY

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

STATE OF WASHINGTON,

Respondent

v.

JAMES DOUGLAS OHLSON,

Appellant.

No. 32112-2-II

PART PUBLISHED OPINION

BRIDGEWATER, J. — James Douglas Ohlson appeals his conviction of two counts of second degree assault. We hold that the victim's out-of-court statements were properly admitted as excited utterances. We further hold that these statements were non-testimonial and did not violate Ohlson's right of confrontation under *Crawford v. Washington*,<sup>1</sup> and we adopt a per se rule that excited utterances cannot be testimonial. We also hold that there was no prosecutorial misconduct in commenting on Ohlson's custody status at the time of trial because Ohlson, himself, testified that he was in custody and the prosecutor's comments were fleeting and not

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<sup>1</sup> *Crawford v. Wash.*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

flagrant or ill intentioned. Lastly, there was sufficient evidence to support Ohlson's conviction. We affirm.

#### FACTS

On April 16, 2004, L.F. and D.L., two minors, were standing on the sidewalk near the entrance to Lion's Field in Bremerton, Washington, waiting for their mothers to pick them up. As they waited, Ohlson drove by, "[f]lipp[ed]" them off, and yelled, "F[] you, niggers." 1 Report of Proceedings (RP) (Jun. 30, 2004) at 63-64. Ohlson then turned around and began "speeding and braking" near L.F. and D.L., continuing to yell racial epithets. 1 RP at 65. He then left the area.

Approximately five minutes later, Ohlson returned and drove his vehicle up onto the sidewalk where L.F. and D.L. were standing, causing them to "jump out of the way." 1 RP at 66. L.F. called 911. L.F. testified that she was facing D.L., who was leaning against a pole; had Ohlson continued driving on the sidewalk, he "would have hit the pole." 1 RP at 66. She believed that Ohlson was driving at about 45 miles per hour. L.F. further testified that she was "kind of scared" because she believed that Ohlson had attempted to run them over. 1 RP at 68.

Officer Crystal Gray of the Bremerton Police Department responded to L.F.'s 911 call. Officer Gray testified that she arrived at the scene within five minutes. She stated that L.F. and D.L. were "pretty upset" and "shaken up" and that L.F. was shaking. 1 RP at 91.

Officers Daniel Fatt and Mike Davis, also of the Bremerton Police Department, contacted Ohlson at his home. Ohlson told Officer Davis that he had called D.L. a "nigger" and that he had

driven "back and forth" past L.F. and D.L. "[k]ind of recklessly to scare them." 1 RP at 84. Ohlson further stated that at one point during the incident, his vehicle was five feet from D.L.

Ohlson was charged with one count of malicious harassment and two counts of second degree assault, and a jury trial commenced on June 30, 2004. D.L. did not testify.

Officer Gray testified that L.F. and D.L. told her that Ohlson had driven past them several times, yelling racial epithets. Ohlson then swerved "up on to the curb trying to hit them," and they had to "jump out of the way" to avoid being struck. 1 RP at 92. Officer Gray stated that L.F. and D.L. believed that Ohlson had tried to hit them with his vehicle. Ohlson objected to the admission of D.L.'s out-of-court statements; and the court admitted the statements as excited utterances.

Robert Klose, an eyewitness to the incident, also testified. Klose testified that he was standing on his deck across the street from L.F. and D.L. when Ohlson drove by them. He observed Ohlson drive up onto the sidewalk where L.F. and D.L. were standing, causing them to jump out of the way. Klose stated that Ohlson "had to come off the shoulder of the road and then onto the sidewalk" and that he took a "pretty good swipe" at L.F. and D.L. 2 RP (Jul. 1, 2004) at 113-14.

Ohlson testified that he had not intended to scare L.F. and D.L. Rather, he was "in a fit of rage" because he had lied to his wife about using drugs. 2 RP at 124. Ohlson further stated that he had stopped using drugs since he had been in jail. During Ohlson's cross-examination, the prosecutor asked him whether the incident had been "dominating [his] thoughts while [he was] in

custody.” 2 RP at 133. Ohlson responded affirmatively and did not object to the prosecutor’s questioning.

In addition, in permitting the jury to continue deliberating, the trial court stated:

I’m going to allow you to keep deliberating -- but here’s the issue we’re trying to resolve right now, as I deal with other people and other institutions, the jail. We’re trying to make sure that if you reach a verdict, so you don’t have to come back tomorrow, we can have the defendant, *since you heard in testimony he is in custody*, whether or not he can be brought over after 4:30.

2 RP at 210-11 (emphasis added). Ohlson did not object to the court’s statements.

The jury found Ohlson guilty of the two counts of second degree assault but not guilty of malicious harassment. He appeals.

#### I. Admission of D.L.’s Hearsay Statements

Ohlson contends that the trial court erred in admitting D.L.’s out-of-court statements<sup>2</sup> to Officer Gray as excited utterances. He argues that the evidence was insufficient to prove that D.L. perceived, and was under the influence of, a startling event at the time the statements were made. We disagree.

We review a trial court’s ruling on the admissibility of evidence for an abuse of discretion. *State v. Moran*, 119 Wn. App. 197, 218, 81 P.3d 122 (2003), *review denied*, 151 Wn.2d 1032 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *Moran*, 119 Wn. App. at 218.

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<sup>2</sup> These statements include testimony by Officer Gray that both L.F. and D.F. told her that Ohlson had driven past them several times, yelling racial epithets. Ohlson then swerved up on to the curb, causing them to jump out of the way to avoid being struck. Officer Gray further testified that L.F. and D.L. told her that they believed that Ohlson had tried to hit them with his vehicle.

ER 803(a)(2) allows the admission of excited utterances as an exception to the rule excluding hearsay statements. *State v. Sunde*, 98 Wn. App. 515, 520, 985 P.2d 413 (1999). An excited utterance is “[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). Three requirements must be met for a statement to qualify as an excited utterance: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of excitement caused by the 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).

Ohlson challenges the first and second of these requirements. He argues that the evidence was insufficient to establish that D.L. perceived, or was under the influence of, a startling event or condition because D.L. did not testify as such and Officer Gray presented insufficient evidence of D.L.’s demeanor at the time of the incident. We reject these arguments.

Ohlson is correct in asserting that we must focus on the declarant’s perception in analyzing whether a startling event has occurred. *See Chapin*, 118 Wn.2d at 687 (for purposes of the excited utterance exception, it is the event’s effect on the declarant that must be focused upon). But the declarant need not testify regarding his perception of the event in order to establish this requirement; indeed, a declarant may even recant his statements about the event. *See State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000) (a later recantation does not disqualify a statement as an excited utterance). Rather, we may consider circumstantial evidence in determining whether the declarant has perceived a startling event.

In *Williamson*, the declarant recanted her statements against the defendant. *Williamson*, 100 Wn. App. at 252. The court nevertheless admitted the statements as excited utterances, considering witnesses' testimony that the declarant was "upset, highly emotional, and in shock" and was "nervous[] and excited" at the time she made the statements. *Williamson*, 100 Wn. App. at 258-59. And in determining that the declarant's statements were made under the influence of the startling event, the court considered witnesses' testimony that the statements were made shortly after the event took place and were a spontaneous recitation of the event. *Williamson*, 100 Wn. App. at 259.

Likewise, the facts of the instant case amply support a finding that a startling event, the assault, occurred and that D.L.'s statements were made under the influence of the assault. L.F. testified that Ohlson began yelling racial epithets at her and D.L. and then drove up onto the sidewalk where she and D.L. were standing. L.F. testified that it was D.L. who said, "look out" before L.F. saw Ohlson's car very close to them. 1 RP at 68. She stated that they had to "jump out of the way" to avoid being hit and that had Ohlson continued driving on the sidewalk, he would have hit the pole D.L. was leaning against. 1 RP at 66.

Officer Gray testified that she spoke with L.F. and D.L. approximately five minutes after the incident occurred and that L.F. and D.L. were "pretty upset" and "shaken up." 1 RP at 91. Additionally, both L.F. and D.L.'s statements were a spontaneous recitation of the facts. The trial court acted within its discretion in concluding that D.L.'s statements were excited utterances.

## II. Right of Confrontation

Ohlson next asserts that the admission of D.L.'s out-of-court statements to Officer Gray violated his right of confrontation and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), because he had no prior opportunity to examine D.L. regarding these statements. The State responds that D.L.'s statements were properly admitted because they were not testimonial and that, even if the statements were admitted in error, the error was harmless.<sup>3</sup>

Ohlson did not raise this issue below. Nevertheless, the right to confront adverse witnesses is an issue of constitutional magnitude,<sup>4</sup> which we may consider for the first time on appeal. RAP 2.5(a); *State v. Clark*, 139 Wn.2d 152, 156, 985 P.2d 377 (1999).

### A. Testimonial Statements

In *Crawford*, the United States Supreme Court held that the admission of a witness's testimonial, out-of-court statements violates the confrontation clause when the witness does not testify at trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness regarding the out-of-court statements. *Crawford*, 541 U.S. at 68-69. Here, it is undisputed that D.L. did not testify at trial and that Ohlson had no prior opportunity to cross-examine him.

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<sup>3</sup> Because of our holding that excited utterances are not testimonial, we do not address harmless error even though we hold that there was not only sufficient, but overwhelming evidence supporting the convictions.

<sup>4</sup> The sixth amendment to the United States Constitution and article I, section 22, of the Washington State Constitution, guarantee criminal defendants the right to confront and cross-examine witnesses against them.

At issue in this case is whether D.L.'s statements to Officer Gray were "testimonial" as *Crawford* contemplated. Officer Gray arrived at the scene approximately five minutes after L.F. called 911 and spoke with both L.F. and D.L. regarding the incident. Ohlson was no longer at the scene. Officer Gray testified that L.F. and D.L. told her:

[w]hile they were out there, a vehicle -- I'm going to -- I have the description. It was an orange Toyota -- had gone by and flipped them off and, I quote, "called them f[---]ing niggers" and sped off. The vehicle then came back around and actually swerved up on to the curb trying to hit them. At least that's the way they felt. They had to literally jump out of the way so that they were not hit. This continued, they said, at least four times, where the car went back and forth in front of them, calling them racial names.

1 RP at 92-93.

The *Crawford* Court declined to comprehensively define "testimonial" statements; however, it identified three examples of the types of statements that could be properly regarded as testimonial statements. These statements include: (1) ex parte in-court testimony or its functional equivalent, i.e., affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that a declarant would reasonably expect to be used prosecutorially; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *Crawford*, 541 U.S. at 51-52. Additionally, the Court stated that statements given to police in the course of interrogations are testimonial. *Crawford v. Wash.*, 541 U. S. at 52.

The statements at issue here do not fall within the first category of testimonial statements identified in *Crawford*. Nor were the statements given in the course of police interrogation. Washington has not yet specifically addressed what type of police questioning might qualify as an “interrogation” for *Crawford* purposes.

But, the courts of other jurisdictions have held that initial police questioning at the scene of a crime does not constitute classic, police interrogation as contemplated by *Crawford*. See *People v. Corella*, 122 Cal. App. 4th 461, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004) (preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an interrogation; *Hammon v. State*, 809 N.E.2d 945, 951-52 (Ind. Ct. App. 2004) (the term “interrogation” does not apply to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred); *Lopez v. State*, 888 So. 2d 693, 698 (Fla. Dist. Ct. App. 2004) (it is doubtful that initial police questioning at the scene of a crime is an interrogation). Further, there is support for this conclusion in *Crawford*: the Court used the term “interrogation” in this context to refer to a structured inquiry. See *Crawford*, 541 U.S. at 53 n.4 (“[w]e use the term ‘interrogation’ in its colloquial, rather than any technical legal, sense”; the declarant’s “recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition” of that term).

Although D.L.’s statements were made in response to questioning by a police officer, Officer Gray’s minimal questioning was not an “interrogation” as *Crawford* contemplated. Officer Gray testified that she merely “made contact” with L.F. and D.L. and “spoke with both of them” about what had happened. 1 RP at 90-91.

Nor do D.L.'s statements fall with the second category of out-of-court statements made in "formalized testimonial materials." *Crawford*, 541 U.S. at 52. Rather, it is the third category of testimonial statements, statements made with the reasonable expectation that they will be used at a later trial, that is of concern in this case.

The State urges us to hold that excited utterances, by definition, cannot be made with a reasonable expectation that they will be used for prosecution. It argues that excited utterances are admissible under the rules of evidence because "the stress of the event suppresses the reflective faculties of the declarant"; accordingly, the declarant of an excited utterance is incapable of reflection and unable to form the expectation that his or her statement will be used in a later prosecution. Br. of Resp't at 21 (quoting *State v. Palomo*, 113 Wn.2d 789, 796, 783 P.2d 575 (1989), *cert. denied*, 498 U.S. 826 (1990)).

Case law from other jurisdictions supports the State's position. See *Anderson v. State*, 111 P.3d 350, 354 (Alaska Ct. App. 2005) (excited utterances by a crime victim to a police officer are not testimonial); *United States v. Webb*, No. DV-339-04, 2004 D.C. Super. LEXIS 17, at \*6-7 ((D.C. Super. Nov. 9, 2004) (it is exceedingly unlikely that the Supreme Court intended to exclude from evidence excited utterances made during investigatory questioning at the scene of a crime soon after the criminal event); *Fowler v. State*, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (the very nature of the declarant's excited utterance places it outside the realm of testimonial statements).

Our recent decision in *State v. Orndorff*, 122 Wn. App. 781, 95 P.3d 406 (2004), *review denied*, 154 Wn.2d 1010 (2005), supports our decision here to adopt a per se rule that excited

utterances are not testimonial. In that case, we held that the victim's statement was not testimonial:

Coble's excited utterance fits into none of [*Crawford's*] categories. It was not a declaration or affirmation made to establish or prove some fact; it was not prior testimony or a statement given in response to police questioning; and Coble had no reason to expect that her statement would be used prosecutorially. Rather, Coble's statement was a spontaneous declaration made in response to the stressful incident she was experiencing. We hold that Coble's excited utterance was not testimonial and, therefore, not precluded by *Crawford's* confrontation clause analysis.

*Orndorff*, 122 Wn. App. at 787.

Similarly, here, D.L.'s statements did not fit any of the categories set forth in *Crawford*. It is not reasonable to regard an excited utterance as "bearing witness" such that the declarant would know that it would be used in a later prosecution. And although *Orndorff* concerned a statement made to a friend, not a policeman, the rationale is the same—excited utterances are not testimonial by their very nature.

Our Supreme Court has addressed 911 calls, and established that they must be examined on a case-by-case basis. *State v Davis*, 154 Wn.2d 291, 302-303, 111 P.3d 844, cert. granted, 2005 U.S. LEXIS 7859 (2005). Our decision is consistent with those cases examining 911 calls.

In *Davis*, the court noted that in most 911 calls the caller is not "bearing witness," and an examination must be made to determine whether the caller is knowingly providing the equivalent of testimony to a government agent. *Davis*, 154 Wn.2d at 301. But *Davis* also quoted from a California case, *Corella*, 18 Cal. Rptr. 3d 770:

The *Corella* court further stated that it is difficult to perceive any circumstances under which a statement qualifying as an excited utterance would be testimonial. The rationale behind the excited utterance exception to the

hearsay rule is that the statement is “made without reflection or deliberation due to the stress of excitement.” “[S]tatements made without reflection or deliberation are not made in contemplation of their ‘testimonial’ use in a future trial.”

*Davis*, 154 Wn.2d at 302 (quoting *Corella*, 18 Cal. Rptr. 3d at 776) (citations omitted).

In *State v. Walker*, 129 Wn. App. 258, 269, 118 P.3d 935 (2005), Division One of this court declined to adopt a per se rule that all excited utterances cannot be testimonial. We do not agree.

We analyze whether excited utterances are testimonial in the same manner that we analyze whether statements are truly excited utterances. Thus, we employ the restrictive reasoning and definition of “excited utterance” as set forth in *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995):

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.” The utterance of a person in such a state is believed to be “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,” rather than an expression based on reflection or self-interest.

*Brown*, 127 Wn.2d at 758 (quoting *Chapin*, 118 Wn.2d at 686 (quoting 6 JOHN HENRY WIGMORE, EVIDENCE § 1747, at 195 (Chadbourn rev. 1976))).

As a result, the “key determination 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.’” *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

*Brown*, 127 Wn.2d at 758-59. Because of this restrictive definition, excited utterances should not be considered as statements that “bear witness.” Using this analysis, along with our review

of the trial court's conclusion that D.L.'s statements were an excited utterance, we adopt a per se rule and hold that excited utterances cannot be testimonial under *Crawford*.

Under our scheme, the trial court will decide whether the statement is an excited utterance. Then, we would review that decision based upon the restrictive definition above, as we have done in this case and as our Supreme Court did in *Brown*. If our review concludes that the statement was an excited utterance, then it would be admissible as non-testimonial.

Accordingly, we do not need to perform a fact-specific analysis in determining whether an excited utterance made to a police officer constituted "testimony" for *Crawford* purposes. The court did not err.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

## II. Sufficiency of Evidence

Ohlson also asserts that the evidence is insufficient to support his convictions. He argues that the record did not support a finding (1) that D.L. was in apprehension of harm or (2) that he intended to harm D.L. and L.F.

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*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are

equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, we do not sort out conflicting evidence, decide which witnesses are credible, or how persuasive the evidence is; the jury resolves these issues. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, Ohlson was convicted of two counts of second degree assault under RCW 9A.36.021(1)(c). Under that statute, a person is guilty of second degree assault if he, under circumstances not amounting to first degree assault, assaults another with a deadly weapon. A deadly weapon includes a vehicle that, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm. RCW 9A.04.110(6).

Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force, to inflict bodily injury on another (attempted battery); (2) an unlawful touching with criminal intent (battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). *State v. Nicholson*, 119 Wn. App. 855, 860, 84 P.3d 877 (2003). When assault is alleged to have been committed by causing another to be in apprehension of harm, the State must prove both that the defendant had the specific intent to place the victim in apprehension of harm and that the victim was in apprehension of harm. *State v. Eastmond*, 129 Wn.2d 497, 500, 503-04, 919 P.2d 577 (1996).

D.L. was not required to testify about the incident for the jury to convict Ohlson of assaulting him; circumstantial evidence is as reliable as direct evidence. *Delmarter*, 94 Wn.2d at 638. Here, L.F.'s 911 call and testimony describing the assaults and identifying Ohlson as the

assailant alone were sufficient to convict Ohlson; D.L.'s statements to Officer Gray were merely duplicative. Further, Klose, an eyewitness, gave nearly identical testimony regarding the assaults. This testimony did not violate *Crawford*, and Ohlson does not challenge it.

And the jury could reasonably infer from L.F.'s testimony that D.L. was in fear and apprehension of harm. Initially, it was D.L. who alerted L.F. as he warned her to "look out." 1 RP at 68. L.F. testified that when Ohlson drove up onto the sidewalk where she and D.L. were standing, they had to "jump out of the way" to avoid being hit and, had Ohlson continued driving on the sidewalk, he would have hit the pole D.L. was leaning against. 1 RP at 68; 1 RP at 66. L.F. further testified that she felt scared because she believed that Ohlson was attempting to run them over. Any rational trier of fact could conclude that D.L., too, was in fear of bodily injury when he avoided being struck by a moving vehicle by jumping out of the way. Moreover, Officer Gray testified that when she spoke with D.L. and L.F., they were upset and shaken up; this evidence was properly admitted. But with D.L.'s statement being properly admitted, there is plain evidence of his apprehension. And finally, Ohlson admitted that he actually intended to cause apprehension. Ohlson admitting calling D.L. a "nigger" and driving "back and forth" past L.F. and D.L. "[k]ind of recklessly to scare them." 1 RP at 84. Ohlson further admitted that at one point during the incident, his vehicle was five feet from D.L. In conclusion, the evidence was sufficient and overwhelming to support Ohlson's convictions.

## III. Comment on Ohlson's Custody Status

Finally, Ohlson contends that the trial court and the prosecutor violated his right to a fair and impartial trial in commenting on his in-custody status.<sup>5</sup> He further argues that the court failed to weigh the prejudicial value of his custodial status against its probative value before this evidence was presented to the jury. In response, the State asserts that references to a defendant's custody status do not rise to the level of a Sixth Amendment violation. Additionally, the State argues that Ohlson waived this issue by failing to object to the comments and by commenting on his own custody status. The State is correct.

On direct examination, Ohlson testified that he had stopped using drugs since he had been in jail. And on cross-examination, the prosecutor asked him whether the incident had been "dominating [his] thoughts while [he was] in custody." 2 RP at 133. Ohlson responded affirmatively and did not object to the prosecutor's questioning. In addition, in coordinating deliberation, the trial court stated, "We're trying to make sure that if you reach a verdict, so you don't have to come back tomorrow, we can have the defendant, since you heard in testimony he is in custody." 2 RP at 210-11.

The sixth and fourteenth amendments to the United States Constitution guarantee a criminal defendant the right to a fair and impartial trial. This guarantee includes the presumption of innocence. *State v. Mullin-Coston*, 115 Wn. App. 679, 692, 64 P.3d 40 (2003), *aff'd*, 152 Wn.2d 107 (2004). The right to a fair trial can be violated where a defendant appears before the

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<sup>5</sup> Ohlson does not argue that the trial court's comment constituted an improper comment on the evidence.

jury in physical restraints. *Mullin-Coston*, 115 Wn. App. at 692; *State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999).

The defendant in *Mullin-Coston* argued, as Ohlson argues now, that his right to a fair trial was violated when the jury heard evidence that he was in custody. *Mullin-Coston*, 115 Wn. App. at 693. Division One rejected this argument, reasoning:

[A]lthough references to custody can certainly carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial. Jurors must be expected to know that a person awaiting trial will often do so in custody. . . . In contrast, shackling a defendant during trial sends the message to the jury that the judge, corrections officers, and security personnel present fear the defendant or think he might leap from his chair at any point and cause harm to someone in the courtroom. That is a much stronger prejudice than a reference to the fact that a defendant was in jail on the same charge for which he is being tried.

*Mullin-Coston*, 115 Wn. App. at 693-94.<sup>6</sup> In addition, the court noted that the defendant did not ask for a limiting instruction, "indicating that even trial counsel did not view the references as critically prejudicial at the time." *Mullin-Coston*, 115 Wn. App. at 694, n.7.

We agree and decline to hold that Ohlson's Sixth Amendment right to a fair trial was violated when the prosecutor and trial court commented on his in-custody status. Moreover, Ohlson, himself, first stated during direct examination that he was in custody, and he failed to object to the comments or to request a limiting instruction. Under the invited error doctrine, a party may not set up an error at trial and then be heard to complain about it on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). The trial court's logistical comment to the

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<sup>6</sup> The court did state, however, that a greater amount of prejudice would inhere if the jury were told that the defendant was previously incarcerated for another crime, particularly if evidence of the crime was inadmissible under ER 404(b) or ER 609. *Mullin-Coston*, 115 Wn. App. at 694 n.7.

jury that it “heard in testimony that [Ohlson was] in custody” was made in response to Ohlson’s testimony, and Ohlson may not now object to it. 2 RP at 210-11.

Nevertheless, Ohlson argues that the trial court was required to weigh the prejudicial value of his custodial status against its probative value. This argument is without merit as Ohlson failed to object to either the prosecutor’s or the trial court’s comment concerning his custody status. *See State v. Sengxay*, 80 Wn. App. 11, 15, 906 P.2d 368 (1995) (a failure to object to the admission of evidence waives the issue on appeal).

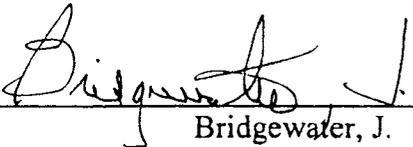
Additionally, Ohlson asserts that the prosecutor committed prosecutorial misconduct in questioning him about his custody status. He argues that the prosecutor’s questioning during cross-examination—i.e., whether the incident had been “dominating” his thoughts while he was in custody—was done merely to “emphasize to the jury [his] custodial status.” Br. of Appellant at 17; 2RP at 133.

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor’s conduct was improper and that the prosecutor’s conduct prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *Dhaliwal*, 150 Wn.2d at 578 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996)).

Ohlson did not object to the prosecutor’s questioning; a defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a curative

instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Here, particularly in light of the fact that Ohlson had already revealed his custodial status, the prosecutor's remarks were neither "flagrant" nor "ill intentioned," and a curative instruction could have remedied any prejudice to Ohlson. The prosecutor's questioning was merely a fleeting remark, made after Ohlson testified that he was being held in custody. The prosecutor did not commit misconduct.

Affirmed.

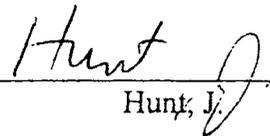
  
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Bridgewater, J.

I concur:

  
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Quinn-Brintnall, C.J.

I agree with the majority's result in this case and almost all of the rationale. But I write separately to express my disagreement with their adoption of a blanket rule that every excited utterance is non-testimonial and, therefore, does not run afoul of constitutional confrontation rights as recently enunciated by the United States Supreme Court in *Crawford v. Washington*.<sup>7</sup> Instead, I would follow Division One's opinion in *State v. Walker*, 129 Wn. App. 258, 269, 118 P.3d 935 (2005), and "decline to adopt a per se rule . . . that *all* excited utterances cannot be testimonial." (Emphasis added.)

Although the blanket rule adopted by the majority here works under the facts of this case, I can conceive of a hybrid situation where a predominantly excited utterance might contain testimonial elements that run afoul of *Crawford*. I think it prudent for now, while the post-*Crawford* case law is newly evolving, to decide this issue on a case-by-case basis. In my view, such an approach should not involve significant additional judicial resources because the trial courts will already be deciding whether a statement offered as an excited utterance is testimonial, such that the statement will not be admissible unless the declarant is, or has been, subject to cross examination. *Crawford*.

  
Hunt, J.

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<sup>7</sup> 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2 d 177 (2004).

