

56935-0

56935-0

80850-3

No. 56935-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

FILED  
2006 JUL 19  
APPELLATE DIVISION  
CLERK OF COURT  
STATE OF WASHINGTON  
PH 4-54

---

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY E. PUGH,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Theresa Doyle

---

APPELLANT'S OPENING BRIEF

---

MAUREEN M. CYR  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR..... 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

D. STATEMENT OF THE CASE ..... 3

E. ARGUMENT ..... 6

    1. THE TRIAL COURT VIOLATED MR. PUGH’S  
      CONSTITUTIONAL RIGHT TO NOTICE OF THE  
      CHARGES AGAINST HIM BY INSTRUCTING THE JURY  
      ON AN ALTERNATIVE MEANS OF COMMITTING THE  
      CRIME OF WITNESS TAMPERING THAT WAS NOT  
      ALLEGED IN THE INFORMATION ..... 6

        a. The jury may not be instructed on a statutory alternative  
           means that is not alleged in the information ..... 6

        b. The jury was instructed on an alternative means of  
           committing witness tampering that was not alleged in the  
           information ..... 7

        c. The conviction must be reversed..... 9

    2. THE ADMISSION OF A 911 TAPE RECORDING OF THE  
      COMPLAINING WITNESS’S DESCRIPTIONS OF A PAST  
      EVENT VIOLATED MR. PUGH’S SIXTH AMENDMENT  
      RIGHT TO CONFRONT THE WITNESSES AGAINST HIM12

        a. The Confrontation Clause prohibits admission of uncross-  
           examined statements by absent declarants when those  
           statements are “testimonial” in nature ..... 12

        b. Statements made to a 911 operator are testimonial when  
           they describe an event that has already terminated ..... 13

c.	Ms. Pugh’s statements to the 911 operator were testimonial because they described an event that had already terminated.....	19
d.	The Confrontation Clause violation requires reversal....	21
3.	MR. PUGH’S STATE CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM FACE-TO-FACE WAS VIOLATED BY THE ADMISSION OF THE HEARSAY STATEMENTS UNDER THE EXCITED UTTERANCE EXCEPTION, ABSENT A SHOWING OF THE WITNESS’S UNAVAILABILITY.....	25
a.	<i>State v. Foster</i> .....	27
b.	The <i>Gunwall</i> factors demonstrate Washington’s constitution provides a right to “face to face” confrontation that was violated by Mr. Pugh’s conviction based upon hearsay statements admitted under the excited utterance exception of an available but non-testifying witness.....	29
i.	<i>Factor One – Textual Language of the Washington Constitution</i> .....	30
ii.	<i>Factor Two – Significant Differences in Texts of Parallel Provisions</i> .....	34
iii.	<i>Factor Three – State Constitutional and Common Law History</i> .....	35
iv.	<i>Factor Four – Preexisting Washington Law</i> .....	41
v.	<i>Factor Five – Differences in structure between the state and federal constitutions</i> .....	48
vi.	<i>Factor Six – Matters of particular state interest or concern</i> .....	48
c.	Mr. Pugh’s state constitutional right to confront the witnesses against him “face-to-face” was violated when the court admitted hearsay statements of the complaining	

witness under the excited utterance exception, without a  
finding that the witness was unavailable ..... 49

F. CONCLUSION ..... 50

## TABLE OF AUTHORITIES

### **Constitutional Provisions**

Const. art. 1, § 22.....	<i>passim</i>
U.S. Const. amend. 6 .....	<i>passim</i>

### **Washington Supreme Court Cases**

<u>Beck v. Dye</u> , 200 Wash. 1, 92 P.2d 1113 (1939).....	42, 43
<u>Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.2d 618 (1982) .....	42
<u>State v. Aldrick</u> , 97 Wash. 593, 166 P. 1130 (1917).....	44, 45
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990) .....	48
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002) .....	9
<u>State v. Eddon</u> , 8 Wash. 292, 36 P. 139 (1894) .....	38, 46
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 38, 39, 48
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	25, 26, 27, 28, 29, 48, 49
<u>State v. Hunter</u> , 18 Wash. 670, 52 Pac. 247 (1898) .....	44
<u>State v. Irizarry</u> , 111 Wn.2d 591, 763 P.2d 432 (1988) .....	6
<u>State v. Palomo</u> , 113 Wn.2d 789, 783 P.2d 575 (1989) .....	38, 47
<u>State v. Redwine</u> , 23 Wn.2d 467, 161 P.2d 205 (1945) .....	22
<u>State v. Ryan</u> , 103 Wn.2d 165, 691 P.2d 197 (1984).....	29, 39
<u>State v. Severns</u> , 13 Wn.2d 542, 125 P.2d 659 (1942) ...	6, 9, 10, 12
<u>State v. Shafer</u> , 156 Wn.2d 381, 128 P.3d 87 (2006).....	38

<u>State v. Smith</u> , 148 Wn.2d 122, 59 P.3d 74 (2002) .....	26
<u>State v. Stentz</u> , 30 Wash. 135, 70 P.241 (1902) .....	36
<u>State v. Stroud</u> , 106 Wn.2d 141, 720 P.2d 436 (1986).....	30
<u>State v. Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001) .....	9

**Washington Court of Appeals Cases**

<u>State v. Bray</u> , 52 Wn. App. 30, 756 P.2d 1332 (1988).....	6, 9, 10, 12
<u>State v. Dixon</u> , 37 Wn. App. 867, 684 P.2d 725 (1984) .....	43
<u>State v. Doogan</u> , 82 Wn. App. 185, 917 P.2d 155 (1996) .....	7, 9, 10
<u>State v. Neslund</u> , 50 Wn. App. 531, 749 P.2d 725 (1988).....	22
<u>State v. Saunders</u> , 132 Wn. App. 592, 132 P.3d 743 (2006)...	25, 36
<u>State v. Silva</u> , 107 Wn. App. 605, 27 P.3d 663 (2001) .....	35

**United States Supreme Court Cases**

<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).....	9, 21
<u>Davis v. Washington</u> , 2006 U.S. LEXIS 4886 (Nos. 05-5224 and 05-5705, June 19, 2006) .....	2, 14, 15, 16, 17, 18, 19, 21, 29, 37
<u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).....	21
<u>Lilly v. Virginia</u> , 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999).....	16
<u>Ohio v. Roberts</u> , 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).....	29, 37, 40
<u>White v. Illinois</u> , 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992).....	36, 37

## Statutes and Rules

ER 801 .....	22
ER 803 .....	41
RCW 9A.44.120 .....	38
RCW 9A.72.120 .....	7, 8

## Other Jurisdictions

<u>Arndt v. State</u> , 642 N.E.2d 224 (Ind. 1994).....	41
<u>Brady v. State</u> , 575 N.E.2d 981 (Ind. 1991).....	29, 33
<u>King v. Brasier</u> , 1 Leach 199, 168 Eng. Rep. 202 (1779) .....	18
<u>State v. Campbell</u> , 299 Or. 633, 705 P.2d 694 (1985).....	40
<u>State v. Moore</u> , 334 Or. 328, 49 P.3d 785 (2002).....	40

## Other Authorities

Aviva Orenstein, <u>"My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule</u> , 85 Cal. L. Rev. 159 (1997).....	47
<u>Journal of the Washington State Constitutional Convention, 1889</u> (Beverly P. Rosenow ed., 1962) .....	32
Lebbeus J. Knapp, <u>The Origin of the Constitution of the State of Washington</u> , 4 Wash. Hist. Q., No. 4 (1913) .....	35
Robert F. Utter, <u>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</u> , 7 U. Puget Sound L. Rev. 491 (1984).....	34, 36
1 <u>Wharton's Criminal Evidence</u> § 262 (10th ed.) .....	45

A. SUMMARY OF ARGUMENT

Following severed trials, Timothy Pugh was convicted of one count of felony violation of a no-contact order, based on an underlying assault, one count of witness tampering, and two counts of misdemeanor violation of a no-contact order. The witness tampering statute sets forth three alternative means of committing the crime. Mr. Pugh was denied his constitutional right to notice of the charges against him when the State alleged in the information only two of the statutory alternative means, but the jury was instructed on all three.

In addition, Mr. Pugh was denied both his federal and state constitutional right to confront his accusers when the trial court admitted inflammatory hearsay statements of the complaining witness in a 911 call, even though the witness did not testify at the trial and Mr. Pugh never had the opportunity to cross-examine her.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Pugh's constitutional right to be informed of the charge against him by instructing the jury on an alternative statutory means of committing the crime that was not alleged in the information.

2. The trial court violated Mr. Pugh's Sixth Amendment right to confrontation by admitting testimonial statements from a 911 call.

3. The trial court violated Mr. Pugh's right to confrontation under article I, section 22 of the Washington Constitution by admitting hearsay statements from the 911 call.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution, an accused person must be informed of the criminal charge he is to meet at trial and cannot be tried for an offense not charged. Where a statute sets forth alternative means by which a crime can be committed, and the charging document alleges one or more of those means, it is error for the factfinder to be instructed on an uncharged alternative. Did the court err in instructing the jury on a statutory alternative means of committing the crime that was not alleged in the information?

2. The Sixth Amendment guarantees a criminal defendant the right to confront witnesses whose "testimonial" statements are admitted in evidence against him. In Davis v. Washington,<sup>1</sup> the United States Supreme Court recently clarified that a person's

---

<sup>1</sup> \_\_\_ U.S. \_\_\_, 2006 U.S. LEXIS 4886 (Nos. 05-5224 and 05-5705, June 19, 2006).

statements to a law enforcement agent describing an event that has terminated are “testimonial.” In this case, the court admitted a 911 recording recounting the complainant’s hearsay statements in which she described an event that had already terminated. Where Mr. Pugh did not have an opportunity to cross-examine the witness, did admission of the testimonial statements violate his Sixth Amendment right to confrontation?

3. Article 1, section 22 of the Washington Constitution is more protective of a defendant’s right to confront the witnesses against him than the Sixth Amendment. Was Mr. Pugh’s state constitutional right to meet the witnesses against him face to face violated when the State introduced hearsay statements against him, he had no prior opportunity to cross-examine the declarant, and the State did not show the declarant was not available as a witness?

#### D. STATEMENT OF THE CASE

Timothy and Bridgette Pugh are married. 7/28/05RP 77-78. In the early morning of March 31, 2005, Ms. Pugh telephoned 911. Exhibit 15. Police were dispatched to the apartment where Ms. Pugh had made the call. 7/19/05RP 275-77. Upon arriving, police observed Ms. Pugh had bruises on her face and a chipped tooth.

7/19/05RP 279-80. Soon thereafter, police contacted Mr. Pugh in the parking lot as he was walking toward the apartment building.

7/19/05RP 284. Police arrested Mr. Pugh. 7/19/05RP 286.

Mr. Pugh was charged with one count of domestic violence felony violation of a court order. CP 94. The State alleged Mr. Pugh violated the terms of a no-contact order by intentionally assaulting Ms. Pugh. CP 94; Exhibit 17.

While Mr. Pugh was in King County Jail following his arrest, he made a series of telephone calls to Ms. Pugh on April 20 and May 5, 2005. 7/20/05RP 44-48. In accordance with the jail's ordinary practice, the telephone calls were monitored and recorded by the jail. 7/20/05RP 31, 34. The State obtained a copy of the recordings of the telephone calls. 7/20/05RP 36, 43-48, 50-51; Exhibit 9.

As a result of the telephone calls, the State filed an amended information charging Mr. Pugh with one count of tampering with a witness and two counts of misdemeanor violation of a no-contact order. 7/11/05RP 4-5; CP 73-74. The State alleged Mr. Pugh violated the terms of a no-contact order when he telephoned Ms. Pugh on two separate days. CP 74; Exhibit 10. The State also alleged that during the telephone calls on April 20, Mr. Pugh

induced Ms. Pugh to testify falsely or to withhold testimony, or to absent herself from the criminal proceedings. CP 73-74.

The trial court granted Mr. Pugh's motion to sever the trial on count one, the felony no-contact order violation charge, from the trial on the three other counts. 7/13/05RP 68, 96-98. Although police had served a subpoena on Ms. Pugh, she did not appear or testify at either of the trials. 7/28/05RP 66; 7/29/05RP 35. At the second trial, on the felony no-contact order violation charge, the trial court admitted Ms. Pugh's hearsay statements to the 911 operator, over defense objection. 7/11/05RP 102; 7/28/05RP 16; CP 87; Exhibit 15. The court admitted the statements under the "excited utterance" exception to the hearsay rule. 7/11/05RP 102.

Two separate juries found Mr. Pugh guilty as charged of all four counts. CP 5, 8, 33-34, 38-40.

## E. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. PUGH'S CONSTITUTIONAL RIGHT TO NOTICE OF THE CHARGES AGAINST HIM BY INSTRUCTING THE JURY ON AN ALTERNATIVE MEANS OF COMMITTING THE CRIME OF WITNESS TAMPERING THAT WAS NOT ALLEGED IN THE INFORMATION

a. The jury may not be instructed on a statutory alternative means that is not alleged in the information. An accused person must be informed of the criminal charge he is to meet at trial and cannot be tried for an offense not charged. U.S. Const. amend. 6<sup>2</sup>; Const. art. I, § 22 (amend. 10)<sup>3</sup>; State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). When a statute sets forth alternative means by which a crime can be committed, the charging document may charge none, one, or all of the alternatives, provided the alternatives charged are not repugnant to one another. State v. Noltie, 116 Wn.2d 831, 842, 809 P.2d 190 (1991); State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942); State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). But if the information alleges a particular alternative, it is error for the factfinder to

---

<sup>2</sup> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation."

consider uncharged alternatives, regardless of the range of evidence presented at trial. Severns, 13 Wn.2d at 548; State v. Doogan, 82 Wn. App. 185, 188-90, 917 P.2d 155 (1996) (holding trial court committed prejudicial error when it instructed jury on uncharged alternative means of committing second degree prostitution); Bray, 52 Wn. App. at 34 (prejudicial error where jury instructed on uncharged alternative means of committing forgery).

b. The jury was instructed on an alternative means of committing witness tampering that was not alleged in the information. The witness tampering statute, RCW 9A.72.120, sets forth three alternative means of committing the crime:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

(a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or

(b) Absent himself or herself from such proceedings; or

(c) Withhold from a law enforcement agency information which he or she has relevant to a criminal

---

<sup>3</sup> Article I, section 22 provides: "In criminal prosecutions the accused shall have the right to . . . demand the nature and cause of the accusation against him [and] to have a copy thereof."

investigation or the abuse or neglect of a minor child to the agency.

RCW 9A.72.120.

In this case, the information<sup>4</sup> alleged:

That the defendant TIMOTHY EARL PUGH in King County, Washington, on or about April 20, 2005, did induce Bridgette Pugh, a witness or person he has reason to believe is about to be called as a witness in any official proceeding, or a person whom he has reason to believe may have information relevant to a criminal investigation, to testify falsely or, without right or privilege to do so, to withhold any testimony or absent herself from such proceedings; . . . .

CP 73-74 (emphasis added); Appendix A. Thus, the information alleged Mr. Pugh committed the crime by inducing Ms. Pugh either to: (1) testify falsely or withhold testimony; or (2) absent herself from the proceedings. Id.; see RCW 9A.72.120(1)(a), (b).

The “to convict” jury instruction,<sup>5</sup> however, instructed the jury they may find Mr. Pugh guilty if they found he committed the crime by any one of the three statutory alternative means. The “to convict” instruction stated:

To convict the defendant of the crime of tampering with a witness, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 20 2005, the defendant attempted to induce a person to testify

---

<sup>4</sup> A copy of the information is attached as Appendix A.

<sup>5</sup> A copy of the “to convict” instruction, Number 11, is attached as Appendix B.

falsely or, without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

(3) That the acts occurred in the State of Washington.

CP 54 (emphasis added); Appendix B.

Because the information alleged only two alternative means of committing the crime, it was constitutional error to instruct the jury on all three statutory alternative means, regardless of the range of evidence presented at trial. Severns, 13 Wn.2d at 548; Doogan, 82 Wn. App. at 188-90; Bray, 52 Wn. App. at 34.

c. The conviction must be reversed. A constitutional error in a jury instruction is presumed prejudicial, and the State can overcome this presumption only if it can affirmatively show the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002); State v. Williams, 144 Wn.2d 197, 213, 26 P.3d 890 (2001). Where the constitutional error consists of the inclusion of a surplus statutory

alternative means in a “to convict” instruction, the State must affirmatively show the jury could not have found the defendant violated that surplus statutory means. Doogan, 82 Wn. App. at 189; Bray, 52 Wn. App. at 34; Severns, 13 Wn.2d at 549. If it is impossible to discern whether the jury found the defendant violated the surplus provision, the instructional error cannot be deemed harmless. Williams, 144 Wn.2d at 213.

The State cannot meet its burden of showing the error was harmless in this case. It is impossible to know whether the jury found Mr. Pugh tampered with a witness in the manner that was not alleged in the information. It is impossible to know whether the jury found Mr. Pugh attempted to induce Ms. Pugh to withhold information from a law enforcement agency. There was no special verdict form requiring the jury to specify which alternative means it had chosen. Moreover, the State’s theory throughout the trial was that Mr. Pugh committed *all three* alternative means of the crime.

The prosecutor repeatedly asserted to the jury the evidence showed Mr. Pugh had committed all three alternative means of witness tampering. In opening statement, the prosecutor stated the State would prove Mr. Pugh had attempted to induce a witness to testify falsely, to absent herself from an official proceeding, or to

withhold information from law enforcement. 7/19/05RP 257. In closing argument, the prosecutor asserted the State had proved Mr. Pugh committed *all three* alternative means set forth in the “to convict” instruction. 7/21/05RP 6, 12-13, 44-45, 48. The prosecutor acknowledged the jury could find Mr. Pugh guilty if they found he had committed only one of the alternative means, but nonetheless asserted “in this case he actually did all three.” 7/21/05RP 12-13; see also 7/21/05RP 44-45 (“he actually did all of [the alternative means] at various times throughout the conversation.”). First, the prosecutor asserted Mr. Pugh attempted to induce Ms. Pugh to provide false testimony by asking her to recant her statement to police. 7/21/05RP 13-14, 16. Second, the prosecutor asserted Mr. Pugh attempted to induce Ms. Pugh to absent herself from official proceedings by telling her not to come to court. 7/21/05RP 17. Finally, the prosecutor asserted Mr. Pugh attempted to induce Ms. Pugh to withhold information from a law enforcement agency by asking her to refuse to talk further to police or to give them any more information about the crime. 7/21/05RP 15, 44-45.

An error in including an uncharged alternative means in the “to convict” instruction cannot be harmless where the prosecutor

draws the jury's attention to the uncharged alternative in closing argument. Severns, 13 Wn.2d at 548-49; Bray, 52 Wn. App. at 34-35. In this case, the prosecutor specifically informed the jury they could find Mr. Pugh guilty of the crime if they found he attempted to induce Ms. Pugh to withhold information from a law enforcement agency. 7/21/05RP 15, 44-45. But Mr. Pugh was not charged with committing the crime in this manner. In light of the prosecutor's closing argument, the State cannot possibly show the jury did not find Mr. Pugh guilty of committing the crime by means of the uncharged alternative. Reversal of the conviction is required.

2. THE ADMISSION OF A 911 TAPE RECORDING OF THE COMPLAINING WITNESS'S DESCRIPTIONS OF A PAST EVENT VIOLATED MR. PUGH'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM

a. The Confrontation Clause prohibits admission of uncross-examined statements by absent declarants when those statements are "testimonial" in nature. In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004), the United States Supreme Court restored the Confrontation Clause to its traditional mode of operation, imposing the categorical requirement that the prosecution make the declarant of any incriminating "testimonial" statement available for cross-

examination. U.S. Const. amend. 6 (guaranteeing a defendant the right, "to be confronted with witnesses against him."); Const. art. 1, section 22 (guaranteeing the accused the right "to meet the witnesses against him face to face.").

In Crawford, the Court reasoned that the Sixth Amendment requires not that evidence be deemed reliable by a court, but that it be tested "in the crucible of cross-examination." 541 U.S. at 61. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 68-69. Thus, the Sixth Amendment imposes an absolute bar to statements that are testimonial absent a prior opportunity to cross-examine the declarant. Id. at 61.

b. Statements made to a 911 operator are testimonial when they describe an event that has already terminated. In Crawford, the Supreme Court declined to give a "comprehensive" definition of the term "testimonial statement" and addressed only the "core class" of testimonial evidence protected by the Confrontation Clause. Crawford, 541 U.S. at 51. The Court set forth "various formulations" of the core class of "testimonial" statements, but found it unnecessary to endorse any of them,

because "some statements qualify under any definition." Id. at 51-52. The Court concluded the declarant's statement in that case -- made to police during structured interrogation at a police station several hours after a stabbing incident -- was testimonial under any definition. Id. at 61.

As a description of only the "core class" of testimonial statements, Crawford left the status of a great many evidentiary statements unresolved. The Court's recent decision in Davis v. Washington, \_\_\_ U.S. \_\_\_, 2006 U.S. LEXIS 4886 (Nos. 05-5224 and 05-5705, June 19, 2006), fills in some of the gaps. The Davis decision maps the outer boundaries of a broader class of testimonial statements which are made to police officers or their agents. The Court reaffirmed its holding in Crawford that statements falling within these boundaries cannot serve as a substitute for live testimony at criminal trials and must be excluded absent an opportunity for cross-examination. Id. at \*27.

The Davis decision makes clear that statements need not be made in response to formal structured police questioning in order to be testimonial. The Court had no trouble viewing 911 operators as agents of police and their questions to callers as "police interrogation" capable of producing testimonial responses from

callers. Id. at \*17 n.2. The Court further emphasized that statements made to police officers (or their agents) in the absence of any interrogation at all are not necessarily nontestimonial. Id. The issue, according to the Court, is not the nature of the interrogator's questions or his or her motivations. Id. at \*16 n.1. Instead, the constitutional inquiry focuses on the circumstances surrounding the declarant's statements. Id. In other words, the testimonial nature of a particular statement is not determined by police action and is essentially beyond police control. Id. at \*31 n.6.

The question in Davis was whether the complainant's statements to a 911 operator about a domestic violence incident were "testimonial." The Court concluded such statements *could be* testimonial, depending upon the circumstances existing at the time the statements were made. The Court set forth the following test:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

2006 U.S. LEXIS 4886, at 16. Again, the issue was not whether the 911 operator intended to ask questions only in order to provide

emergency aid. Id.; id. at \*31 n.6. The question, instead, was whether, objectively viewed, the complainant's statements were a call for help in the face of an ongoing emergency. Id. at \*23.

The test set forth in Davis, and in the companion case of Hammon v. Indiana, for determining whether a person's statements to police are testimonial is a narrow one. Statements to police or their agents are nontestimonial only if they are made under circumstances indicating an ongoing emergency currently exists. In Davis, the Court concluded the statements were made during an ongoing emergency, because the complainant "was speaking about events *as they were actually happening*, rather than 'describing past events.'" Id. at \*23 (quoting Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion)). Moreover, any reasonable listener would recognize the complainant was currently facing a bona fide physical threat, as Davis had not yet left the premises. Id.; id. at \*26. Finally, objectively viewed, the elicited statements were necessary to enable police to *resolve* the present emergency rather than to learn (as in Crawford) what had happened in the past. Id. at \*23-24. In sum, the circumstances of the interrogation indicated "its primary purpose was to enable police assistance to meet an ongoing emergency." Id. at \*24. Thus, the

statements that were the product of the interrogation were nontestimonial. Id.

Although the Court concluded the statements at issue in Davis were nontestimonial, the Court also made clear that statements made to police after an incident has terminated must be deemed testimonial, even if lingering danger arising from the episode still exists. In Hammon, police responded to a “reported domestic disturbance” at the home of Hershel and Amy Hammon, where they interviewed Amy. Id. at \*11. Amy told the officer that she and Hershel had been in an argument which became physical. Id. at \*12-13. The Court easily concluded Amy's statements were testimonial, as it was clear from the circumstances there was no emergency in progress. Id. at \*28. Because the interview took place after the events described were over, the statements were made as part of an investigation into past possibly criminal conduct and were not a call for aid. Id. at \*27-28. The statements in Hammon were testimonial even though it was not clear from the circumstances whether Hershel was a continuing danger to his wife and whether Amy might still require police assistance. Id. at \*46-47 (Thomas, J., dissenting).

Even statements made immediately after an event has terminated can be testimonial, as long as they describe the past event. The Davis Court distinguished the early case of King v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1779), where a rape victim "'immediately on her coming home, told all the circumstances of the injury' to her mother.'" Id. at \*26. The Court reaffirmed that statements made under such circumstances were testimonial, as they were not a call for aid from the victim's assailant; to the contrary, "by the time the victim got home, her story was an account of past events." Id. at \*25.

The Court's analysis of the facts in Davis, Hammon and Brasier, leads to the conclusion a declarant's report to police (or police agents) is testimonial *unless the incident described is still in progress*. In this case, the trial court admitted Ms. Pugh's hearsay statements to a 911 operator. 7/11/05RP 102; Exhibit 15.<sup>6</sup> Because the statements described an event that had already terminated and were not a call for aid from an ongoing emergency, they were "testimonial" for Sixth Amendment purposes. Admission of the statements therefore violated Mr. Pugh's fundamental right to confront and cross-examine his accusers.

---

<sup>6</sup> The full text of the 911 call is attached as Appendix C.

c. Ms. Pugh's statements to the 911 operator were testimonial because they described an event that had already terminated. Ms. Pugh's statements during the recorded conversation with the 911 operator are testimonial under the narrow test set forth in Davis. At the time of the call, the alleged assault had already terminated. Unlike the complainant in Davis, Ms. Pugh used the past tense to describe what had happened. Whereas McCottry told the 911 operator "He's here jumpin' on me again" and "He's usin' his fists," Ms. Pugh stated her husband had "hit" her and "pushed" her but she did not indicate he was currently a threat. 2006 U.S. LEXIS 4886, at \*7-8; Appendix C, at 2, 4. Unlike Davis, who was in the house at the time the incriminating statements were made, Ms. Pugh stated her husband was no longer on the premises. 2006 U.S. LEXIS 4886, at \*8; Appendix C, at 2. In sum, her statements described an event that had already terminated and she was not requesting aid from an ongoing assault.

Moreover, the State understood the testimonial nature of Ms. Pugh's 911 call. The prosecutor assured the jury that although Ms. Pugh "didn't come before you and testify, . . . that doesn't mean that you didn't hear her voice. That doesn't mean that she didn't tell you what happened to her. She told the 911 operator what

happened to her. And you heard that.” 7/29/05RP 7. Recognizing the jury might have preferred to hear from her in person, the prosecutor explained that “when Bridgette wasn’t here to tell her story to you, in a way she was” -- through the 911 call. 7/28/05RP 14.

Additionally, the 911 operator sought information about the crime apart from whether the caller needed immediate rescue. For example, after hearing the initial allegation and receiving an address for the incident, the 911 operator sought more investigative information to shape a possible prosecution, asking whether there was a restraining order in place and whether the suspect had forced his way in. Appendix C. The 911 operator was plainly seeking information relevant to possible arrest or prosecution, rather than for emergency services.

Objectively viewed, the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution. Accordingly, Ms. Pugh's statements during the call were “testimonial.” See 2006 U.S. LEXIS 4886, at \*16. The statements were inadmissible at trial absent an opportunity to fully and fairly cross-examine the complainant about the allegations.

d. The Confrontation Clause violation requires reversal. Ms. Pugh's 911 "testimony" contained inflammatory allegations that Mr. Pugh assaulted her and violated a restraining order. Mr. Pugh never had the opportunity to test these allegations and this error cannot be harmless beyond a reasonable doubt.

Confrontation Clause violations are subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Chapman, 386 U.S. at 24; Davis, 154 Wn.2d at 304. The correct inquiry is whether, assuming the damaging potential of the testimony was fully realized, a reviewing court can nonetheless say the error was harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 684.

In this case, the State's untainted evidence of the assault was far from overwhelming. Aside from the contents of the 911 call, the primary evidence on which the State relied were Ms. Pugh's bruises and chipped tooth that police observed, and four "adoptive admissions" Mr. Pugh made during the jail telephone calls. The bruises and chipped tooth are evidence that Ms. Pugh was injured, but tell little about how she was injured or whether anyone else was to blame for her injuries. Moreover, Mr. Pugh's

“adoptive admissions” were ambiguous. Without the inflammatory allegations on the 911 call, the State’s case was unpersuasive.

In the assault trial, the trial court admitted four of Mr. Pugh’s statements made during the jail telephone calls as “adoptive admissions” by a party-opponent under ER 801(d)(2)(ii).

7/26/05RP 17-18; Exhibit 23; see CP 169, lines 1-4; CP 171, lines 18-22; CP 192, lines 16-18; CP 200, lines 3-8. ER 801(d)(2)(ii) provides that an admission by a party-opponent is not hearsay if it is offered against a party and is "a statement of which he has manifested his adoption or belief in its truth." The reasoning behind the rule is that

when a statement is made in the presence and hearing of an accused that is accusatory or incriminating in character, and such statement is not denied, contradicted, or objected to by him, both the statement and fact of his failure to deny, contradict, or object are admissible [in] a criminal trial as evidence of his acquiescence in its truth.

State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725 (1988) (quoting State v. Redwine, 23 Wn.2d 467, 470, 161 P.2d 205 (1945), overruled on other grounds in State v. Robinson, 24 Wn.2d 909, 917, 167 P.2d 986 (1946)). Because “adoptive admissions” are not considered to be hearsay, Mr. Pugh’s statements were admitted as substantive evidence of guilt. See ER 801(d)(2)(ii).

The trial court admitted the following four statements by Mr.

Pugh as adoptive admissions:

RECEIVER: You know you hit me like I was a nail in the ground. You fuckin hit. My head was all fucked up. My face was all fucked up. I mean you did. I'm gonna take it all back but I'm sayin you did, Tim. You know what I'm sayin. And I love you.

CALLER: You forgive me, right?

CP 169, lines 1-4.

RECEIVER: And I won't press charges against you. But I mean, I did at that time -- because I was so beat up Tim, you have no idea how beat up I was. You beat me up really bad. You'd psyched yourself up to do it. That's the mad thing about it. You let people psyche you up to beat me up like that, didn't he? [sic]

CALLER: Yeah.

CP 171, lines 18-22.

CALLER: And this is a felony violation of a no contact order, DV.

RECEIVER: Cause you hit me again.

CALLER: Right. Because I hit you, right.

CP 192, at 67, lines 16-18.

RECEIVER: I, I know you love me, you probably didn't say you love me? But where have you really hurt since you injured me? I mean do you think about the

consequences of when you hit me?

CALLER: Of course.

RECEIVER: No you don't.

CALLER: Yes I did.

CP 200, lines 3-8.

In the entire context of the telephone calls, these "adoptive admissions" by Mr. Pugh are ambiguous. Mr. Pugh testified he did not contest his wife's allegations during the telephone calls, not because he agreed with what she was saying, but because he did not want to argue with her. 7/28/05RP 114-15, 125. He testified he did not deny or otherwise respond to the allegations, because "I don't know how to give an answer to something that's not the truth." 7/28/05RP 114. In Mr. Pugh's opinion, the argument with his wife on the telephone was over something that had not happened; there was no purpose in arguing further. 7/28/05RP 135.

In addition, at other points during the telephone calls, Mr. Pugh did flatly deny Ms. Pugh's allegations that he assaulted her. For instance, early in the telephone call, when Ms. Pugh accused him of pushing her, Mr. Pugh unequivocally disagreed:

RECEIVER: You didn't push me, did you?

CALLER: No, I did not.

CP 161, lines 20-21. Later in the telephone call, when Ms. Pugh accused him of “jump[ing] on me,” he again flatly denied it. CP 181, lines 18-19.

In sum, in the context of the entire conversation that occurred during the telephone calls between Mr. and Ms. Pugh, these few isolated exchanges are simply too ambiguous to rise to the level of proof beyond a reasonable doubt that Mr. Pugh assaulted Ms. Pugh as charged by the State. The felony violation of a no-contact order conviction must be reversed.

3. MR. PUGH'S STATE CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM FACE-TO-FACE WAS VIOLATED BY THE ADMISSION OF THE HEARSAY STATEMENTS UNDER THE EXCITED UTTERANCE EXCEPTION, ABSENT A SHOWING OF THE WITNESS'S UNAVAILABILITY

Article 1, section 22 of the Washington State Constitution provides, “in criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face.” This Court has recognized that article 1, section 22 must be interpreted independently of the Sixth Amendment, using the factors set forth in State v. Gunwall. State v. Saunders, 132 Wn. App. 592, 605, 132 P.3d 743 (2006) (citing State v. Gunwall, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986)). That is because in State v. Foster, 135

Wn.2d 441, 957 P.2d 712 (1998), five members of the Washington Supreme Court concluded that article 1, section 22 must be interpreted independently from the Sixth Amendment. Id. at 473-74 (Alexander, J., concurring in part, dissenting in part); Id. at 481-94 (Johnson, J., dissenting). The Foster court analyzed whether RCW 9A.44.150, which permits a child victim to testify via closed-circuit television in certain situations, violated either the federal or state confrontation clauses. The five justices agreed the Washington Constitution provides a broader right to face-to-face confrontation than that guaranteed by the Sixth Amendment. Id.

The Washington Supreme Court requires a party advocating a broader interpretation of a state constitutional provision to provide an analysis that applies the Gunwall factors to the particular situation presented by the case.<sup>7</sup> State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002). Although the Smith court recognized it had earlier concluded in Foster that article 1, section 22 provides greater protection than the Sixth Amendment, the court declined to analyze the Washington Constitution separately, as the defendant

---

<sup>7</sup> In Gunwall, the court set forth six factors to consider in determining whether a state constitutional provision affords greater protection than its federal counterpart. The six factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and

had not applied the Gunwall factors to the particular situation presented by the case. Id. at 131.

The issue in this case is whether Mr. Pugh's state constitutional right to confrontation was violated when the court admitted the complaining witness's hearsay statements to the 911 operator under the excited utterance exception to the hearsay rule, where Mr. Pugh had no opportunity to cross-examine the witness, and where there was no showing the witness was unavailable to testify. Mr. Pugh contends that, in light of the analysis of the Gunwall factors set forth below, the admission of the complaining witness's hearsay statements violated the more stringent requirements of article 1, section 22, even if the statements were admissible under the Sixth Amendment. The greater protection afforded by the state confrontation clause required Mr. Pugh be given the opportunity to meet the witness "face to face" before her excited utterances could be admitted into evidence, absent a showing by the State that the witness was unavailable to testify.

a. State v. Foster. It is useful to begin this analysis by first examining Foster, focusing on the four-justice dissent and the one-justice concurrence/dissent. These five justices agreed the

---

state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

provisions of article 1, section 22 provide a broader confrontation right than the Sixth Amendment.

After conducting a Gunwall analysis, Justice Johnson's dissent concluded that article 1, section 22 "has a different meaning than the Sixth Amendment" and the "language of the state confrontation clause is absolute and allows for no 'flexibility,' dependent upon the significance of the interest involved." Foster, 135 Wn.2d at 482 (Johnson, J., dissenting). Therefore, four justices concluded, because nothing short of face-to-face confrontation will suffice, permitting a witness to testify by closed circuit television deprived the defendant of his right to confront the witness. Id. at 498.

Justice Alexander's concurrence/dissent agreed in substantial part with Justice Johnson's Gunwall analysis, but disagreed with the ultimate conclusion that the term "face-to-face" must be rigidly and literally defined. Foster, 135 Wn.2d at 474. Opting instead for a "more flexible and enduring view," Justice Alexander found modern technological advances could provide "the functional equivalent" of the face-to-face confrontation required by article 1, section 22. Id. at 480.

The principal point upon which Justice Alexander relied in rejecting a too-literal reading of “face-to-face” was, that “[n]either [the state nor federal confrontation] clause has been read literally, for to do so would result in eliminating all exceptions to the hearsay rule.” Foster, 135 Wn.2d at 474 (citing State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984) (citing Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980))). Justice Alexander chided the dissent for failing to recognize this implication of its decision. Id.

But that is not to say the state confrontation clause does not bar admission of some hearsay statements that are otherwise admissible under an exception to the hearsay rule. To the contrary, “exceptions to the hearsay exclusionary rule are not per se consistent with the State constitutional right to meet the witnesses face to face, but must be separately tested.” Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991).

b. The *Gunwall* factors demonstrate Washington’s constitution provides a right to “face to face” confrontation that was violated by Mr. Pugh’s conviction based upon hearsay statements admitted under the excited utterance exception of an available but non-testifying witness. In Davis, the United States Supreme Court allowed admission of hearsay statements to a 911 operator

describing a past event, as long as an ongoing emergency still existed. See Discussion in preceding section. But the Washington Confrontation Clause provides different and broader protections than its federal counterpart. Thus, the Washington provision should not be interpreted consonantly with the federal constitution, but should instead be interpreted independently to *preserve* individual rights. Cf. State v. Stroud, 106 Wn.2d 141, 148, 720 P.2d 436 (1986) (concluding broader right to privacy under article 1, section 7 than under Fourth Amendment requires court to interpret state provision as preserving privacy rights in face of federal decisions limiting privacy rights). The Gunwall analysis below demonstrates the state confrontation clause must be independently interpreted to preclude the admission of hearsay statements to police that describe a past event, regardless of whether an ongoing emergency still exists, absent an opportunity for cross-examination. Thus, the state constitution bars admission of the statements on which the State based its prosecution in this case.

*i. Factor One – Textual Language of the Washington Constitution.* The text of article 1, section 22 demonstrates the drafters intended the right to confrontation be different from that of the existing Sixth Amendment. While the Sixth

Amendment provides a criminal defendant the right “to be confronted by the witnesses against him,” article 1, section 22 speaks of “the right . . . to meet the witnesses against him face to face.” U.S. Const. amend. 6; Wash. Const. art. 1, § 22.

The Washington Supreme Court has recognized that the difference in language between the state and federal provisions is significant and supports an independent interpretation of the state provision. In his concurrence/dissent in Foster, Justice Alexander, who advocated an independent interpretation of article 1, section 22, focused his discussion on how the court should construe the meaning of “face to face.” 135 Wn.2d at 473-81. Justice Alexander concluded there was no constitutional right to a literal interpretation of the phrase, that is, to “eyeball to eyeball” confrontation. Id. at 477. Instead, Justice Alexander focused on whether the procedure used was in accordance with the “essential purpose” of confrontation, which is cross-examination. Id. at 478. Justice Alexander concluded the procedure did not impermissibly infringe the right of cross-examination, as the statute required defendant’s counsel be present in the same room with the witness, and be in constant contact with the defendant both electronically and physically. Id. at 478. Justice Alexander concluded, “[b]ecause the

right to cross-examine is in no way impaired by closed-circuit testimony, criminal defense is not compromised by admission of this testimony.” Id. at 478.

The four-member dissent also concluded the difference in language between the state and federal provisions was significant and focused its opinion on that difference in language. “The majority and the concurrence/dissent effectively write ‘face-to-face’ out of article I, section 22, by not giving meaning to those specific words.” Id. at 481 (Johnson, J., dissenting). The essential question, according to the dissent, was the manner in which the defendant was entitled to exercise his fundamental right to confront the witness, that is, “face-to-face.” Id. at 483. The dissent concluded the inclusion of the term “face-to-face” in the state provision supported Foster’s assertion that a different interpretation was required under the state constitution. Id. at 483-84.

Washington’s article 1, section 22 is modeled after the Oregon and Indiana Constitutions. Foster, 135 Wn.2d at 460, 488 (citing Journal of the Washington State Constitutional Convention, 1889, at 511 n.37 (Beverly P. Rosenow ed., 1962)). In reviewing its state confrontation clause, the Indiana Supreme Court looked to the

current and historical meaning of the term “face to face.”<sup>8</sup> Brady, 575 N.E.2d at 987. The Indiana court noted that the term is an adverbial phrase modifying “to meet” and thus describes how an Indiana criminal defendant and the State’s witnesses are to meet. Looking at dictionaries from 1755, 1856, and 1928, the court found that face to face means physical confrontation and concluded the state constitutional provision had an unmistakable meaning that was more concrete and detailed than the Sixth Amendment. Id.

The term “face to face” in Washington’s constitution also means that the defendant and the witness must be present in the same place. Foster, 135 Wn.2d at 483 (Johnson, J., dissenting). The language of article 1, section 22, and its common meaning support the conclusion that Washington’s constitution must be independently interpreted. Id. at 483-84.

Foster addresses a different issue from the one presented in this case. Both cases, however, involve the same constitutional protection – the right to physically confront and question witnesses. In Foster, the defendant was denied face-to-face confrontation, but the witness testified via closed circuit television and he was

---

<sup>8</sup> Article I, section 13 of the Indiana Constitution reads, “In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face.”

therefore able to cross-examine the witness. Mr. Pugh, in contrast, was not permitted to physically confront or cross-examine the witness.

As the Foster dissent recognized, the term "face-to-face" addresses the *manner* in which the right to cross-examine is to be exercised. But the inclusion of this language in the state provision also indicates the framers of the Washington Constitution intended the right to cross-examine itself be more robust than under the federal constitution. The term suggests a right to physically and literally confront the witnesses that was denied in Mr. Pugh's case.

*ii. Factor Two – Significant Differences in Texts of Parallel Provisions.* The textual differences between article 1, section 22 and the Sixth Amendment mandate an independent interpretation of the state constitutional provision. Foster, 135 Wn.2d at 484-86 (Johnson, J., dissenting). The framers of the Washington Constitution were certainly aware of the federal constitution, and they specifically drafted and adopted different language. Id. at 485 (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights; 7 U. Puget Sound L. Rev. 491, 515 (1984) and Lebbeus J. Knapp, The Origin of the

Constitution of the State of Washington, 4 Wash. Hist. Q., No. 4, at 246 (1913)). In addition, article 1, section 22 lists several rights not included in the Sixth Amendment, such as the right to appear in person, have a copy of the charge, testify on one's own behalf, and to appeal. Id. at 485-86. These additional rights conferred support the conclusion that the state provision must be interpreted as more restrictive against any encroachments upon an accused's rights. Id. at 486. While the Sixth Amendment does not explain how confrontation is to be achieved, article 1, section 22 specifies the method of confrontation – “face to face.” The state constitution is thus more detailed, again demonstrating a broader interpretation from that given to the Sixth Amendment. Id.

*iii. Factor Three – State Constitutional and Common Law History.* Little is known about the history of the drafting of article 1, section 22. Foster, 135 Wn.2d at 722, 734-35; State v. Silva, 107 Wn. App. 605, 619, 27 P.3d 663 (2001).

Logically, the framers of the Washington Constitution did not intend article 1, section 22 to be interpreted identically to the federal Bill of Rights, since they copied the provision from other state constitutions and the federal Bill of Rights did not then apply to the

states. Utter, 7 U. Puget Sound L. Rev. at 496-97 (1984); Silva, 107 Wn. App. at 672-73.

As early as 1902, the Washington Supreme Court explained that article 1, section 22's guarantee of due process included the right to meet the witnesses in open court. State v. Stentz, 30 Wash. 135, 142, 70 P.241 (1902).

Under the constitutional provisions defining the rights of accused persons, the appellant had the right, not only to be tried by an impartial jury, but to defend in person and by counsel, and to meet the witnesses against him face to face. Article 1, § 22, Const. This means that the examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him.

Id. Noting this language, the five justices in Foster held that state constitutional and common law history require an independent interpretation of article 1, section 22. Foster, 135 Wn.2d at 486-93.

As this Court recognized in Saunders, to date, no Washington case has analyzed article 1, section 22 independently in the context of the question presented here. The United States Supreme Court addressed the application of the Sixth Amendment to the "excited utterance" hearsay exception in White v. Illinois, 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992). There, the trial court had admitted the complainant's excited utterances, although she never testified at trial. The Court, relying on its earlier decision

in Ohio v. Roberts,<sup>9</sup> concluded admission of the statements did not offend the Sixth Amendment, even though it was not demonstrated the witness was unavailable to testify. Id. at 357.

In Crawford, the Supreme Court abandoned the test it had earlier set forth in Roberts for determining the admissibility of hearsay statements under the Sixth Amendment. 541 U.S. 36. The Court announced it was reverting to a traditional test, concluding hearsay statements that are "testimonial" are inadmissible absent an opportunity to cross-examine the declarant. Id. at 61. In Davis, the Court recognized its holding in White allowing the admissibility of statements under the excited utterance exception was an "arguable exception" to the traditional rule it re-embraced in Crawford, as the statements at issue in White were arguably testimonial. 2006 U.S. LEXIS 4886, at \*20 (citing White, 52 U.S. 346).

In accordance with the United States Supreme Court's pre-Crawford interpretation of the Sixth Amendment, the Washington Supreme Court has held the State need not demonstrate the declarant's unavailability in order to offer out-of-court statements under the hearsay exception for excited utterances. State v.

---

<sup>9</sup> 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

Palomo, 113 Wn.2d 789, 797, 783 P.2d 575 (1989). The Palomo court, however, did not independently consider the question under the Washington Constitution. The court stated, “[a]lthough the language of Const. art. 1, § 22 (amend. 10) is different from that of the Sixth Amendment and arguably gives broader protection than the Sixth Amendment language,” the court declined to analyze the state provision separately, as it had not been briefed. Id. at 794.

Washington courts at the time of the founding of the state constitution required face to face confrontation and cross-examination before hearsay statements describing a past event could be admitted, unless the witness was unavailable. See, e.g., State v. Eddon, 8 Wash. 292, 36 P. 139 (1894) (dying declaration admissible because witness unavailable). A recent decision from the Washington Supreme Court suggests the state constitution requires a more stringent adherence to this traditional requirement of unavailability than under the Sixth Amendment. In State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006), the court addressed the admission of a child's hearsay statements under RCW 9A.44.120. The Court acknowledged that "an independent analysis of article 1, section 22 is required," but concluded it "need not engage in such analysis here." Id. at 391 (citing Foster, 135 Wn.2d

441). The court stated it had already concluded RCW 9A.44.120 does not offend article 1, section 22 in State v. Ryan. Id. at 391 (citing State v. Ryan, 103 Wn.2d 165, 169-70, 691 P.2d 197 (1984)).<sup>10</sup> The court held child hearsay statements under the statute "comport with the general approach utilized to test hearsay against confrontation guaranties." Id. at 170. That was because the statute requires a determination that the statements are reliable and additionally "requires the child to testify at the proceedings, or to be unavailable, and does not alter the necessary showing of unavailability." Id. at 170.

Although the Washington Supreme Court has not yet separately addressed the application of the Washington Constitution to the admissibility of hearsay statements under the excited utterance exception, decisions from other courts indicate the more stringent requirements of the state constitution preclude admission of the statements at issue here. In interpreting our state constitution, it is helpful to look to court decisions from states with constitutions that the Washington Constitution was modeled after. Foster, 135 Wn.2d at 488 (Johnson, J., dissenting). Those states

---

<sup>10</sup> This conclusion is curious, as the Ryan decision contains no independent analysis of the Washington Constitution. See Ryan, 103 Wn.2d at 169-77.

have addressed whether out-of-court statements are admissible under the excited utterance exception where there is no showing of the witness's unavailability.

Oregon has independently interpreted its identical confrontation clause to require witness unavailability before hearsay may be admitted under the excited utterance exception when the defendant has not had a prior opportunity to cross-examine the witness.<sup>11</sup> State v. Moore, 334 Or. 328, 49 P.3d 785 (2002) (retaining two-part test from Ohio v. Roberts despite erosion of unavailability requirement in later United States Supreme Court opinions). The court re-examined the text, history and case law regarding the constitutional provision and concluded that “face to face” confrontation required a demonstration of the witness’s unavailability before the hearsay could be admitted. Id. at 340-41; see also State v. Campbell, 299 Or. 633, 706, 705 P.2d 694 (1985) (court must be satisfied witness is not available before hearsay is admitted in criminal trial).

Indiana requires a meeting face-to-face, which can be satisfied only by an opportunity for cross-examination, even where

---

<sup>11</sup> Article I, section 11 of the Oregon Constitution reads, “In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face.”

the witness is shown to be unavailable. In Arndt v. State, the Indiana Supreme Court considered the admissibility of statements three-year-old J.M. made to his mother, which arguably fell under the excited utterance exception to the hearsay rule. 642 N.E.2d 224, 227 (1994). The child witness was unavailable to testify due to incompetence as a witness. Id. Like the Oregon Supreme Court, the Indiana court recognized its state provision must be interpreted to provide greater protection than the Sixth Amendment. The court explained, “[t]he state paradigm for full confrontation differs from the federal one in that it contemplates a face-to-face meeting in which the accused and the witness can see and recognize one another.” Id. at 228. The court concluded a meeting of that character did occur between appellant and J.M. at a pre-trial hearing, at which “defense counsel conducted an untrammelled cross-examination.” Id. at 227. Therefore, “[t]he surrogate here for cross-examination of a sworn witness, observable by the trier of fact, [was] satisfied.” Id.

iv. Factor Four – Preexisting Washington Law.

The State’s case depended upon hearsay statements introduced under the hearsay exception for excited utterances. ER 803(a)(2). A prosecution on this basis was unknown in early Washington law

as this hearsay exception did not exist at the time of the passage of the Washington Constitution. In looking at a different state constitutional provision, article 1, section 21's jury trial guarantee, the Washington Supreme Court held that it preserves the right as it existed at the time of the passage of the Washington Constitution. Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). In 1889, courts would not have permitted Mr. Pugh to be convicted based upon hearsay admitted under the excited utterance exception in the absence of any finding that the declarant was unavailable to testify. Thus, preexisting Washington law demonstrates that a trial by hearsay admitted under the excited utterance exception would offend the framers' purpose in providing face to face confrontation for criminal defendants.

The excited utterance exception to the hearsay rule was unknown at the time of the passage of article 1, section 22. It evolved from the "res gestae" exception.<sup>12</sup> Washington courts have

---

<sup>12</sup> The Supreme Court formally established the elements of the res gestae exception in Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939). The six-part test for admissibility was:

- (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize the event;
- (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, complete affair;
- (3) it must be a statement of fact, and not the mere expression of an opinion;

openly acknowledged that the state's modern excited utterance rule "is not as restrictive as the requirements of the common law [res gestae] exception." State v. Dixon, 37 Wn. App. 867, 871-72, 684 P.2d 725 (1984).

A res gestae declaration differs from an excited utterance in that it is not a narrative description of a past event. A res gestae statement is one that is "of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event." Beck, 200 Wash. at 10-11.

Washington courts at the time of the adoption of the Washington Constitution and well afterward rigorously enforced the requirement that a statement was admissible only if it was part of, rather than a description of, an event. In 1898, for example, the Washington Supreme Court addressed a prosecution for the rape of a child where the child's mother testified to her child's statements

---

(4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design;

(5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and

(6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.  
200 Wash. at 9-10.

and condition immediately after the assault. State v. Hunter, 18 Wash. 670, 52 Pac. 247 (1898). After examining cases from various jurisdictions, the court held there was no error because the evidence was restricted to the condition of the child's clothing and the "fact of the complaint," and not to the particulars of the complaint. 18 Wash. at 672. The court warned, "anything beyond that is hearsay of the most dangerous character." Id.

In State v. Aldrick, 97 Wash. 593, 166 P. 1130 (1917), the alleged rape victim told her father the particulars of the offense on the morning following the evening when the incident allegedly occurred, and the father was permitted to detail what his daughter had told him. Id. at 594-95. The court held it was error to permit the father to relate upon the witness stand the facts as his daughter had detailed them to him. Id. at 595. The court rejected the State's argument that the statements were part of the res gestae and therefore admissible. The statements were not part of the res gestae, as they were "not the utterance of instinctive words." Id. at 596.

The court's decision in Aldrick should leave little doubt that the res gestae doctrine, as reflected in the court's decisions, was shaped by a desire to protect the right to confrontation. The court

explained despite the development of the res gestae doctrine, the defendant maintained the right to cross-examination where the evidence offered consisted of the words of a participant who was narrating the events:

'Res gestae are events speaking for themselves, through the instinctive words and acts of participants, but are not the words and acts of participants when narrating the events. What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is res gestae; it is part of the transaction itself.'

Id. at 596 (quoting 1 Wharton's Criminal Evidence § 262 (10th ed.)).

The only recognized exception (aside from dying declarations) to the prohibition against admitting declarations outside of the res gestae actually proved the rule, i.e., that introducing any narrative declaration accusing someone of having committed a criminal act implicated the right to confrontation. In cases in which a person had been "ravished," "the fact that the ravished person made complaint after the occurrence may be shown in evidence, either by the testimony of the complaining witness or by the person to whom the complaint was made." Aldrick, 97 Wash. at 595. But while the fact of the complaint may

be shown, the details or particulars of the complaint were subject to objection. Id. That was not because such fact of complaint was part of the res gestae: “the rule permitting the fact of complaint to be shown is not based upon the theory that it is a part of the res gestae, but upon the fact that it tends to confirm the testimony of the person ravished.” Id. at 595-96.

Thus, the rule around the time of the founding of the Washington Constitution was that a spontaneous declaration might be admissible in a criminal case if it was part of the res gestae, that is, an inseparable part of the event itself. But, save the exception for dying declarations, statements describing a completed criminal act were considered inadmissible hearsay if the declarant did not testify at trial. Moreover, in State v. Eddon, 8 Wash. at 302, the court held it was error to instruct the jury to give a dying declaration the same weight as other sworn testimony. This powerfully suggests the founding fathers and courts originally conceived the state right to confrontation as precluding the admission of such accusatory evidence as a substitute for live trial testimony in an adversarial setting.

Finally, modern science and social science demonstrate the theory behind the new hearsay exception for excited utterances is

flawed and undermine its continued use in the absence of cross-examination. The rule presumes that a person under physical shock is unable to reflect or control her statements, so that any utterance is necessarily spontaneous and sincere. State v. Palomo, 113 Wn.2d at 796; Aviva Orenstein, "My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 Cal. L. Rev. 159, 169-74 (1997). If that theory was ever reliable, modern research has demonstrated its fallacy. Orenstein, 85 Cal. L. Rev. at 178-83 (excited utterance exception has been "subjected to extensive physiological criticism"). Scientific research shows that a person can craft a lie in a matter of seconds. Id. at 178 (and studies cited therein). The idea that extreme stress stills conscious thought ignores "the complicated process of perception" and undervalues "the vast cognitive processes that transpire as part of any utterance." Id. Moreover, a declarant who is afraid or under stress is likely to be confused and have a diminished ability to perceive and remember. Id. at 180-81. And, even if the stress is helpful to memory, it affects only the short-term memory whereas the excited utterance exception has been applied to statements long after the startling act. Id. Thus, the excited utterance exception to the hearsay rule does not guarantee the statements

are so reliable that Mr. Pugh should not have the opportunity to confront the declarant.

v. Factor Five – Differences in structure between the state and federal constitutions. The United States Constitution is a grant of limited power to the federal government, whereas the Washington Constitution imposes limitations on the otherwise plenary power of the state. Foster, 135 Wn.2d at 458-59; Gunwall, 106 Wn.2d at 61. This factor supports an independent analysis of the confrontation clause. Id.

vi. Factor Six – Matters of particular state interest or concern. The regulation of criminal trials in Washington is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62. This includes the protection provided to criminal defendants by the Confrontation Clause. Foster, 135 Wn.2d at 494.

Thus, the six Gunwall factors support the conclusion the right to meet the witnesses face to face found in article 1, section 22 is more stringent than its federal counterpart when applied to the issue presented in this case, and must be interpreted to preclude the admission of the hearsay evidence here.

c. Mr. Pugh's state constitutional right to confront the witnesses against him "face-to-face" was violated when the court admitted hearsay statements of the complaining witness under the excited utterance exception, without a finding that the witness was unavailable. Article 1, section 22, provides that a criminal defendant must be permitted to meet a state's witness face to face and cross-examine her. The Gunwall analysis above indicates this provision must be interpreted more broadly than its federal counterpart, and must be interpreted to *preserve* individual rights that have eroded under federal jurisprudence. Moreover, constitutional and common-law history, as well as the state of the common law at the time of passage of the state constitution, indicate the founders did not intend to allow admission of hearsay statements describing a past event, absent an opportunity for cross-examination and a showing the witness was unavailable to testify.

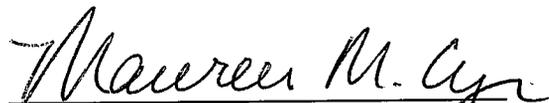
Here, the prosecution's case against Mr. Pugh hinged on the complaining witness's hearsay statements to a 911 operator that described a past event. Mr. Pugh did not have an opportunity to cross-examine the witness, and the State did not demonstrate the witness was unavailable to testify. In these circumstances, Mr.

Pugh's conviction violated his rights under Article I, section 22. For the reasons set forth in the preceding section, the error cannot be deemed harmless. Reversal of the conviction is required.

F. CONCLUSION

Because the jury was instructed on an alternative means of committing witness tampering that was not alleged in the information, the witness tampering conviction must be reversed. The admission of inflammatory hearsay accusations of a complaining witness that Mr. Pugh never had the opportunity to cross-examine violated his state and federal rights to confrontation. The conviction for felony violation of a no-contact order must therefore be reversed.

Respectfully submitted this 29th day of June 2006.

  
MAUREEN M. CYR (WSBA 28024)  
Washington Appellate Project - 91052  
Attorneys for Appellant

**APPENDIX A**



1 may have information relevant to a criminal investigation, to testify falsely or, without right or  
2 privilege to do so, to withhold any testimony or absent herself from such proceedings;

3 Contrary to RCW 9A.72.120, and against the peace and dignity of the State of  
4 Washington.

5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
COUNT III

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse TIMOTHY EARL PUGH of the crime of **Domestic Violence Misdemeanor Violation of a Court Order**, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant TIMOTHY EARL PUGH in King County, Washington, on or about April 20, 2005, did know of and willfully violate the terms of a court order issued on April 5, 2005 by the SeaTac Municipal Court pursuant to RCW chapter 10.99, for the protection of Bridgette Pugh;

Contrary to RCW 26.50.110(1), and against the peace and dignity of the State of Washington.

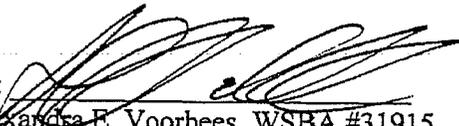
COUNT IV

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse TIMOTHY EARL PUGH of the crime of **Domestic Violence Misdemeanor Violation of a Court Order**, based on a series of acts connected together with another crime charged herein, committed as follows:

That the defendant TIMOTHY EARL PUGH in King County, Washington, on or about May 5, 2005, did know of and willfully violate the terms of a court order issued on April 5, 2005 by the SeaTac Municipal Court pursuant to RCW chapter 10.99, for the protection of Bridgette Pugh;

Contrary to RCW 26.50.110(1), and against the peace and dignity of the State of Washington.

NORM MALENG  
Prosecuting Attorney

By:   
Alexandra E. Voorhees, WSBA #31915  
Deputy Prosecuting Attorney

Norm Maleng, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000  
FAX (206) 296-0955

## APPENDIX B

No. 11

To convict the defendant of the crime of tampering with a witness, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 20 2005, the defendant attempted to induce a person to testify falsely or, without right or privilege to do so, withhold any testimony or absent himself or herself from any official proceeding or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation; and

(2) That the other person was a witness or a person the defendant had reason to believe was about to be called as a witness in any official proceedings or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count II.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count II

## APPENDIX C

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff,
	)	No. 05-1-06304-8
vs.	)	
	)	TRANSCRIPTION OF 9-1-1 CALL
TIMOTHY PUGH,	)	
	)	
	)	Defendant,
	)	
	)	
	)	

LIZ: This is Liz (Unintelligible) at the Valley Communications Center.  
 Today's date is March thirty-first two thousand five and the time is nine  
 thirty-five hours. The following taped incident has been recorded from the  
 Valley Communications master recording of March thirty-first two  
 thousand five at zero three thirteen hours.

OPERATOR: Nine-one-one.

PUGH: My husband was beating me up really bad.

OPERATOR: What address are you're at?

PUGH: Two-oh-six-four-one (unintelligible) Avenue south (unintelligible).

OPERATOR: Okay, hold on, slow down. Are you in apartment number one?

1 PUGH: Yeah.

2 OPERATOR: Okay, what's the name of your apartments?

3 PUGH: There's no name on 'em. My husband (unintelligible) he (unintelligible).

4 OPERATOR: Is he still there?

5 PUGH: No he's walking away.

6 OPERATOR: Any weapons?

7 PUGH: No.

8 OPERATOR: Need an ambulance?

9 PUGH: He fuckin' hit me as I was . . . he fuckin' hit me. I'm his fuckin' wife.

10 (Unintelligible) . . .

11 OPERATOR: What's his last name?

12 PUGH: Pugh, P-U-G-H.

13 OPERATOR: His first name?

14 PUGH: Timothy.

15 OPERATOR: Timothy?

16 PUGH: Yep.

17 OPERATOR: What's his middle initial?

18 PUGH: E for Earl.

19 OPERATOR: And his date of birth?

20 PUGH: Nine-one-seventy.

21 OPERATOR: What race is he?

22 PUGH: Don't talk to me.

23 OPERATOR: What race is he?

1 PUGH: What?

2 OPERATOR: What race is he?

3 PUGH: What? What?

4 OPERATOR: What race is he?

5 PUGH: Black.

6 OPERATOR: How old?

7 PUGH: Don't talk to me.

8 OPERATOR: How tall is he?

9 PUGH: Six uh . . . six feet.

10 OPERATOR: Small, medium or heavy build?

11 PUGH: Medium.

12 OPERATOR: What color hair?

13 PUGH: I don't care (unintelligible) put your hands on me.

14 OPERATOR: Mam, talk to me so I can help you. What color hair?

15 PUGH: He got little braids in his hair. (Unintelligible).

16 OPERATOR: Any eye glasses or facial hair?

17 PUGH: No.

18 OPERATOR: What color shirt or jacket?

19 PUGH: (Unintelligible).

20 OPERATOR: Mam, talk to me so I can help you. What . . .

21 PUGH: (Unintelligible).

22 UNKNOWN: (Unintelligible talking in the background).

23 OPERATOR: What color shirt or jacket?

1 PUGH: He has a long black jacket on.

2 UNKNOWN: (Unintelligible talking in the background).

3 PUGH: (Unintelligible).

4 OPERATOR: Is he still there or did he leave?

5 PUGH: He's just outside. He fuckin' pushed me (unintelligible) . . .

6 OPERATOR: Does he have a vehicle?

7 PUGH: Nope he's walking.

8 OPERATOR: Which way was he walking in . . .

9 PUGH: (Unintelligible).

10 OPERATOR: did you see?

11 PUGH: Huh?

12 OPERATOR: Did you see which way he was walking?

13 PUGH: He was walking towards (unintelligible)?

14 OPERATOR: Towards where?

15 PUGH: Towards the street . . . seven-eleven. How? Because he was fuckin'

16 pushin' me (unintelligible). I (unintelligible).

17 OPERATOR: Mam.

18 PUGH: I didn't do nothin'.

19 OPERATOR: Mam.

20 PUGH: Yes.

21 OPERATOR: How many people do you have over there? Who you . . .

22 PUGH: This is my aunt's (unintelligible).

23 OPERATOR: Are there any children there?

1 PUGH: (Unintelligible).

2 OPERATOR: Mam you need to calm down, I can't understand you.

3 PUGH: He's beatin' me up (unintelligible).

4 OPERATOR: Okay, do you have any children there?

5 PUGH: Only my baby.

6 OPERATOR: What?

7 PUGH: My baby boy.

8 OPERATOR: Okay, do you have any . . .

9 PUGH: (Unintelligible).

10 OPERATOR: And there's no weapons or . . . correct?

11 PUGH: No.

12 OPERATOR: And you don't need an ambulance?

13 PUGH: Yes I (unintelligible) I do.

14 OPERATOR: What?

15 PUGH: Yes, I do. I would like an ambulance please.

16 OPERATOR: Can you still see him from where you are?

17 PUGH: I'm not gonna . . . you want me to go outside so he can beat me up so

18 more?

19 OPERATOR: What?

20 PUGH: Do you want me to go out there and see him so he can beat me up some

21 more?

22 OPERATOR: No, I didn't ask you that. I asked you if . . .

23 PUGH: No, I'm in the house.

1 OPERATOR: you could see him from where you are now.

2 PUGH: (Unintelligible) he's outside of the house. He pushed me off

3 (unintelligible). He pushed me off the (unintelligible) and chipped my

4 tooth.

5 OPERATOR: He chipped your tooth?

6 PUGH: Yeah, he pushed me off the . . . the (unintelligible).

7 OPERATOR: What's your last name mam?

8 PUGH: Same like him, I'm married to him.

9 OPERATOR: And your first name?

10 PUGH: Bridgette. I don't have no (unintelligible).

11 OPERATOR: Your middle initial?

12 PUGH: Um L for (unintelligible).

13 OPERATOR: And your date of birth?

14 PUGH: (Unintelligible).

15 OPERATOR: And you said there is a restraining order in place?

16 PUGH: Yes there is.

17 OPERATOR: Okay. Has he been drinking or anything?

18 PUGH: (Unintelligible) that's all he ever does.

19 OPERATOR: I'm sorry?

20 PUGH: That's all he does.

21 OPERATOR: So that's a yes?

22 PUGH: Yes.

23 OPERATOR: Is he living there with you?

1 PUGH: Nope.

2 OPERATOR: Did he force his way in or how did he get . . .

3 PUGH: I . . . I was outside (unintelligible).

4 OPERATOR: Okay, do you have any medical problems the aid crew needs to be aware

5 of?

6 PUGH: No.

7 OPERATOR: Are you bleeding from somewhere or . . .

8 PUGH: I . . . I don't have . . . I (unintelligible) so I can go look.

9 OPERATOR: Where are you having pain that you need an ambulance?

10 PUGH: (Unintelligible) my face.

11 OPERATOR: And you can no longer see him, correct?

12 PUGH: Yes.

13 OPERATOR: Yes you can or . . .

14 PUGH: I can not.

15 OPERATOR: He was alone tonight, correct?

16 PUGH: What?

17 OPERATOR: He was alone tonight?

18 PUGH: Yes . . . yeah.

19 OPERATOR: Okay. Let me know when the officers or the aid crews with you.

20 PUGH: Hi. They . . . they're here now.

21 OPERATOR: Okay, I'll let you go.

22 PUGH: Look what he did to me.

23 (Call ends).

