

65037-4

65039-4

NO. 65039-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALBERT HOLDRIDGE,

Appellant.

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King County Prosecutor
Appellate Unit

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

The Honorable Laura Inveen, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Does the State's brief fail to address the appellant's primary argument?

2. Does the State's brief misrepresent this Court's central holding in Warner v. Regent Assisted Living¹?

3. Does the State's brief misapprehend the trial court's ruling by arguing this case is analogous to United States v. Napier²?

B. ARGUMENTS IN REPLY

1. THE STATE'S BRIEF MISCONSTRUES MR. HOLDRIDGE'S CENTRAL ARGUMENT AND THEREFORE FAILS TO ADDRESS IT.

Hearsay is generally inadmissible unless it falls within an exception to the rule barring hearsay, such as the exception for "excited utterances." ER 802(a)(2). This Court interprets ER 803(a)(2) in a restrictive manner "to preserve the purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present." State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984). A statement must therefore meet three requirements to qualify for this exception: there must be a startling event or condition; the declarant must

¹ Warner v. Regent Assisted Living, 132 Wn. App. 126, 130 P.3d 865 (2006).

² United States v. Napier, 518 F.2d 316, 317-18 (9th Cir.), cert. denied, 423 U.S. 895 (1975).

make the statement while still under the stress or excitement of the event or condition; and the statement must relate to the event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The State has the burden of demonstrating the exception applies. United States v. Marrowbone, 211 F.3d 452, 455 (8th Cir. 2000).

In an apparent attempt to construct an easily toppled “straw man,” the State inaccurately asserts that Mr. Holdridge’s claim on appeal is that there was insufficient evidence of the startling event. Arguing there is no such requirement, the State presents a lengthy block quote from State v. Young, 160 Wn.2d 799, 161 P.3d 967 (2008), which rejected an out-of-state requirement of independent evidence corroborating an excited utterance. Brief of Respondent (BOR) at 15-16.

Even though the State responded to one possible argument, Holdridge raised another, challenging the sufficiency of the State’s proof as to second criterion, whether Tamara Adams remained continuously under the stress of the startling event. Absent evidence as to when the startling event occurred, however, there is no way to evaluate whether any state excitement was continuous.

Contrary to the State’s repeated references to “circumstantial evidence” that the startling event was close in time to Adams’s statements, there is no such evidence. The State appears to rely not on evidence, but

instead on circular reasoning that because the envelope containing two of the excited utterances includes the date December 27, the startling event must have occurred that day as well. BOR at 12, 16; cf. 7RP 139 (Tokarczyk's acknowledgement she was unfamiliar with Adams's usual mental state in late 2007-early 2008).

It is no accident that the State has pointed to no case upholding the admission of an excited utterance in which the "startling event" occurred at an undetermined time. As argued in the opening brief, any argument that the exception applies because (1) a startling event may have occurred and (2) the declarant was distressed at some later time eliminates an essential requirement of the hearsay exception and requires reversal.

2. *WARNER* SUPPORTS EXCLUSION OF ADAMS'S HEARSAY STATEMENTS.

The State also argues the Warner court "upheld the trial court's exclusion of the [complainant's] excited utterance . . . not because of the time that had passed . . . but because of her dementia and bipolar disorder and the lack of any corroborating evidence of her accusation." BOR at 17.

The State again provides a lengthy block quote. Buried precisely in the middle of the quote, however, is the fact that the Warner court's "primary concern" in finding the statements inadmissible was the

“complete lack of evidence of [the declarant’s] mental state during the [two hour] time lapse and the alleged event.” Warner v. Regent Assisted Living, 132 Wn. App. 126, 141, 130 P.3d 865 (2006); see also State v. Cotto, 182 N.J. 316, 328, 865 A.2d 660, 667 (2005) (“[t]he crucial element is the presence of a continuing state of excitement”); State v. Sims, 348 S.C. 16, 21-22, 558 S.E.2d 518, 521 (2002) (statement after extended period admissible only if made under continuing state of excitement).

As to the factor this Court and others have considered “primary” and “crucial,” the time lapse here was not two hours but was indeterminate. The lack of evidence of a continuing state of excitement is, therefore, even more apparent in this case than in Warner. Moreover, many of the ancillary concerns present in Warner, such as the declarant’s dementia, were also present here. For the reasons set forth in the opening brief, Warner supports Holdridge’s argument that the trial court erred in admitting the challenged statements.

3. THE STATE’S ATTEMPT TO LIKEN THIS CASE TO *NAPIER* LIKEWISE FAILS.

In United State v. Napier, the court admitted the excited utterance of a kidnapping and assault victim eight weeks after attack. The court held the startling event was not the attack itself, but seeing a picture of the

assailant in the newspaper. Napier, 518 F.2d 316, 317-18 (9th Cir.), cert. denied, 423 U.S. 895 (1975).³

The State argues that the January 4 police visit was a startling event provoking Adams's statement that "now they're telling me that the \$60,000 was a loan." 7RP 129; 8RP 47-49, 84-85. While this was, generally, the State's theory when it moved to admit evidence,⁴ the Court made no factual or legal findings that the police visit was an event startling enough to provoke the January statements. See, e.g., State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (absent factual finding, reviewing court "must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue"); Car Wash Enters., Inc. v. Kampanos, 74 Wn. App. 537, 546, 874 P.2d 868 (1994) ("The absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue."). Instead, the court found Adams's January statements related back to the original event. 7RP 215; BOR at 7-8; Brief of Appellant (BOA) at 18 n. 13. Thus, the ruling to admit the 2008

³ See Brief of Appellant at 18 (distinguishing Napier).

⁴ 4RP 89-90; CP 127-51.

statement suffers from the same, or worse, infirmity as the ruling to admit the December 2007 statements.

But even assuming, *arguendo*, that the single incriminating January 2008 statement was admissible, it did not have the same damaging impact as all the 2007 statements. The record demonstrates the erroneous admission of the 2007 statements alone would have still prejudiced the defense. BOA at 20-22.

C. CONCLUSION

For the reasons stated above and in the appellant's opening brief, this Court should grant the requested relief.

DATED this 18th day of November, 2010.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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| STATE OF WASHINGTON, |) | |
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| Respondent, |) | |
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| v. |) | COA NO. 65039-4-1 |
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| ALBERT HOLDRIDGE, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF NOVEMBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALBERT HOLDRIDGE
2612 HAVARD AVENUE E.
SEATTLE, WA 98102

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF NOVEMBER, 2010.

x *Patrick Mayovsky*