

66503-1

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No. 66503-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

IRA DEMARIO WASHINGTON,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvas

BRIEF OF APPELLANT

Susan F. Wilk
Attorney for Appellant

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

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A. ASSIGNMENT OF ERROR

The trial court erred in permitting the State to introduce hearsay by admitting the 9-1-1 recording.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Subject to narrow exceptions, out-of-court statements are inadmissible to prove the truth of the matter asserted. Before a statement may be admitted under the excited utterance exception, the proponent must show that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. Where the declarant is not available to testify to the event or condition at the trial, the proponent must provide corroboration of the event or condition before the statements may be admitted. Here, the State did not corroborate the existence of a startling event or condition or even establish what condition prompted the 9-1-1 call. Did the trial court err in admitting statements in the 9-1-1 call under the “excited utterance” exception to the hearsay rule?

C. STATEMENT OF THE CASE

In the early morning hours of February 24, 2010, an unknown person called the police from an address in Federal Way.

The caller, a woman, told the 9-1-1 dispatcher that she needed the police there “immediately.”¹ Ex. 2.

Federal Way Police Officer Steve Olson arrived at the residence approximately ten minutes after the call. 2RP 142.² As he pulled up he recognized a car from an unrelated call earlier that day, which he had seen appellant Ira Washington driving. 2RP 142-43. He also saw a woman whom he believed to be Felicia Kirkland exit the house. 2RP 144. He believed he recognized Kirkland because she had been involved in an incident earlier that month in which it was necessary to fingerprint her to confirm her identity. Id. The woman Olson believed was Kirkland appeared agitated. She said, “he’s inside,” or “he’s leaving from inside.” 2RP 148.

The back door of the house was open. 2RP 150. Washington was on the wet outdoor deck area, half seated and half lying down, as if he had just slipped. 2RP 153-54. The woman Olson believed was Kirkland came outside and found Olson and

¹ The woman also stated, there had been a domestic violence dispute and “I’ve been beat up.” This portion of the call was excluded from the trial as irrelevant and unduly prejudicial. 1RP 29-30.

² Two volumes of transcripts are cited in this brief. The first contains hearings on August 10 and 11, 2011, and is cited herein as 1RP followed by page number. The second contains hearings on August 12 and 16, 2011 and is cited herein as 2RP followed by page number.

another officer with Washington. 2RP 155. There was an order prohibiting contact between Washington and Kirkland, and Washington was arrested. 2RP 156, 160.

The woman Olson believed was Kirkland did not cooperate with the police. 2RP 155. He did not obtain confirmation of her identity or her fingerprints that night. 2RP 173, 181. He did not describe any identifying marks or tattoos that would have helped to corroborate the accuracy of his identification. Another black woman was at the premises as well but the officers did not identify her either. 2RP 200.

Washington was charged with felony violation of a court order.³ Pretrial, Washington moved to prohibit the State from introducing the recording of the 9-1-1 call that resulted in his arrest. 1RP 10, 12. He noted that there was no one to authenticate the call or identify the caller, and contended that the statements made to the 9-1-1 dispatcher were hearsay. 1RP 10. He argued that to the extent the fact of the 9-1-1 call was relevant to establish why the police were dispatched, the State could simply introduce testimony that the officers responded to a 9-1-1 call. 1RP 22.

³ Washington had two prior convictions for violating a court order. CP 28; 2RP 228.

The State contended the call was substantively relevant because Kirkland was expected to deny that she was at the home. 1RP 25. The State averred that the 9-1-1 call was “the only piece of evidence that corroborates that it was Felicia Kirkland who was at the house.” 1RP 26.

Washington argued that the contents of the call had to be treated as hearsay because there was no proof of a startling event to lay the foundation for an excited utterance. 2RP 120. He contended that the court should not presume the truth of the statements in the call without some extrinsic proof. While noting that Washington’s argument was “novel,” the court ruled that there was “something going on” that stressed the caller, and admitted the statements. 2RP 124-25.

At the trial, Washington’s girlfriend, Avalina Fortson, testified that on the night of the incident she was staying in Washington’s home along with Julia Kirkland, Felicia Kirkland’s sister.⁴ She stated that she was arguing with Washington, which is why the police came. 2RP 236-37. She stated that Kirkland was not there. 2RP 239. She explained that Julia told Fortson that Washington had been arrested. 2RP 237.

⁴ Julia Kirkland is referenced herein as “Julia” and Felicia Kirkland as “Kirkland” to avoid confusion. No disrespect is intended.

Kirkland also testified. She stated that on prior occasions she had been confused for both Julia and Fortson. 2RP 255. She explained that at the time of the incident, Julia was living with Washington. 2RP 253. She denied having been around Washington on February 24, calling the police, or witnessing his arrest. 2RP 255. Kirkland has tattoos on her arm and neck that the police know about. 2RP 256, 259.

A jury convicted Washington as charged. 2RP 348; CP 28-29. Washington appeals. CP 58.

D. ARGUMENT

THE STATE FAILED TO ESTABLISH THE EVIDENTIARY FOUNDATION FOR THE STATEMENTS IN THE 9-1-1 CALL TO FALL WITHIN ANY HEARSAY EXCEPTION.

1. The statement was not admissible as an excited utterance because the State could not prove a startling event.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Subject to narrow exceptions, hearsay is presumptively inadmissible. ER 802.

One such exception to the hearsay rule is the exception for so-called “excited utterances.” An excited utterance is defined as

“[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). Under the current iteration of the rule, the proponent of hearsay under this exception must satisfy three closely-connected requirements: “that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition.” State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007) (citation omitted).

In the recent decision of State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009), the Supreme Court explained that the present-day “excited utterance” exception evolved from the early form of the *res gestae* exception to the hearsay rule. Id. at 839-40. As summarized in an early Washington opinion, the exception required:

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

Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939) (quoted in Pugh, 167 Wn.2d at 839).

Both the plain language of the rule and its historical antecedents, as explicated in Beck, make clear that for a statement to qualify as an “excited utterance,” there must have been an event or condition that precipitated the statement. The declarant must have witnessed or participated in the act or transaction and be under its influence such that her statement is made without reflection or deliberation. Beck, 200 Wash. at 9-10; Young, 160 Wn.2d at 806.

Considering this necessary link between the startling event and the utterance, the Supreme Court in Young agreed that “the declarant’s statement alone—the bare words of the utterance—is insufficient to corroborate the occurrence of a startling event.” Id. at 809. The Court held, however, that “circumstantial evidence,

independent from those bare words, can corroborate that a startling event occurred, and such corroboration can be sufficient to satisfy the first element of the excited utterance exception.” Id.

In Young, the Court concluded that circumstantial evidence corroborated a recanting complainant’s allegations of child molestation. Id. at 820. There was no physical evidence of the molestation, but the Court noted:

[I]ndependent of the bare words of K.L.’s statement, K.L. showed Barnes money she said Young gave her for cleaning. When Barnes asked Young what happened, after K.L. made her statements, Young said that he did not want any trouble and did not want Barnes to call the police. Barnes testified that he never said anything about calling the police. When Barnes and Lomax returned to Young’s house a few minutes later, Young did not answer the door and Barnes and Lomax saw Young jumping over the back fence. Taken together, these circumstances provide ample circumstantial evidence, independent of the bare words of K.L.’s statements, that a startling event had occurred.

Id. at 819.

Here, by contrast, there was no proof whatsoever of a startling event. Indeed, the State could only guess at what had precipitated the 9-1-1 call and the court was at a loss as to what had happened, stating:

There is some evidence that something was going on at that address that caused the caller to be under the

stress of the excitement because of some startling event.

2RP 125.

But without knowing what the event was – without being able to identify the condition that precipitated the 9-1-1 call – there is no conceivable way to gauge the impact of the event on the caller's mental state as required to conclude that the statement falls within a hearsay exception. The State could not even identify the caller with any certainty. Unlike Young, there is no way to know what happened and whether the hearsay statements are corroborative. The 9-1-1 tape should have been excluded.

2. The admission of the evidence was prejudicial. An evidentiary error prejudices the right to a fair trial if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Asaeli, 150 Wn. App. 543, 580 n.39, 208 P.3d 1136 (2009). This Court should conclude that the admission of the 9-1-1 tape was the crucial evidence the State needed to convince the jury that Kirkland was at the residence when Washington was arrested. Kirkland herself denied this, as did Fortson. Although Olson believed he recognized

Kirkland, he did not check her identification, her fingerprints, or even confirm the presence of her tattoos.

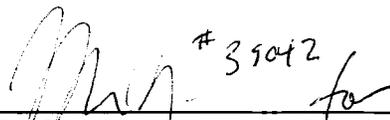
If the 9-1-1 tape recording had not been admitted, the State would have had difficulty overcoming these problems with its case. This Court should conclude that the admission of the 9-1-1 tape recording prejudiced Washington. Washington's conviction should be reversed.

E. CONCLUSION

For the foregoing reasons, this Court should reverse Washington's conviction.

DATED this 28th day of July, 2011.

Respectfully submitted:

 # 39042

SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JULY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> IRA WASHINGTON 766117 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF JULY, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710