

NO. 67272-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

FAUSTO VEGA-FILIO,

Appellant.

REC'D
SEP 28 2011
King County Prosecutor
Appellate Unit

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

The Honorable Bruce Hilyer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in admitting hearsay statements as excited utterances under ER 803(a)(2).

Issue Pertaining to Assignment of Error

Did the trial court err by concluding that the complaining witness was still under the stress of events related to the alleged assault and ruling that her statements to police were admissible as excited utterances?

B. STATEMENT OF THE CASE

1. Procedural Facts

Fausto Vega-Filio was charged by amended information with first degree kidnapping (Count I), second degree assault (Count II), first degree robbery (Count III), felony harassment (Count IV) and interfering with domestic violence reporting (Count V). CP 10-12. Tara Lovejoy was the named victim in all the charges and all carried a domestic violence allegation. Id. A jury found Vega-Filio guilty as charged. CP 25-29. The court sentenced Vega-Filio to a concurrent sentence of 84 months on Count I, 29 months on Count II, 75 months on Count II and 12 months on Count IV. CP 73-80. On Count V, a misdemeanor, Vega-Filio was sentenced to 12 months consecutive to the sentences in Counts I-IV. CP 81-83.

2. Substantive Facts¹

Tara Lovejoy and Vega-Filio knew each other for a couple of years and during that time they occasionally dated. 1RP 41, 43. On October 27, 2010, Vega-Filio walked out of his apartment complex and approached Lovejoy while lifting his shirt to reveal a gun tucked in his pants. 1RP 44. Lovejoy testified Vega-Filio pulled the gun out of his pants and hit her on the side of her head with it. 1RP 45. Lovejoy tried to pull away from Vega-Filio and she told him to stop but he took her to his bedroom window and pushed her inside his bedroom. 1RP 46-48.

When they were inside the room, Vega-Filio threatened to kill Lovejoy. 1RP 53. She did not believe he would intentionally kill her but she was afraid he might accidentally kill her. 1RP 61. Vega-Filio took Lovejoy's cell phone from her when she told him she was going to call police. 1RP 52.

Vega-Filio then hit and choked Lovejoy a number of times. 1RP 49. Lovejoy testified Vega-Filio choked her by grabbing her windpipe. 1RP 50. Vega-Filio was sitting on Lovejoy's back choking her and she was starting to black out when police arrived. 1RP 51. When police entered the room Vega-Filio let go of Lovejoy and climbed out the window. 1RP 54.

¹ 1RP refers to the verbatim report of proceedings for February 22nd and 23rd 2011; 2RP February 24, 2011; 3RP February 28 and March 1, 2011; 4RP May 20, 2011.

Nicole Freutel was the first officer to arrive, followed shortly by Jason Pitts. 2RP 63. 2RP 58-61. Freutel, who was at the front of the apartment, heard a woman screaming and the words “stop” and “help.” 2RP 129-130. Pitts, who had gone to the back of the apartment, heard a woman crying so he went back to the front of the apartment and joined Freutel. 2RP 63-64.

The two officers knocked on the door and a man quickly answered. 2RP 67, 131. They pushed past the man and Freutel went through a closed door into the bedroom. 2RP 132, 156-157. When she entered the room she saw Vega-Filio leaning into the room from the outside, through the window, holding on to Lovejoy. When Vega-Filio saw Freutel he let go of Lovejoy and ran. 2RP 132-133, 152.

Two other officers who were in the area stopped Vega-Filio based on a description given by Freutel. 2RP 36-37, 44, 50. Vega-Filio was searched and police found two cell phones. One was Lovejoy’s phone. 1RP 55, 2RP 39.

A police dog was called to scene to track for evidence. 2RP 105. The dog stopped at the base of a tree and under some leaves police found an air gun. 2RP 121. It had no magazine and was designed to shoot small plastic pellets. Id. Police did not find any fingerprints on the toy gun.

2RP 11, 14. The gun was not checked for DNA. 2RP 25-26. Lovejoy testified the gun looked like the gun Vega-Filio had that night. 1RP 58.

3. Facts Pertaining to Assignment of Error

On the first day of trial, after Lovejoy testified, the State moved to admit a recording of an interview between Freutel and Lovejoy. The interview was recorded by Freutel's patrol car camera. 1RP 73-75. The State argued the recording was admissible under the excited utterance exception to the hearsay rule. 1RP 75. Vega-Filio objected arguing the evidence did not show Lovejoy was under the stress of excitement caused by the event and the statements she made during the interview were not spontaneous. 1RP 77, 79. Vega-Filio pointed out the interview occurred approximately 45 minutes after the incident and occurred after Lovejoy was taken to where police arrested Vega-Filio and Lovejoy identified him. 1RP 77. Further, during the interview Lovejoy called a friend. 1RP 78.

The court reviewed the recording that evening in chambers. The court apparently decided it was admissible and by email directed counsel to make appropriate redactions. 1RP 80; 2RP 5.

Before the recording was admitted Freutel testified. Freutel said that when she initially contacted her, Lovejoy appeared distressed and was panting and gasping. 2RP 137-138. An Emergency Medical Technician (EMT) was called to the scene. The EMT treated Lovejoy and then

Freutel took her to where Vega-Filio had been arrested. They then returned to the apartment complex and while sitting in Freutel's patrol car, Freutel recorded her interview with Lovejoy. 2RP 139-141. Freutel testified Lovejoy had calmed down by then, although she was still crying. 2RP 141. Freutel described Lovejoy as upset, scared and angry. Id. Freutel also testified Lovejoy was clear and coherent when she talked about the incident. 2RP 142, 143.

At the conclusion of Freutel's testimony, Vega-Filio again moved to exclude the recorded interview with Lovejoy. 2RP 161-162. The court denied the motion finding that because Freutel testified Lovejoy was upset and scared, that was sufficient to establish a foundation to admit the recorded interview under the excited utterance exception to the hearsay rule. 2RP 162. The recording was played to the jury. Ex. 48; 3RP 29-31.

C. ARGUMENT

THE COURT ERRED IN ADMITTING LOVEJOY'S STATEMENTS TO POLICE UNDER THE EXCITED UTTERANCE EXCEPTION.

An appellate court reviews for abuse of discretion a trial court's decision to admit a hearsay statement as an excited utterance. State v. Ohlson, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007). 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). Hearsay is inadmissible unless it qualifies as one of the exceptions to the hearsay rule. ER 802; State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995). An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. ER 803(a)(2); Warner v. Regent Assisted Living, 132 Wn. App. 126, 139, 130 P.3d 865 (2006).

To determine whether the statement is admissible as substantive evidence, the key is whether the statement was made while the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. Brown, 127 Wn.2d at 758; State v. Sellers, 39 Wn. App. 799, 804, 695 P.2d 1014 (1985). The underlying rationale is that under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The excited utterance exception is based on the premise the speaker has no opportunity to lie before making the utterance, if the speaker in fact did have that opportunity, then by definition the statement cannot be an excited utterance. State v. Briscoeray, 95 Wn. App. 167, 172, 974 P.2d 912 (1999).

A statement must meet three requirements to qualify as an excited utterance: there must be a startling event or condition; the declarant must 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 at 686; Warner, 132 Wn. App. at 139. Although the statement need not be made contemporaneously with or immediately after the event, it must be spontaneous and made under circumstances that negate the concern that it was made by design or after premeditation. Id. Even statements made immediately after the event in question are inadmissible unless the declarant remains in the necessary state of excitement. State v. John Doe, 105 Wn.2d 889, 893, 719 P.2d 554 (1986).

The State has the burden of demonstrating a hearsay exception applies. United States v. Marrowbone, 211 F.3d 452, 455 (8th Cir. 2000). The trial court must find by a preponderance of the evidence that the declarant remained continuously under the influence of the event at the time the statement was made. ER 104(a); State v. Ramires, 109 Wn. App. 749, 757, 37 P.3d 343 (2002). This Court should interpret ER 803(a)(2) in a restrictive manner so as to not lose sight of the basic elements that distinguish excited utterances from other hearsay statements in order 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)

In Warner, a resident at an assisted-living facility approached the front desk angry and crying. She told a staff member that a man had tried to make her take a shower and tried to climb in bed with her. When an aide passed by in the lobby, she identified him as the man. The Warner court held the statement was inadmissible as an excited utterance because even though the woman was agitated and emotional when she made the statement, the statement occurred more than two hours after the purported startling event and there was no evidence that she remained agitated during that period. Warner, 132 Wn. App. at 140.

In Dixon, the complaining witness ran screaming from her apartment after Dixon attempted to force her to have sexual intercourse. Dixon, 37 Wn. App. at 869. The neighbors called the police. When the police arrived, the complainant was upset and distraught. The police described her as somewhat hysterical, in tears and having a hard time breathing. The police made efforts to calm the complainant while they took written statement from her. Id. at 869-70. The court held:

A reading of [the complainant] statement makes it obvious that she had the ability to recall and narrate the details of her experience with Dixon. Other than being described as upset, there is nothing to indicate that her ability to reason, reflect, and recall pertinent details was in any way

impeded. The statement gives every indication that, if motivated to do so, [the complainant] could have fabricated some of the details. Under these circumstances, we have no basis for finding a guaranty of trustworthiness, which is the ultimate basic ingredient which must be present in order to qualify a statement as an excited utterance.

Dixon, 37 Wn. App. at 874.

Here, almost 45 minutes passed from the time police broke into the room and Freutel interviewed Lovejoy. In that time the EMT treated Lovejoy, Vega-Filio was arrested and Lovejoy was taken to the scene of the arrest to identify him. While Lovejoy can be heard on the recording crying at times, Freutel's testimony and the recording shows that Lovejoy had calmed down and gave clear and concise answers to Freutel's questions. Ex. 48; See, Chapin, 118 Wn.2d at 690 (a statement is made in response to a question is a factor that raises doubt as to whether the statement was truly a spontaneous and trustworthy response to a startling event). Lovejoy even made a phone call during the interview. Ex. 48. Other than being understandably upset, Lovejoy was able to reason, reflect, answer questions and recall details. On this record, the State failed to show the Lovejoy made her statement while still under the stress or excitement of the event.

When a court errs by admitting hearsay that does not fall within a hearsay exception, this Court must also consider whether the hearsay,

within reasonable probabilities, affected the outcome of the trial. Dixon, 37 Wn. App. at 875. Because Lovejoy testified at trial and the jury was allowed to hear her interview with Freutel, Lovejoy essentially testified twice. The admission of her recorded statements bolstered Lovejoy's trial testimony and likely led jurors who may have had a reasonable doubt that Vega-Filio committed the offenses based on her trial testimony alone to nonetheless convict him.

D. CONCLUSION

The trial court erred in admitting Lovejoy's prejudicial hearsay statements. The introduction of such damaging statements likely affected the outcome as to all counts. Vega-Filio's convictions should be reversed.

DATED this 28 day of September 2011.

Respectfully submitted:


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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67272-0-1
)	
FAUSTO VEGA-FILIO,)	
)	
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 28TH DAY OF SEPTEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] FAUSTO VEGA-FILIO
DOC NO. 350395
WASHINGTON STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

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

x *Patrick Mayovsky*

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COURT OF APPEALS
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