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67272-0

NO. 67272-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FAUSTO VEGA-FILIO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HILYER

BRIEF OF RESPONDENT

2011 DEC 21 PM 4: 03

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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**A. ISSUES PRESENTED**

Did the trial court abuse its discretion by admitting hearsay evidence from Tara Lovejoy when she was under the stress and excitement of a startling event when she spoke to police?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Respondent agrees with Appellant's procedural facts.

**2. SUBSTANTIVE FACTS**

Tara Lovejoy and Fausto Vega-Filio met a couple of years before 2010 while they lived in the same apartment complex in the South Park neighborhood of Seattle. 1RP 41. Lovejoy's apartment was just down a short walkway from the defendant's unit, and they began dating shortly after meeting one another and dated off and on until 2010. 1RP 42-43. Lovejoy knew the appellant both as Fausto Vega-Filio and Esteban "Steven" Garcia, though she most commonly referred to him as "Steven". 1RP 42-44. In October of 2010, Lovejoy and the defendant still lived in the same apartment building located at 1201 S. Cloverdale Street in the Southpark neighborhood of Seattle. 1RP 42-43, 2RP 58-63.

On the evening of October 27, 2010, Lovejoy returned home in the evening and saw her ex-boyfriend, the appellant, who flashed

the handle of a gun by lifting his shirt to reveal the handle, and commanded that she go with him. 1RP 44-46. She followed the appellant's instructions because it appeared that he was heavily intoxicated and he forced the gun into her back. 1RP 45. As Lovejoy moved toward the apartment building, the appellant placed the gun in the small of her back and forced her into his apartment. 1RP 45. At some point Lovejoy fell to the ground and the appellant slammed a portion of the gun into her temple, causing her great pain. 1RP 45. Eventually, the appellant was able to push Lovejoy into his apartment against her will via a window on the outside of the building. 1RP 46-48.

Once inside the apartment, the appellant commenced brutally beating Lovejoy. He claimed that she was playing games and that he was going to kill her. 1RP 48-53. He choked her until she could not breathe, threw her against a wall, and continued beating her until police arrived. 1RP 48-53. At one point Lovejoy was able to pull away from the appellant to attempt to call 911, but only seconds later he grabbed the phone away from her and prevented her from calling for help. 1RP 52-53.

While Lovejoy was being assaulted within the apartment, Seattle Police Officer Nicole Freutel was racing to the apartment

building in response to a 911 call that alerted her to the incident around 10:30 p.m. 2RP 126. When Freutel arrived there was commotion outside of the building indicating that there was a woman screaming inside. 2RP 129. Officer Freutel ran to the defendant's apartment and called out for officers to "step it up" because she could hear cries for help coming from behind the door. 2RP 130. As Officer Freutel waited for a back-up unit to assist her she watched the front door of the apartment bow out towards her under the weight of someone inside. 2RP 129. Eventually, Officer Jason Pitts arrived and the two officers announced their presence and immediately the sounds inside ended. 2RP 130-131. A man answered the door appearing as if he had just woken up. 2RP 131. Officer Freutel immediately pushed past the man and scanned the apartment for the woman who was screaming, locating her in a back bedroom. 2RP 131-133. The woman, later identified as Tara Lovejoy, appeared shocked and beaten while the appellant was still holding onto her as he jumped out of the first-floor window. 2RP 132-133. As the appellant jumped, he let go of Lovejoy and began running from the apartment. 2RP 145, 151.

Though crying and screaming, Lovejoy was able to tell Officer Freutel that the appellant had tried to kill her and had choked her until

she could no longer breathe. 3RP 135. Freutel noted marks on Lovejoy's neck which were later captured by Officer Pitts in photographs. 2RP 135-36. Lovejoy also indicated that her phone had been taken by the defendant and that he had threatened to kill her in such a serious way that she thought she was going to die. 2RP 135. During the initial conversation Officer Freutel noticed that Lovejoy was almost unable to talk and was panting and gasping, providing a "stressed-out" reaction. 2RP 138.

A few minutes after the appellant jumped out of the window he was caught in a quiet area and arrested by two police officers. 2RP 35-39. There were few businesses in the area and only a minimal amount of people out in the area both where Lovejoy was attacked and where the appellant was located. 2RP 35-39, 97-99. The appellant was then identified by Lovejoy as her attacker. 2RP 139-141. Officer Freutel identified the appellant as matching the general description of what she had seen at the apartment at the end of the attack. 2PR 141. The appellant had mud on his pants and had in his possession two cellular phones, one of which Lovejoy identified as her own. 2RP 37-39. Several minutes after the defendant was arrested, a K-9 officer working with a search dog located the gun the appellant used, located about halfway up an outdoor staircase along

the path where the appellant had fled. 2RP 97-99. The gun was found in a muddy area where no people were located. 2RP 97-99. Lovejoy provided a statement to Officer Freutel after she identified the suspect as her attacker. 2RP 141. Officer Freutel stated that during the statement Lovejoy had calmed down from the seconds after the attack, but was upset, scared and angry. 2RP 141. During the statement Lovejoy cried, was distressed and her hands shook. 2RP 141.

At trial, the Honorable Judge Bruce Hilyer reviewed the video of Lovejoy's statement and considered the testimony of Lovejoy and Officer Freutel and ruled that the Lovejoy's statements to Freutel were sufficient to establish a foundation for the excited utterance exception. 2RP 162.

C. **ARGUMENT**

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TARA LOVEJOY'S STATEMENTS AS EXCITED UTTERANCES BECAUSE SHE MADE THE STATEMENTS WHILE SHE WAS UNDER THE STRESS OF EXCITEMENT CAUSED BY AN ASSAULT.

Decisions regarding the admission of hearsay under the excited utterance exception are reviewed for an abuse of discretion. State v. Briscoeray, 95 Wn.App 167, 171-73, 974 P.2d 912, review

denied, 139 Wn.2d 1011, 994 P.2d 848 (1999). A trial court abuses its discretion only when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. State v. Banuelos, 91 Wn.App. 860, 862, 960 P.2d 952 (1998). Under ER 803(a)(2), an excited utterance is admissible as a hearsay exception, regardless of the declarant's availability as a witness. 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). For a statement to qualify as an excited utterance, three conditions must be satisfied. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of the excitement of the startling event or condition. Third, the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681, 688-89, 826 P.2d 194 (1992). The key to the rule is spontaneity. Briscoeray at 173. Spontaneity depends on factors that indicate whether the declarant had an opportunity to reflect on the event and fabricate a story about it. Briscoeray at 173-74. Such factors may include the amount of time that passed between the startling even and the

statement, as well as the declarant's emotional state when making the statement. Briscoeray at 173-74.

A statement may qualify as an excited utterance even though it is made in response to a question. State v. Hieb, 39 Wn. App. 273, 693 P.2d 145 (1984), judgment rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986). Lengths of multiple hours have been deemed acceptable for a victim to be under the stress of the excitement of the startling event or condition. State v. Guizzotti, 60 Wn. App. 289, 803 P.2d (1991). (In a prosecution for rape, the victim testified that she fled from her assailant and hid under a tarp for seven hours before she called the police to report the rape. The tape recording of the victim's call to police was deemed admissible.)

Here, the appellant does not challenge either that there was a startling event or that the statements were related to that event. Little doubt can be cast on the attack that Lovejoy suffered or that her statements, describing the event and explaining how she knew the appellant, were related to the attack itself and the crimes charged. Rather, the appellant states that too much time had passed since the event, that she had been treated by medical personnel, that she was calmer than she was during her initial

statements seconds after she was attacked, and that she was able to reason, reflect and answer questions and details. However, while each of these arguments may prove that Lovejoy was less traumatized than when she spoke with Officer Freutel in the apartment where she was attacked seconds after the incident, they fail to show that she was not under the stress of the excitement of the startling event or condition.

While forty-five minutes or so had passed from the time of the assault, Lovejoy was still crying and shaking when she spoke with Officer Freutel for her statement. 2RP 141. Freutel also described her as scared, upset, and distressed. 2RP 141. While Lovejoy was not having trouble breathing as in her assailant's apartment and had calmed down enough to speak with someone in coherent sentences, based on her description she was still "under the stress" of the event, her assault. And while she could convey answers to questions using reason, the events flooded back to her, causing her tears and shakes, things she could not seemingly control. These are the actions of a person who is not able to fully control herself and thus the exact type of person who is not able to calm herself and create the mental stability necessary to fabricate facts. While her control improved from when she was unable to

breathe, there is little to no proof from the appellant that she was able to control herself in the manner necessary to craft a dishonest statement.

Appellant relies heavily on State v. Dixon, 37 Wn. App. 867, 874, 684 P.2d 725 (1984), for his conclusion that Lovejoy's statements were improperly admitted. In Dixon, a victim of indecent liberties completed a four-page statement to the police over the course of two hours after the incident. Dixon at 869. Moreover, the victim added several lines at the end with an explanation that she remembered those facts after she generated three and one-half pages of the statement. Dixon at 873. The Dixon court concluded that the statement was not an excited utterance because it showed an unimpeded ability to reason, reflect, recall, and narrate pertinent details of her experience with the perpetrator from start to finish and that the only indication that it should qualify as an excited utterance was because the victim was "upset" while providing the statement. Dixon at 873-74. The court further explained that there was little shown that the statement was different from any other statement provided by a victim in a criminal case who would almost always be upset at recalling the events of the crime that they suffered. Dixon 873-74.

Dixon is distinguishable from the present case because the officers in Dixon obtained a written statement from the victim over a period of two hours and the police attempted to calm down the victim and get her to focus on the written statement she was providing. Further, the victim in Dixon was allowed to make amendments to the statement after it was created and the ultimate proffered statement at trial was the written product created during the two-hour session with police. In contrast, Tara Lovejoy provided her statement to Office Freutel within approximately 45 minutes of her assault and while in a fragile emotional state. The statement provided by Lovejoy was oral and thus she was not able to make changes to a written document or add amendments as in Dixon, so the jury heard the statements as they were made. Also, during the period while Lovejoy waited to give her statement she was forced to see her attacker a second time to identify him and thus the emotion of the forty-five minute distance between the assault and statement was not without continuing stress, unlike the victim in Dixon. Lovejoy's statement was much closer in time and much more spontaneous than that proffered in Dixon and was provided without the assistance of law enforcement, therefore the appellant's reliance on the case is misguided.

Appellant's reliance on State v. Warner, a case with another two-hour delay, is also unreasonable. Warner v. Regent Assisted Living, 132 Wn. App. 126, 130 P.3d 865 (2006). In Warner the court found that no evidence existed that the declarant "remained in an emotional and agitated state during this intervening period" and that given the elderly declarant's mental state, "at least some evidence that she remained in a state such that she had not engaged in reflective thought between the event and the statement" was necessary. Warner at 140-41. The evidence of Lovejoy's crying, shaking and distressed state of mind in the present case shows that she remained in an agitated state between the assault and the statement she provided, unlike the victim in Warner. Further, there is no evidence that Lovejoy suffered from the mental infirmities that challenged the victim in Warner. Thus, Warner is not useful in the present case. Rather, based upon the differences in Dixon and Warner, and the record in both Lovejoy's statement and Officer Freutel's testimony, Lovejoy's statements were made under the stress of the excitement of the startling event or condition, and thus the trial court's ruling should be upheld.

2. EVEN IF THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED THE HEARSAY STATEMENT OF TARA LOVEJOY,

THE ERROR WAS HARMLESS BECAUSE THERE IS NO REASONABLE PROBABILITY THAT ADMISSION OF THE STATEMENTS WOULD HAVE CHANGED THE OUTCOME OF THE CASE.

Error only requires reversal if it is constitutional in nature, or if within reasonable probabilities, it affected the outcome of the case. State v. Dixon at 874-75. Appellant cannot meet this hurdle.

At trial, Tara Lovejoy testified, described the attack he engaged in against her and identified the appellant as the person who attacked her. 1PR38-66. The appellant matched the general description of the attacker seen by Officer Nicole Freutel. 2RP 141. Further, the appellant was caught only a short distance away from where the attack took place, and only a short while after the incident. 2RP 35-39. Finally, and likely most independently damning, the appellant was located close to a weapon that was identified as being involved in the assault, was covered in mud much like the area where the weapon was found and the path from the scene to the where he was located, and was caught with Lovejoy's phone. 2RP 35-39, 97-99. There were also few people out in the area late at night making the appellant one of the only likely suspects even if Lovejoy never testified. 2RP 35-39, 97-99.

Even without Lovejoy's video statement the jury would have been left with a suspect who was identified by his victim and generally matched a description from a responding officer. The appellant was also close in proximity to the scene of the crime and a weapon involved in the attack, and was covered in mud matching a path likely taken by a suspect. In addition, the jury would have a full description by Lovejoy of the events of the evening thereby providing a basis for all of the proffered charges. Given this factual scenario, it strains credulity for the appellant to argue that the outcome in the case would have been any different without the admission of Lovejoy's statement. Therefore, the appellant cannot meet the burden of harmless error and his appeal should be denied.

**D. CONCLUSION**

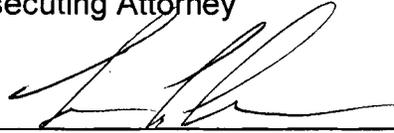
The Court did not improperly admit hearsay evidence in this case because the declarant of the statements was still under the influence of a startling event and thus the statements fell under the excited utterance hearsay exception. Even if the statements were improperly admitted, the error was harmless given the victim's testimony at trial and the circumstances of the appellant's location

and behavior after the incident. The State asks this court deny the appellant's appeal and affirm the conviction of Fausto Vega-Filio.

DATED this 21<sup>st</sup> day of December, 2011.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric J. Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. FAUSTO VEGA-FILIO, Cause No. 67272-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Name JILL CARTER  
Done in Seattle, Washington

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Date

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