FILED
COURT OF APPEALS
DIVISION II

2012 DEC 17 AM 9:29

STATE OF WASHINGTON

BY

NO. 42855-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

LYRIC LEEYN CLINE,

Appellant.

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

The Honorable Ronald E. Culpepper

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S BRIEF DOES NOT COMPLY WITH RAP 10.3(a)(4)(5).

RAP 10.3(a)(4) requires a fair statement of the facts "relevant to the issues presented for review" in the statement of the case. The respondent's statement of the case contains only facts based on the trial testimony of Officer Bortle and Oien's father. Brief of Respondent at 2-4. It contains no facts from the pretrial hearings which are relevant to whether the trial court erred in admitting Oien's 911 call and statements she made to Officer Bortle. Furthermore, the State does not cite to the record in its argument section in violation of RAP 10.3(a)(5), which requires "references to relevant parts of the record." Brief of Respondent at 4-15. Consequently, if this Court considers the State's argument, it must search the record to determine the accuracy of the State's assertions.

2. THE TRIAL COURT ERRED IN ADMITTING THE 911 RECORDING AND STATEMENTS TO THE OFFICER IN VIOLATION OF CLINE'S RIGHT TO CONFRONTATION WHERE OIEN'S STATEMENTS TO THE OPERATOR AND OFFICER WERE TESTIMONIAL AND CLINE HAD NO OPPORTUNITY TO CROSS-EXAMINE OIEN.

The State argues that Oien's 911 call and statements to Officer Bortle were nontestimonial because Oien "was speaking about events as they were actually happening, rather than describing past events" and her

"911 call and statements to the police were made in the course of an ongoing emergency." Brief of Respondent at 8-10. The record belies the State's argument.

Oien called 911 from customer service at Home Depot and waited there until Bortle arrived. Ex. 1 (911 tape); 5RP 91-93. The record substantiates that during the 911 call and when Oien spoke with Bortle, she was not describing events actually happening and there was no ongoing emergency. Oien told the 911 operator, "My boyfriend beat me up and took my car basically." She said the incident occurred half an hour to 40 minutes earlier. In response to questions, she explained what happened and described Cline and her car. Oien declined medical attention and never said she was in danger. She said Cline "took off" and she never expressed any fear of him finding her at Home Depot. But for a fleeting moment of emotion, she remained calm and collected. Ex. 1 (911 tape). Bortle testified that he arrived at Home Depot 32 minutes after the 911 call. 5RP 127. Oien said her boyfriend assaulted her and took her car and she described the assault. 5RP 96-100. Oien refused medical aid. 5RP 95. Contrary to the State's claim that "there was a bonafide physical threat at the time the statements were made," there was clearly no threat of Cline coming after Oien at Home Depot in the presence of customer service employees and a police officer. The State claims that Oien "was

without anyone she knew," but Bortle testified that Oien's father met him in the parking lot of Home Depot and they went inside together to talk to Oien. 5RP 92. Bortle allowed Oien to go home with her father and he did not alert dispatch about Cline. 5RP 102, 126.

The trial court erred in admitting the 911 call and statements to Bortle because Oien's statements to the operator and Bortle were testimonial where the circumstances objectively indicate that there was no ongoing emergency and that the primary purpose of the interrogation was to establish past events potentially relevant to later criminal prosecution. Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

3. THE TRIAL COURT ERRED IN ADMITTING OIEN'S 911 CALL AND STATEMENTS TO OFFICER BORTLE AS EXCITED UTTERANCES.

The State argues that Oien's statements were "clearly admissible" as excited utterances citing State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992). Brief of Respondent at 10-15. The State mistakenly relies on the Chapin court's discussion of United States v. Napier, 518 F.2d 316 (9th Cir.), to support its argument. The court observed that the startling event that must occur for purposes of the excited utterance exception need not be the "principal act" underlying the case. Chapin, 118 Wn.2d at 686. The

court concluded that when an assault victim was unexpectedly shown a picture of her assailant and she exclaimed, "He killed me, he killed me," her exclamations were excited utterances. The startling event was not the assault, but the victim being confronted with the picture of her assailant. Id. at 687. The Chapin court's analysis has no application here where Oien was not confronted with a picture of Cline and Cline did not reappear to confront her while she made the 911 call or spoke to Bortle.

Furthermore, "the essence" of the excited utterance exception is the requirement that "the statement must have been made while the declarant was under the stress of excitement caused by the startling event." Even where a startling event occurred and the statements relate to the event, the statements are not excited utterances if the declarant was not under the stress of the startling event. Chapin, 118 Wn.2d at 687.

The State argues that Oien "was still under the stress of the repeated strangulation, beatings, and death threats," but fails to cite to the record. Brief of Respondent at 14. Contrary to the State's unsubstantiated assertions, the record establishes that Oien was no longer under the stress of the assault when she called 911 and spoke with Bortle at Home Depot. Oien's first statement to the operator was that her boyfriend beat her up and took her car. While the operator was trying to get information about the assault, Oien interrupted and asked if he wanted the license plate

number of her car. Ex. 1 (911 tape). Bortle testified that Oien "was more worried about getting her car back than she was about the injuries that I observed all over her body." 5RP 96. It is evident that by the time Oien spoke with the 911 operator 30 to 40 minutes after the incident and later when she spoke with Bortle, she was no longer under the stress of the "startling event." Consequently the trial court abused its discretion in admitting the evidence because no reasonable judge would have made the same ruling. State v. Woods, 143 Wn.2d 561, 595-97, 23 P.3d 1046 (2001).

4. IF THIS COURT CONCLUDES THAT CLINE HAD AN OPPORTUNITY TO CROSS-EXAMINE OIEN AT THE PRETRIAL HEARING, DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO DO SO.

The State agrees that it "was unforeseen that Ms. Oien would fail to appear at trial," but argues that there "is no evidence" that Oien would have testified at the pretrial hearing that "she fabricated the statements that she made during the 911 call." Brief of Respondent at 19-21. To the contrary, the record establishes that Bortle saw Oien with Cline in her car the day after the incident. 5RP 118, 185-86. When Bortle arrested Cline, Oien became upset and she was "very uncooperative." 5RP 128. In an attempt to prevent Bortle from arresting Cline, she changed her story and said a female assaulted her. 5RP 119, 128. In light of the fact that Oien

was already back together with Cline the very next day and denying that he assaulted her, it is evident that she would have recanted her statements at the pretrial hearing if defense counsel had questioned her about the 911 call.

Consequently, defense counsel's performance was deficient in failing to cross-examine Oien and Cline was prejudiced by the deficient performance because there is a reasonable probability that the court would not have admitted the 911 tape as an excited utterance if Oien testified under oath that her statements were fabricated. Strickland v. Washington, 466 U.S.668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should reverse Mr. Cline's conviction.

DATED this 14th day of December, 2012.

Respectfully submitted,

VALERIE MARUSHIGE
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Attorney for Appellant, Lyric Leeyn Cline

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue, Tacoma, Washington 98402.

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

DATED this 14th day of December, 2012 in Kent, Washington.

Valerie J Marushige

VALERIE MARUSHIGE
Attorney at Law
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