

NO. 43203-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARK MARKUSSEN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert L. Harris, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR1

C. STATEMENT OF THE CASE.....2

 1. Procedural history and trial testimony:.....2

 2. Verdicts, enhancements and assessments2

 a. The court's denial of the 911 CAD record was
 erroneous2

D. ARGUMENT8

 1. THE TRIAL COURT ERRED BY EXCLUDING
 A REPORT BUSINESS RECORD T D.....8

 a. The court's denial of the 911 CAD record was
 erroneous8

 b. The court's denial of the 911 CAD record was
 erroneous9

 c. The Appellant provided a sufficient foundation
 for the admission of the CAD report as a
 business record10

 d. The error was not harmless11

E. CONCLUSION14

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Christopher</i> , 114 Wn.App. 858, 60 P.3d 677, review denied, 149 Wn.2d 1034 (2003)	12
<i>State v. Bradley</i> , 17 Wn.App. 916, 567 P.2d 650 (1977).....	10, 11
<i>State v. Dixon</i> , 37 Wn. App. 867, 684 P.2d 725 (1984)	14, 14
<i>State v. Hardy</i> , 133 Wn.2d 701, 946 P.2d 1175 (1997).....	12
<i>Jarstad v. Tacoma Outdoor Recreation, Inc.</i> , 10 Wash.App. 551, 519 P.2d 278 (1974).	16
<i>State v. Kreck</i> , 86 Wn.2d 112, 542 P.2d 782 (1975).....	11
<i>State v. Strauss</i> , 119 Wn.2d 401, 832 P.2d 78 (1992)	12
<i>State v. Tharp</i> , 26 Wn.App. 184, 612 P.2d 11 (1980), aff'd, 96 Wn.2d 591, 599 (1981)	15
<i>State v. Woods</i> , 143 Wn.2d 561, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001).....	14

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>State v. Knapstad</i>	7

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 9A.32.030	6, 7
RCW 9A.40.020(1)(b), (c).....	6, 7 R C
W 5 .4 5 .0 2 0	6 RCW
9.94A.825	7

<u>COURT RULE</u>	<u>Page</u>
CrR 8.3.....	5

<u>OTHER AUTHORITIES</u>	<u>Page</u>
5 KARL TEGLAND, <i>Washington Practice</i> § 90, at 203 (2d ed. 1982).....	7, 9

A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to admit as a business record a Computer Aided Dispatch [CAD] report or record made by a 911 operator simultaneously with a 911 call she received from the victim.

2. The trial court erred in refusing to admit a CAD report documenting the victim's call to 911 as an excited utterance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A hearsay statement may nonetheless be admissible if the statement falls within a hearsay exception. A business record is a valid hearsay exception. Prior to the admission of a business record, the proponent of the evidence must establish through the custodian of records or other qualified witness the identity and mode of preparation of the record and that it was made in the regular course of business at or near the time of the event. Did the court err in denying a Computer Aided Dispatch record of details of a 911 call from the victim where the record was made by a 911 operator who received the call simultaneously with the call? Assignment of Error No. 1.

2. Did the trial court err in refusing to admit the CAD record of the 911 call as an excited utterance where the statement was made within minutes of the startling event, and pertained to the event? Assignment of Error No. 2.

C. STATEMENT OF THE CASE

1. Procedural history and trial testimony:

On the morning of August 17, 2010, an intruder entered the house of Terrie Cox in Vancouver, Clark County, Washington. 3B Report of Proceedings [RP] at 451.¹ Her husband had left for work and she was alone in the house at the time of the intrusion. 2RP at 456. Ms. Cox had opened the garage door in order to go outside to trim some trees in front of her house, and then went back inside her home. 3B RP at 453. A man entered through the open garage door and went inside the house. 3B RP at 453, 454. Ms. Cox saw the man standing in the hallway wearing a black stocking cap, a blue "puffy" jacket, jeans and a t-shirt. 3B RP at 454. She stated that the man produced what she described as a gun. 3B RP at 454. The man told her to turn around and face away from him. She complied and he grabbed her hair and put the gun to her neck. 3B RP at 457. He took her to an office in the house and told her to sit down. He then backed up and walked down the

¹The record of proceedings consists of six volumes:
1RP—December 3, 2010, February 10, April 7, May 19, June 16, June 21, July 19, July 28, July 29, August 4, September 16, September 22, November 29, and December 1, 2011, CrR 3.5 hearing;
2RP—December 2, December 5, 2011, jury trial;
3A RP—December 6, 2011, jury trial; 3B RP—December 6, 2011, jury trial;
4RP—December 7, 2011, jury trial; and
5RP -December 8, 2011, jury trial; January 12, February 29, and March 9, 2012, sentencing.

hallway, and she ran out of the house. 3B RP at 458. The man intercepted her outside with what she described as a gun, grabbed her and took her back inside the house into the office. 3B RP at 458, 459. In the office the man attacked her and tried to pin her down. 3B RP at 459. She fought back but he was able to pin her face down in a chokehold and then sat on her back and put the gun on the floor. 3B RP at 460. He then put his hand in his pocket and pulled out a rubber glove. 3B RP at 460. As he was putting on the glove she bit his right hand and "started shredding the glove," and then reached up and pulled off the man's stocking cap. 3B RP at 461. She said that the man had black hair and that he had a strong odor of cigarette smoke. 3B RP at 463. As he was choking her, he told her that someone wanted her dead and that he was not leaving until he had killed her. 3B RP at 462. She told him that she was hurt and that she needed to get up and promised that she would not turn around and look at him. 3B RP at 464. She got up and then ran out of the house and ran to a neighbor's house. 3B RP at 464.

During the attack the intruder was injured and left blood on Ms. Cox's left leg, hand, and arm. 3B RP at 471. Police took swabs of the blood for DNA² analysis.

²DNA denotes the molecule Deoxyribonucleic acid. <http://www.biology-online.org/dictionary/Dna>

Ms. Cox thought the attacker was a building contractor who had performed work in her house in 2005. 3B RP at 465. She believed that she recognized his voice and recognized him by the cigarette odor. 3B RP at 466. She subsequently obtained two checks written to Mark Markussen in 2005 for work he did in a closet in the house. 3B RP at 476, 477. At trial, Ms. Cox identified Mr. Markussen as the man who entered her house on August 17, 2010. 3B RP at 506.

On September 14, 2010 Ms. Cox, a real estate agent, went to a restaurant in Vancouver called Tommy O's to meet a client, who was also one of her friends. 3B RP at 480, 481. In the bar of the restaurant, she saw a man talking on cell phone who she believed was the man who had attacked her the previous month. 3B RP at 481, 4RP at 412. Ms. Cox's friend obtained the man's name and cell phone number. 3A RP at 390, 3B RP at 481. The man gave his name as "Mark." Ms. Cox called 911 and also alerted the restaurant manager that she believed the attacker was in the restaurant. 3B RP at 483. A restaurant patron obtained the man's license plate number and other information regarding his vehicle when he left the restaurant, and she provided the information to police. 3B RP at 483, 484, 3A RP at 413.

Detective Darren McShea of the Vancouver Police Department

testified that the license plate number was from a vehicle registered to Sidney Cables, who lived at an address in Washougal. 3B RP at 747. He testified that Mr. Markussen was associated with that address. 3B RP at 747.

After obtaining a search warrant, police got a DNA sample from Mr. Markussen on September 17, 2010. 3B RP at 553, 568. A DNA report was prepared by Erica Graham of the Washington State Patrol Crime Laboratory on November 17, 2010, indicating that the DNA obtained from Ms. Cox fit the profile of the DNA sample obtained from Mr. Markussen on September 17. Mr. Markussen was arrested on November 22, 2010. 4RP at 656, 657, 753.

At trial, Ms. Graham testified that the probability of the DNA samples obtained from Ms. Cox's palm and leg of matching the DNA profile obtained from Mr. Markussen is one in 970 quadrillion. 4RP at 658.

Mr. Markussen was evaluated at Western State Hospital and determined to be competent to stand trial. 1RP at 15; CP 19.

Jury trial in the matter started December 5, 2010, the Honorable Richard Melnick presiding.

The State charged Mr. Markussen with kidnapping in the first degree, contrary to RCW 9A.40.020(1)(b), (c); burglary in the first degree, contrary

to RCW 9A.52.020(1)(a), (b); and assault in the second degree. Clerk's Papers [CP] 1. The State filed an Amended Information on November 28, 2011, alleging that Counts 2 and 3 were committed while armed with a deadly weapon and adding an additional count of assault in the second degree and witness tampering. CP 41-42.3 The State also alleged a deadly weapon enhancement in Counts 1 through 4, pursuant to RCW 9.94A.825 and 9.94A.533(4). CP 41-42. The State filed a Second Amended Information on January 12, 2012. CP 282. Count 5 was subsequently severed from Counts 1 through 4. 2RP at 230.

Immediately following the incident the morning of August 17, 2010, Ms. Cox's neighbor, Bruce Bown, called 911 after Ms. Cox told him what had happened. 2RP at 291. After Mr. Brown spoke with the 911 operator, he gave the phone to Ms. Cox, who also spoke with the 911 operator. 2RP at 296, 5RP at 836. The 911 call was not recorded due to a malfunction and the person who took the call, Lori Brenner, simultaneously made a Computer Aided Dispatch [CAD] record of the call to be transmitted to the responding police officers. 5RP at 832-33. Defense counsel moved to prevent the State from amending Counts 1 through 4 to add deadly weapon enhancements,

³Mr. Markussen entered a guilty plea to the severed count of witness tampering on January 12, 2012. 5RP at 955.

pursuant to *State v. Knapstad*,⁴ arguing that a caller to 911 on August 17, 20010 stated that an intruder was using a fake gun. CP 52, 53. The court, which addressed the motion under CrR 8.3, denied the motion and permitted the State to file its second amended information. 2RP at 225.

The defense sought to introduce the CAD report under the business record exception to ER 803 and as an excited utterance. The court denied the motion. 5RP at 828-30. In an offer of proof, Ms. Brenner stated that in the course of her employment as a county 911 system operator, she received a call the morning of August 17, 2010 and spoke with Terrie Cox. 5RP at 832, 835. She stated that in addition to taking each call, 911 operators create a "call for police dispatch" in the CAD system contemporaneously with each incoming call. 5RP at 833. The information is then relayed to responding police officers and appears on the computers in their cars. 5RP at 834. Ms. Brenner stated that the CAD entry she created referred to a "fake plastic gun" and that the information was provided by Ms. Cox. 5RP at 835.

The defense rested without calling any witnesses. 5RP at 869.

Neither exceptions nor objections were taken to the jury instructions were taken by counsel for the defense. 5RP at 815.

2. Verdicts, enhancements, and sentence:

The jury found Mr. Markussen guilty as charged in Counts 1 through

⁴¹ 07 Wn.2d 346, 729 P.2d 48 (1986).

4. C P 270, 271, 272, 273. The jury also found a deadly weapon enhancement for each count. CP 274, 275, 276, 277. The defense argued that the merger doctrine applies to kidnapping, burglary and assault convictions. 5RP at 981. The court found that kidnapping merges with second degree assault as charged in Count 3. 5RP at 982, 983. The court imposed a standard range sentence of 174 months, including enhancements totaling 72 months. CP 304.

Timely notice of appeal was filed March 8, 2012. CP 320. This appeal follows.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY RULING THE CAD RECORD WAS INADMISSIBLE AS A BUSINESS RECORD

a. The court's denial of the CAD report by the 911 operator regarding a "fake plastic gun."

Out-of-court statements offered at trial to prove the truth of the matter asserted are inadmissible unless they fall within a valid hearsay exception. A statement, other than one made by the declarant while testifying at trial or at a hearing, offered to prove the truth of the matter asserted is hearsay and is inadmissible absent a rule or statute which authorizes its admission. ER 801(a) - (c), 802. Whether a statement is offered to prove the matter asserted

depends upon the purpose for which it is offered. Karl Tegland, 5B Washington Practice, Evidence, § 801.8 at 288 (4 ed. 1999). It also turns on a question of relevancy: if the statement is only relevant if it is true, it is hearsay. *Id.*

Here, the trial court erred by ruling that Ms. Brenner's CAD record notes regarding the 911 call was inadmissible as a business record. As a consequence, defense counsel was precluded from arguing that Mr. Markussen could not have committed the offense of first degree burglary and second degree assault as alleged in Count 3---and that the enhancements did not apply---because the assailant was not armed with a deadly weapon but instead had a fake plastic gun.

b. The court's denial of the 911 CAD record was erroneous.

Evidence Rule 801(c) defines hearsay as "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 802 states that hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." The Uniform Business Records as Evidence Act (the business records exception to the hearsay rule) provides such an exception. The

Uniform Business Records Act is codified and contained in RCW 5.45.020.

ER 803(a)(6). It provides:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020. See also *State v. Kreck*, 86 Wn.2d 112, 118-20, 542 P.2d 782 (1975).

In *State v. Bradley*, 17 Wn.App. 916, 567 P.2d 650 (1977), this Court upheld the admissibility of police department CAD printouts as business records under this statute. The trial court admitted a computer printout as a record that was kept of all phone calls requesting police assistance. *Bradley*, 17 Wn.App. at 918. Bradley assigned error to the admission of the computer printout on the ground that it contains double hearsay. *Id.* This Court upheld the trial court's ruling and noted:

The printout is a record of an event made in the regular course of business that satisfies the requirements for admission under the Uniform Business Records as Evidence Act, RCW 5.45.020. [Citations omitted] A document that qualifies as a business record cannot be denied admission on the ground that the person who entered the information in the record does not testify in court. *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wash.App. 551, 519 P.2d 278 (1974). Thus the statements of the person who received the phone call come within an exception to the hearsay rule for business records.

Bradley, 17 Wn.App. at 918.

c. The Appellant provided a sufficient foundation for the admission of the CAD report as a business record.

The admissibility of hearsay as a business record hinges upon the opinion of the trial court that "the sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020; Tegland, 5C Wash.Prac. § 803.42, at 23. Here, 911 operator Lori Brenner stated in the offer of proof how the report was prepared and that it is prepared contemporaneously with each 911 call to provide information to responding officers. She demonstrated that she had control over the accuracy of the information and affirmed that the information regarding a "fake gun" was accurately entered in the report. Ms. Brenner's knowledge of the CAD system and her affirmation that the information was accurately received and entered in the report leads to the inescapable conclusion that she is a qualified witness to lay the foundation necessary to admit the report as business records.

Pursuant to the holding of *Bradley*, the trial court erred in denying the admission of the CAD report as a business record.

d. The error was not harmless.

The court's error in denying the operator's CAD record regarding a "fake plastic gun" was not harmless as it denied the defense's ability to argue that Mr. Markussen could not have committed first degree burglary and second degree assault as alleged in Count 3, and that the State did not prove the deadly weapon enhancements on the four counts because the perpetrator did not use a deadly weapon but instead had a fake plastic gun. Where the court makes an erroneous evidentiary ruling, the error is subject to "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Christopher*, 114 Wn.App. 858, 863, 60 P.3d 677, review denied, 149 Wn.2d 1034 (2003), quoting *State v. Tharp*, 26 Wn.App. 184, 612 P.2d 11 (1980), aff'd, 96 Wn.2d 591, 599 (1981).

The error in precluding the admission of the CAD record was not harmless as the outcome of the trial---particularly regarding the deadly weapon enhancements---would have been different had the evidence been admitted.

**2 THE TRIAL COURT ERRED IN RULING THE
CAD REPORT OF THE 911 CALL WAS
INADMISSIBLE AS AN EXCITED
UTTERANCE.**

The hearsay rules prohibit admission of out-of-court statements to prove the truth of the matter asserted, except as provided by evidence rules, court rules, or statute. ER 801(c); ER 802. Although hearsay, certain out-of-court statements are admissible as exceptions to the rule. ER 802. An excited utterance is one such exception. ER 803(a)(2). 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). Excited utterances are sufficiently reliable to qualify as a hearsay exception because they are "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." *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (citation omitted). The stressful circumstance is believed to temporarily overcome the ability to reflect and fabricate. *State v. Dixon*, 37 Wn. App. 867, 872, 684 P.2d 725 (1984).

An excited utterance must satisfy three requirements: (1) a startling event or condition must have occurred; (2) the statement was made while the declarant was still under the stress of the startling event or condition; and (3) the statement must relate to the startling event or condition. *State v. Davis*,

141 Wn.2d 798, 843, 10 P.3d 977 (2000); *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

The statement should be made contemporaneously with or immediately following the startling event. The longer the time between the event and the statement, the "greater the need for proof the declarant did not engage in reflective thought prior to making the statement." *State v. Davis*, 141 Wn.2d at 844. If the evidence suggests the person had time to collect his thoughts and fabricate, the statement does not constitute an excited utterance. *Dixon*, 37 Wn. App. at 874. The trial court's decision is reviewed for an abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001).

Here the issue is whether Ms Cox's statement to the 911 operator that the assailant had a "fake gun," as reflected in the CAD report discussed *supra*, should have been admitted as an excited utterance.

The court erred in denying admission of Ms. Cox's statement; the statement qualified as an excited utterance. The record of the 911 call satisfies the three-part test noted above. The neighbor Mr. Brown called 911 almost immediately after the incident, and Ms. Cox then spoke with the operator after Mr. Brown left to look for the perpetrator. 2RP at 291.

Witnesses described Ms. Cox as shaking and being extremely upset following the incident. 2RP at 290. Last, the 911 call and Ms. Cox's statement regarding the gun to the operator was about the startling event.

The trial court abused its discretion in refusing to admit Ms. Cox's statement in the CAD report as an excited utterance.

F. CONCLUSION

Based on the above, Mr. Markussen respectfully requests this court to reverse and dismiss his convictions and deadly weapon enhancements.

DATED: November 2, 2012.

Respectfully submitted,
THE TILLER LAW FIRM

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IN THE COURT OF APPEALS
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