NO. 44212-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

IRA FOREMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Flemming, Judge

No. 11-1-02688-6

RESPONDENT'S BRIEF

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Table of Contents

Table of Authorities

State Cases

Rules and Regulations

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion in admitting hearsay statements as an excited utterance?

B. STATEMENT OF THE CASE.

1. Procedure

On July 5, 2011, the Pierce County Prosecutor's Office (State) filed an Information that charged Ira Foreman (defendant) with one count of unlawful possession of a firearm in the second degree. CP 1. On December 28, 2011, the State amended the Information to charge defendant with one count of unlawful possession of a firearm in the first degree. CP 3.

On September 20, 2012, the case proceeded to a jury trial before the Honorable Frederick Fleming. 1 RP 1.[1] Trial began with a CrR 3.6 hearing in which the court ruled that statements made by third parties to Pierce County Sheriff's Deputy Scott Mock were admissible as an excited utterance. 1 RP 25.

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[1] The State will refer to the verbatim report of proceedings as follows: The three separately paginated volumes referred to as 1–3 will be referred to by the volume number followed by RP.

On October 23, 2012, the jury convicted defendant of unlawful possession of a firearm in the first degree. CP 18; 3 RP 60.

On November 16, 2012, the court sentenced defendant to 89 months confinement within the standard range of 67–89 months. CP 57–68, 3 RP 74. Defendant's offender score was a seven. CP 57–68.

Defendant filed this timely notice of appeal on November 16, 2012. CP 69.

2. Facts

Shortly after 1:00 A.M. on July 3, 2011, Pierce County Sheriff's Deputy Scott Mock observed two cars race into a parking lot in Tacoma. 2 RP 33. Deputy Mock was sitting in his patrol vehicle in the same parking lot when the first vehicle abruptly stopped in front of him. 2 RP 33. The occupants, two males and one female, exclaimed that a passenger in the second vehicle had pointed a gun at them. 2 RP 36–37, 53. The three occupants were "very excited," "boisterous, loud, [and] yelling all at the same time." 2 RP 37. Deputy Mock followed the second vehicle as it continued through the parking lot. 2 RP 37. As Deputy Mock got closer to the second car, he observed the front passenger, later identified as defendant, get out of the car carrying an object that appeared to be a firearm. 2 RP 38, 63. Deputy Mock saw the defendant throw the object over some bushes. 2 RP 39. After a brief foot chase, Deputy Mock arrested defendant. 2 RP 42.

Once defendant was in custody, Deputy Mock returned to the bushes and recovered a firearm. 2 RP 42–43. The loaded gun was damaged, but functional. 2 RP 43–44, 81–82.

By the time defendant was in custody and Deputy Mock had secured the firearm, the first vehicle had left the scene. 2 RP 47.

Defendant's wife, Ms. Stephanie Foreman, testified on defendant's behalf. According to Ms. Foreman, she was purchasing fireworks on Muckelshoot Tribal land in Auburn when her 12 year-old son noticed a backpack leaning against one of the fireworks stands. 3 RP 11. The bag was overflowing with fireworks and the man working at the fireworks stand advised Ms. Foreman to take the bag because it was unclaimed. 3 RP 12. Ms. Foreman claimed that she found a firearm in the backpack but that she did not tell her son or husband about it. 3 RP 20.

Later that night, Ms. Foreman went to a bowling alley in Tacoma to pick up her husband, who was there testing a new bowling ball he had recently purchased. 3 RP 7–8. As defendant exited the bowling alley, Ms. Foreman observed a group of five white males attack defendant, knocking him down to the cement several times. 3 RP 9. Ms. Foreman contemplated calling the police, but remembered that she had a firearm in the trunk of her vehicle. 3 RP 10–11. Ms. Foreman retrieved the firearm and then walked toward the fight, holding the gun in the air. 3 RP 13. The assailants scattered, and Ms. Foreman–with gun in hand–helped her husband back to the safety of her vehicle. 3 RP 14. At that moment, a

vehicle full of white males pulled up to Ms. Foreman and yelled a racial slur at her. 3 RP 14–15. Ms. Foreman began to drive, and the other vehicle began chasing her. 3 RP 17. Defendant told Ms. Foreman to get help, jumped out of the moving vehicle, and started to run. 3 RP 17. Panicked, scared, and not wanting to "get caught with a gun[,]" Ms. Foreman then threw the firearm out of car's window. 3 RP 17.

Defendant testified to a similar version of events as Ms. Foreman. 3 RP 24–30. Defendant claimed that he did not see a gun the entire evening. 3 RP 32. Defendant also claimed that he did not remember being chased by a police officer. 3 RP 29. According to defendant, his wife told him that a vehicle was behind them and he "instantaneously thought" that the people in the car were going to kill him. 3 RP 33. Defendant did not look to see if it was the same car that had been chasing him earlier, or see if anyone was even chasing him. 3 RP 33.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING TESTIMONY AS AN EXCITED UTTERANCE.

This Court reviews a trial court's ruling on the admissibility of evidence for an abuse of discretion. ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." ***State v. C.J.***, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A

discretionary decision is manifestly unreasonable if it "is outside the range of acceptable choices, given the facts and the applicable legal standard." ***State v. Lamb***, 175 Wn.2d 121, 128, 285 P.3d 27 (2012) (quoting ***State v. Powell***. 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A discretionary decision "is based on 'untenable grounds' or made for 'untenable reasons' if it rests on facts unsupported in the record or was reached in applying the wrong legal standard." ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting ***State v. Rundquist***, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

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 an exception under the rules of evidence, court rules, or by statute. ER 802.

Under the excited utterance exception, spontaneous utterances that are made under the shock or stress of an event are admissible. ***State v. Chapin***, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The following three requirements must be satisfied for a hearsay statement to qualify as an excited utterance:

> (1) A startling event or condition must have occurred;
>
> (2) The statement must have been made while the declarant was under the stress or excitement caused by the startling event or condition; and

(3) The statement must relate to the startling event or condition.

State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); *see also* ***Chapin***, 118 Wn.2d at 688.

The first and second requirements must be established by evidence extrinsic to the declarant's words alone. ***State v. Young***, 160 Wn.2d 799, 807, 161 P.3d 967 (2007). Such evidence can include "the declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made." *Id.* at 810.

Defendant claims that the first two requirements have not been met. Brief of Appellant, 7–9. The third requirement is uncontested. *Id.*

a. There was sufficient circumstantial corroborating evidence that a startling event or condition occurred.

Corroborating evidence is not limited solely to third party eyewitness accounts. Here, the declarants' "behavior, appearance, and condition," are indicative that defendant pointed a firearm at them. The trial court noted that the declarant's were yelling and appeared "panicky." 1 RP 24. Deputy Mock described the declarants as "very excited," "boisterous, loud, [and] yelling all at the same time." 2 RP 37.

The circumstances under which the statement was made also indicate that the startling event occurred. The first car "raced into the parking lot" and quickly approached Deputy Mock's police cruiser. 2 RP 33; CP 9–12 (Finding II). The second vehicle also "raced" into the empty

parking lot, closely following the first vehicle. 1 RP 13, 24; 2 RP 33, 41. Deputy Mock followed the second vehicle and observed defendant discard what was later confirmed to be a firearm. 2 RP 39, 42–43.

Both the declarants' demeanor and the circumstances surrounding the statement corroborate that a stressful event had occurred. The court considered both before ruling the statements admissible. The trial court did not abuse its discretion in admitting the statements as an excited utterance for lack of corroboration of the startling event.

b. The declarants' utterances were made while under the stress of excitement caused by the event or condition.

The key to determining whether a statement was made while under the stress of excitement caused by a startling event is spontaneity. ***State v. Williams***, 137 Wn. App. 736, 748, 154 P.3d 322 (2007), quoting ***Chapin***, 118 Wn.2d at 688. "The passage of time between the startling event and the alleged excited utterance is a factor to be considered by a court exercising discretion to admit into evidence an alleged excited utterance, but is not solely determinative." ***State v. Flett***, 40 Wn. App. 277, 287, 699 P.2d 774 (1985) (internal citations omitted); *see also* ***State v. Collins***, 45 Wn. App. 541, 547, 726 P.2d 491 (1986) (holding that a statement can qualify as an excited utterance even if the precise length of time between startling event and statement is indeterminate.). "Other considerations include the declarant's emotional state and whether the declarant had an

opportunity to reflect on the event and fabricate a story." ***State v. Williamson***, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000). "Evidence that the declarant has calmed down before making a statement tends to negate a finding of spontaneity." ***State v. Ramires***, 109 Wn. App. 749, 758, 37 P.3d 343 (2002). A statement may be so detailed as to suggest the exercise of choice or judgment, rather than spontaneity. ***State v. Sims***, 77 Wn. App. 236, 238, 890 P.2d 521 (1995).

"Whether a declarant makes statements while still under the stress of an event is a highly factual determination." ***Ramires***, 109 Wn. App. at 757–58. Statements made eight weeks after the startling event occurred have qualified as an excited utterance, while statements two years after the startling event have not. ***State v. Ramirez-Estevez***, 164 Wn. App. 284, 292 n.5, 263 P.3d 1257 (2011).

Here, although the exact time of the startling event is unclear, the surrounding circumstances indicate that the declarants were under the stress of excitement when they told Deputy Mock that a passenger had pointed a gun at them. When the first vehicle raced into the parking lot, its occupants were yelling and were panicked. 1 RP 24. The declarants indicated that defendant had not only pointed a firearm at them, but that defendant was *chasing* them. 1 RP 9; CP 9–12 (finding of fact II). Deputy Mock corroborated this fact as he personally observed a second car following "seconds behind" the first car. 1 RP 9; 2 RP 37. There is no

indication that there was a break in this chase that would provide a moment for the declarants to calm down and fabricate a story.

The record supports that the declarants' statements were made while under the stress of a startling condition. Therefore, it was not manifestly unreasonable for the trial court to admit the statements as an excited utterance.

Even if the admission of the evidence was error, the statements were of minor significance. *See* ***State v. Bourgeois***, 133 Wn.2d 389, 945 P.2d 1120 (1997). Reversal is required only if there is a reasonable probability that the excited utterances affected the verdict. ***State v. Owens***, 128 Wn.2d 908, 914, 913 P.2d 366 (1996). "The admission of evidence which is merely cumulative is not prejudicial error." ***State v. Todd***, 78 Wn.2d 362, 372, 494 P.2d 542 (1970).

Deputy Mock observed defendant throw what appeared to be a firearm into the bushes. 2 RP 39. Deputy Mock recovered a firearm (damaged, but functional) at the location where he saw defendant throw the item. 2 RP 43–44, 81–82. That the declarants observed defendant with a gun was merely cumulative of Deputy Mock's observations.

D. CONCLUSION.

For the reasons stated above, the State respectfully asks this Court to affirm defendant's conviction.

DATED: June 26, 2013.

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The undersigned certifies that on this day she delivered ~~by U.S. mail or~~ e
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6.26.13 Date Signature

PIERCE COUNTY PROSECUTOR

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