No. 90347-6

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

IRA LYNNY FOREMAN,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 44212-4-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 11-1-02688-6
The Honorable Frederick Flemming, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. IDENTITY OF PETITIONER

The Petitioner is IRA LYNNY FOREMAN, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the Commissioner's ruling of the Court of Appeals, Division 2, case number 44212-4-II, which was filed on March 25, 2015. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it allowed statements to be presented to the jury under the "excited utterance" hearsay exception, where the corroborating evidence was insufficient to establish that a "startling event" occurred?

2. Did the trial court err when it allowed statements to be presented to the jury under the "excited utterance" hearsay exception where there was no evidence to establish that the declarants were still under the stress of excitement from the "startling event"?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Ira Lynny Foreman by Amended Information with one count of unlawful possession of a firearm (RCW 9.41.040(1)(a)). (CP 3) Before trial, Foreman moved *in*

limine to preclude the State from presenting the hearsay statements of several unidentified and non-testifying witnesses. (CP 4-5) Following a hearing, the trial court ruled that the statements were admissible under the "excited utterance" exception to the hearsay rules. (RP1 7-25; CP 9-12)[1]

A jury convicted Foreman as charged. (RP3 60; CP 18) The trial court imposed a standard range sentence of 89 months of confinement. (RP3 68, 74; CP 60, 63) Foreman timely appealed. (CP 69) A Commissioner the Court of Appeals affirmed Foreman's conviction, and ruled that Foreman's appeal is without merit. The Court subsequently denied Foreman's Motion to Modify, by order dated May 14, 2014.

B. SUBSTANTIVE FACTS

At about 1:00 in the morning on July 3, 2011, Pierce County Sheriff's Deputy Scott Mock was in his patrol vehicle at a drive-through coffee stand, when he saw two cars race through the surrounding parking lot. (RP2 30, 31, 32, 33) The first car stopped abruptly in front of Deputy Mock's vehicle, and the three passengers inside yelled that a passenger in the second car had

[1] The transcripts, labeled Volumes I through III, will be referred to by their volume number ("RP#).

pointed a gun at them. (RP2 33, 36) Deputy Mock testified that the occupants seemed very excited. (RP2 37)

Deputy Mock saw the second car drive past him in the parking lot, then come to a stop. (RP2 37) As Deputy Mock approached the car in his patrol vehicle, he saw the passenger step out of the car holding what Deputy Mock believed was a handgun. (RP2 38) As the passenger walked away, the car sped away. (RP 39) Deputy Mock followed the passenger on foot, and saw the passenger toss the handgun into some nearby bushes. (RP2 39)

Deputy Mock yelled at the passenger to stop, but he kept running. (RP2 39, 41) Deputy Mock caught the passenger after a 50 yard chase, and took him into custody. (RP2 41, 42) Deputy Mock subsequently returned to the parking lot and found a handgun in the nearby bushes. (RP2 42-43) The first car and its three passengers had left the scene and were never identified. (RP2 47, 58-59)

Deputy Mock also ran a record check and discovered that the passenger, Ira Foreman, had a prior conviction that prevented him from legally possessing a firearm. (RP2 39, 46; RP3 39-40; Exh. P7)

The Sheriff's forensic technician was unable to lift any

identifiable finger prints from the handgun or magazine found by Deputy Mock. (RP2 18, 22-23) However, the handgun was tested and determined to be operable. (RP2 81, 83)

Foreman's wife, Stephanie Foreman, testified that she had found the gun earlier in the day in an abandoned backpack, and had placed it in the trunk of her car without her husband's knowledge. (RP3 11-12) She and Foreman both testified that Foreman did not handle the gun and had no knowledge of its presence in the car. (RP3 20, 29)

The Foremans testified that Ira went bowling earlier in the evening, and that he had consumed a significant amount of alcohol before Stephanie came to pick him up at the bowling alley. (RP3 7-8, 25, 26) As Ira stood outside waiting for Stephanie, a man approached him and shoved him. (RP3 8-9, 27) Ira responded by trying to punch the man, and a fight broke out between Ira and several of the other man's friends. (RP3 9, 27)

Stephanie saw the men beating up her husband, and heard the other men using racial slurs. (RP 9-10) She was afraid for his safety so she yelled at them to stop. (RP 10) When that did not work, she remembered the handgun in her trunk. (RP3 10-11) She retrieved the handgun and held it in the air as she walked towards

the fight. (RP3 13) The men scattered, and Stephanie helped her husband off the ground and into their car. (RP3 14, 27-28) As they prepared to leave, a white Chevy Blazer passed by, and the passengers yelled racial slurs and threats at the Foremans. (RP3 15, 28)

As Stephanie drove away from the bowling alley, she put the handgun on her lap. (RP3 15) Soon, however, the Foremans noticed that a car with its headlights off seemed to be following them. (RP3 16, 28) The Foremans were scared and felt panicked. (RP3 17, 28) Ira told Stephanie to go get help, and then he jumped out of the car in an effort to divert the other car's occupants away from Stephanie. (RP3 17, 29) Before she drove away, Stephanie threw the gun out of the car. (RP3 17)

V. ARGUMENT & AUTHORITIES

The issues raised by Foreman's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

Although ER 801(c) generally excludes out-of-court statements offered to prove the truth of the matter asserted, ER 803(a)(2) excepts "[a] statement relating to a startling event or

condition made while . . . under the stress of excitement caused by the event or condition." In this case, the trial court admitted the hearsay statements of the unidentified occupants of the first car under this "excited utterance" exception. (RP1 24-25; CP 10-11) Deputy Mock was allowed to testify that the occupants of the car told him that the passenger in the second car pointed a gun at them. (RP2 33) A trial court's decision to admit a hearsay statement under the excited utterance exception is reviewed for abuse of discretion. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

According to the advisory committee that promulgated Federal Rule of Evidence 803(2), on which Washington's ER 803(a)(2) was modeled, the underlying theory "is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[2]

Accordingly, "the 'key determination 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

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[2] 56 F.R.D. 183, ADVISORY COMMITTEE'S NOTE at 304 (1975); accord, State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995).

fabrication, intervening actions, or the exercise of choice or judgment.'" State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (alteration in original) (quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

The proponent of excited utterance evidence must satisfy three "closely connected requirements": (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

> **Words alone, the content of the declarant's statement, can establish only the third element of the excited utterance test—that the utterance relates to the event causing the declarant's excitement**. The first and second elements (that a startling event or condition occurred and that the declarant made the statement while under the stress thereof) must therefore be established by evidence extrinsic to the declarant's bare words. Extrinsic evidence can include circumstantial evidence, such as the declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made.

Young, 160 Wn.2d at 809-10 (emphasis added). In this case, the State failed to proffer sufficient proof to satisfy the first and the

second requirements.

A. THERE WAS INSUFFICIENT CORROBORATING EVIDENCE THAT A STARTLING EVENT OR CONDITION OCCURRED

"[A] declarant's statement alone is insufficient to corroborate the occurrence of a startling event[.]" Young, 160 Wn.2d at 816-17. For example, in Young, the Court found corroborating evidence of a startling event even though the child victim recanted her allegations of that event—sexual abuse—at trial, where three witnesses testified at a pretrial hearing about the victim's condition while making the allegations, and others testified at trial about the defendant's incriminating statements and actions afterward. Young, 160 Wn.2d at 818-19.

Similarly, in State v. Ohlson, the Court held that "the evidence amply supports a finding that [declarant] perceived a startling event" where two other eyewitnesses to the event testified at trial and corroborated the non-testifying declarant's utterances. 162 Wn.2d 1, 9, 168 P.3d 1273 (2007).

Unlike in Young and Ohlson, there is insufficient corroborating evidence in this case to establish that the startling event, i.e. Foreman pointing a gun at the occupants of the first car, actually occurred. No other witnesses saw this supposed event,

and Deputy Mock only observed the two cars driving through the parking lot at a high speed. (RP2 33, 58) Without corroborating evidence of the "startling event," the hearsay statements of these unknown persons lack the necessary indicia of reliability and should not have been admitted as excited utterances.

B. THE STATE FAILED TO ESTABLISH THAT THE DECLARANTS' UTTERANCES WERE MADE WHILE UNDER THE STRESS OF EXCITEMENT OF A STARTLING EVENT OR CONDITION

"The second element 'constitutes the essence of the rule' and '[t]he key to the second element is spontaneity. '" State v. Lawrence, 108 Wn. App. 226, 234, 31 P.3d 1198 (2001) (quoting Chapin, 118 Wn.2d at 687-88). To determine whether a statement is sufficiently spontaneous, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it. State v. Briscoeray, 95 Wn. App. 167, 173-74, 974 P.2d 912 (1999) (citing Chapin, 118 Wn.2d at 88).

In this case, even if this Court does find sufficient corroborating evidence that Foreman pointed a gun at the occupants of the first car, there was no evidence indicating when that event occurred. The occupants appeared to be "excited" but

there is nothing in the record that would show that the excitement was the result of a recent startling event rather than the result of fabrication.

C. THE ERROR IN ADMITTING THE HEARSAY EVIDENCE IS NOT HARMLESS

The error in admitting the hearsay statements was not harmless, even though Foreman was not charged in connection with the allegation that he pointed a gun at the occupants of the first vehicle. The prosecutor used the occupants' statements to bolster the credibility of its primary witness, Deputy Mock, and relied on their statements as proof that Foreman possessed the gun. (RP3 44-45) The State argued to the jury that "we have three civilians who saw the defendant with a gun that day." (RP3 467, 54) Because the jury had to weigh the credibility of the Foremans against the credibility and memory of the Deputy in order to determine whether the State had proved its case beyond a reasonable doubt, it cannot be said that this additional evidence did not impact the jury's decision.

V. CONCLUSION

The trial court erred when it allowed the statements of non-testifying and unidentified citizens to be presented to the jury under

the "excited utterance" hearsay exception, because there was insufficient corroboration that the "startling event" occurred or that the declarants were still under the stress of excitement of the "startling event" when they made the statements. Accordingly, Foreman's conviction should be reversed, and his case remanded for a new trial. The Court of Appeals erred when it found that Foreman's appeal is without merit, and this Court should grant review and reverse Foreman's conviction.

DATED: June 10, 2014

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Petitioner Ira L. Foreman

CERTIFICATE OF MAILING

I certify that on 06/10/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ira L. Foreman, DOC# 841559, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. IRA LYNNY FOREMAN, Appellant.	No. 44212-4-II RULING AFFIRMING JUDGMENT AND SENTENCE

Ira Foreman appeals from his conviction for first degree unlawful possession of a firearm, arguing that the trial court erred by admitting statements of unidentified witnesses under the excited utterances exception to the hearsay rule. This court considered his appeal as a motion on the merits under RAP 18.14. Concluding that the trial court did not abuse its discretion by admitting the statements, this court affirms his judgment and sentence.

At approximately 1 A.M. on July 3, 2011, Pierce County Sheriff's Deputy Scott Mock was stopped at a coffee stand in a parking lot. As he was sitting in his car, he saw two vehicles racing into the parking lot. The occupants of the first car were yelling that the passenger in the other car had pointed a gun at them. Deputy Mock pulled behind the second car as it drove by. The passenger of the car, later identified as Foreman, got out of the car with what appeared to be a gun.

Deputy Mock saw Foreman throw the gun into some bushes and begin running. Deputy Mock was able to apprehend Foreman and take him into custody. After taking

Foreman into custody. Deputy Mock searched the area near the bushes and recovered the gun. The occupants of the first car were never identified.

The State charged Foreman with first degree unlawful possession of a firearm. Foreman filed a motion in limine to exclude the statements made by the unidentified occupants of the car as hearsay. At the hearing on Foreman's motion, Deputy Mock testified that the passengers of the car appeared scared, "boisterous, very loud, [and] panicky." Report of Proceedings (Sep. 20, 2012) at 8. He testified that the occupants of the first car were yelling that the passenger of the car following them pointed a gun at them and that the car was chasing them. Due to the dynamics of the cars and the pace at which the incident happened, Deputy Mock believed the statements the occupants of the unidentified car made. The State responded that the excited utterances exception to the hearsay rule applied because having a gun pointed at a person is a startling event, the occupants of the car were still under the influence of the starting event because they were panicked and yelling, and the statements clearly related to the startling event because they were about who pointed a gun at them. Foreman replied that there was no way to know when the occupants of the car were threatened with the gun, therefore, the State could not demonstrate proximity between the startling event and the occupants' statements.

The trial court found that the occupants of the unidentified car were yelling that the passenger of the car following them had pointed a gun at them. Further, the trial court found that the occupants of the unidentified car were in an excited state while they were yelling to Deputy Mock. Based on its findings, the trial court concluded that "the

statements were made after a gun had just been pointed at [the occupants of the car], they were still under the stress of that event, and that their statements related directly to that event." Clerk's Papers at 11. Therefore, the trial court admitted the statements under the excited utterances exception to the hearsay rule under ER 803(a)(2).

A jury found Foreman guilty of first degree unlawful possession of a firearm. Foreman appeals.

Foreman argues that the trial court erred by admitting the occupants' statements as excited utterances because (1) there was no evidence the startling event occurred and (2) there was no evidence establishing that the startling event occurred in close proximity to the statements such that the occupants of the unidentified car were actually under the stress of the startling event at the time they made the statement. A trial court's determination that a hearsay statement falls within the exited utterance exception will not be disturbed on appeal absent an abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001). The trial court does not abuse its discretion unless it makes a decision no reasonable judge would make. *Woods*, 143 Wn.2d at 595-96.

An out-of-court statement offered to prove the truth of the matter asserted is admissible if it relates 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). Three closely connected elements must be satisfied in order 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. *Woods* 143 Wn.2d at 597. Spontaneity is the key to the requirement that the statements be made while under the stress of excitement caused by the startling event. *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). Courts also consider the declarant's emotional state in determining whether the statement is an excited utterance. *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000).

The trial court did not abuse its discretion by admitting the statements from the occupants of the unidentified car to Deputy Mock. A reasonable judge could find that there was a startling event and that the startling event occurred in close proximity to the occupants' statements. The car containing the person alleged to have threatened the occupants of the car was following directly behind the occupants' car and was chasing them. When the passenger in the following car got out, Deputy Mock saw a gun in his hand. Deputy Mock observed that all the occupants of the car were panicked and yelling. The statements appeared spontaneous because there was no evidence that the occupants of the car were purposefully seeking out an officer. Instead, they happened to drive by Deputy Mock when he was parked at a coffee stand. Therefore, the trial court did not abuse its discretion by admitting the occupants' statements as excited utterances.

Because the trial court did not abuse its discretion by admitting the occupants' statements as excited utterances, it is not necessary for this court to address Foreman's argument that the admission of the statements was not harmless.

Foreman's appeal is clearly without merit because the trial court's decision was clearly within its discretion. RAP 18.14(e)(1)(c). Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Foreman's judgment and sentence are affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 128, 135-36, 702 P.2d 1185 (1985).

DATED this 25th day of March, 2014.

Eric B. Schmidt
Court Commissioner

cc: Stephanie C. Cunningham
Kimberley DeMarco
Hon. Frederick W. Fleming
Ira I. Foreman

CUNNINGHAM LAW OFFICE

June 10, 2014 - 12:00 PM

Transmittal Letter

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To: Thomas, Lisa; PCpatcecf@co.pierce.wa.us; kdemarc@co.pierce.wa.us
Cc: Ponzoha, David
Subject: Re: 90347-6 - State of Washington v. Ira Lynny Foreman

Hello Lisa. I electronically filed a Petition for Review on Mr. Foreman's behalf on June 10th. I'm attaching a copy of the proof of filing that I received from COA2 on that date, and a copy of the petition. So...I'm not really sure how to proceed. Do I need to file a motion of some sort?

Stephanie C. Cunningham
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From: "Thomas, Lisa" <Lisa.Thomas@courts.wa.gov>
To: "SCCAttorney@yahoo.com" <SCCAttorney@yahoo.com>; "PCpatcecf@co.pierce.wa.us" <PCpatcecf@co.pierce.wa.us>; "PCpatcecf@co.pierce.wa.us" <PCpatcecf@co.pierce.wa.us>
Cc: "Ponzoha, David" <David.Ponzoha@courts.wa.gov>
Sent: Friday, July 25, 2014 11:16 AM
Subject: 90347-6 - State of Washington v. Ira Lynny Foreman

Counsel and Clerk:

Attached is a copy of the letter issued by the Clerk or Deputy Clerk on this date in the above referenced case. Please consider this as the original for your files, a copy will not be sent by regular mail. When filing documents by email with this Court, please use the main email address at supreme@courts.wa.gov

Lisa Marie
Washington State Supreme Court
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