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King County Prosecutor  
Appellate Unit

NO. 64328-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TRAMAINE ISABELL,

Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's Sixth Amendment right to confrontation by admitting hearsay statements of the complaining witness who did not testify at trial. 2RP 101-02.<sup>1</sup>

2. The trial court erred in admitting hearsay statements of the complaining witness as excited utterances and present sense impressions under ER 803(a). 2RP 107-10.

Issues Pertaining to Assignments of Error

In appellant's trial for residential burglary, the trial court admitted the complaining witness' 911 call identifying appellant as the intruder. The witness was calm during the 911 call she made from outside her neighbor's apartment. The State presented no other substantive evidence connecting appellant to the incident. The State subpoenaed the complaining witness but did not request a material witness warrant. She did not testify and appellant had no opportunity to cross-examine her.

1. Was appellant denied his Sixth Amendment right to confrontation when the trial court admitted the testimonial hearsay statements, despite the fact the complaining witness was unwilling to testify and appellant never had the opportunity to cross-examine her?

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – August 21, 2009; 2RP –September 1, 2009; 3RP –September 9, 2009; 4RP – September 10, 2009; 5RP – October 2, 2009.

2. Even if the hearsay statements were non-testimonial, did the trial court err in admitting them as excited utterances and present sense impressions where the complaining witness was calm and reporting an event that had already ended?

B. STATEMENT OF THE CASE

1. Procedural History

On March 26, 2009, The King County prosecutor charged Tramaine Isabell with residential burglary – domestic violence, occurring on or about February 1, 2009. CP 1-4. On September 1, 2009, the Honorable Jeffrey Ramsdell conducted a pre-trial hearing on the State's motion to admit complaining witness Shayla Poree's statements to a 911 operator. 2RP. The court found the statements admissible. 2RP 101-03; 108-09. Trial commenced on September 9, 2009. See 3RP.

A jury found Isabell guilty. CP 56. Isabell was sentenced to 12 months and one day in prison. CP 69-76; 5RP 25-26. Isabell timely appeals. CP 77-85.

2. Charged Offense

On January 26, 2009, Poree met Shawn Crawford. 3RP 106-07, 117. On January 31, after having drinks at Poree's apartment, she and Crawford went to bed together. 3RP 108-09.

In the early morning of February 1, 2009, Crawford awoke to a person standing in front of Poree's bed yelling her name. The person followed Poree out of the bedroom. Crawford said he could hear the person asking Poree "what's going on?" and yelling at Poree downstairs. 3RP 108-10, 116. Crawford did not see a gun and said he did not recall any threats. The person did not hit Crawford and he did not see the person hit Poree. 3RP 90-91, 112, 117-20. Crawford had never seen the person before. Crawford said the person he saw in Poree's apartment was not Isabell. 3RP 111, 114-16, 120, 125.

The person said Crawford needed to leave. Crawford got dressed and left the apartment before Poree and the person did. 3RP 110, 117, 119-20, 122, 125. Crawford did not call 911 because he did not believe Poree was in any immediate danger. 3RP 101, 112, 122. Crawford said Poree "looked pretty shaken up, but wasn't like tears, terrified or anything." 3RP 126.

At 3:33 a.m., Poree called 911 and said her ex-boyfriend broke into her house. 3RP 22-23, 26-27, 29-30, 39-40; Ex. 1; Ex. 2. Poree was at

her neighbor's apartment across the street from her apartment during the call. 3RP 40, 69; Ex. 2. Poree identified Isabell as her ex-boyfriend after the dispatcher asked for his name. Poree told the dispatcher she thought Isabell was still in her apartment, and that Isabell said he had a gun. Poree could not correctly spell Isabell's first or last name when asked by the dispatcher. Poree also could not provide Isabell's date of birth. Ex. 2.

Seattle Police officer Mitch Choi met Poree and her daughter at the neighbor's apartment at 2122 East Jefferson. 3RP 67-69. Poree had no visible injuries and declined medical assistance. 3RP 85. Choi escorted Poree to her apartment at 2101 East James Street. 3RP 71; 4RP 13. Choi did not see signs of forced entry on Poree's apartment door. 3RP 86-87.

No one was found inside Poree's apartment. 3RP 72; 4RP 14, 21. Choi said the couch was overturned, clothes were strewn around, a hair straightener was broken, and body lotion was spread around the apartment. The State offered no fingerprint evidence. Choi said a black sharpie had been used to write on the apartment walls. 3RP 72, 74, 85, 88-89; 4RP 15-17. Seattle Police Officer Dave Foley took pictures of the apartment interior. Foley took two rolls of film. Foley said all the pictures were overexposed and blurry when processed. 3RP 87; 4RP 17-20. There is no evidence police returned to the apartment to take additional pictures. 2RP 27, 40; 4RP 63.

Poree gave a written statement to Choi detailing the incident and alleging Isabell was the person who entered her apartment. 3RP 77. Poree told Choi the damage to her apartment happened after she left. 3RP 96. Poree's statements to Choi were admitted at trial as impeachment evidence and not for the truth of the matter asserted. The court gave a limiting instruction to the jury. 3RP 74-76, 91.

After speaking with Poree, Choi ordered Crawford to return to Poree's apartment. Choi spoke with Crawford but did not take a statement from him. 3RP 78-79, 112. Crawford said when he returned he noticed Poree's apartment door lock was damaged. Poree told Crawford it was damaged before the incident. 3RP 112-13, 123-24.

While Choi was at Poree's apartment, Poree received a phone call from a person she identified as her "ex." 3RP 79. Choi told Poree to answer the phone and let Choi talk to the person. Choi said he identified himself and asked the person for his location so he could be interviewed. Choi said the person told him "they wouldn't let him into the apartment. He was punched in the face." Choi said the person then hung up. Poree gave Choi Isabell's cell phone number. Choi did not see the number the person called from. 3RP 80-82. Choi did not ask the person for their name or date of birth. Choi admitted other than what Poree told him, he had no idea who was on the phone. 3RP 90.

On February 18, 2009, Seattle Police Detective Michelle Barker interviewed Poree over the phone. 4RP 39, 44-45. Poree told Barker she dated Isabell for three years and had broken up with him two months before the incident. 3RP 83; 4RP 45. Poree said Isabell returned the apartment key when he moved out. Poree told Barker about the incident and said Isabell was the person who entered her apartment. 4RP 45-47.

But on April 1, 2009, Poree left a message with Barker stating Isabell did not enter her apartment on February 1, 2009, and indicating she did not want Isabell to be prosecuted. 4RP 52-53, 73-74, 77. Barker did not speak with Poree after April 1, 2009. 4RP 55. Poree's statements to Barker were admitted only as impeachment evidence, and not for the truth of the matter asserted. The court reiterated its previous limiting instruction. 4RP 47, 49.

Barker left a message on Isabell's phone on February 18, 2009 asking to speak with him. On February 19, 2009, Isabell called Barker from California where he was at Disneyland with his children. Isabell was not aware of Poree's allegations when he spoke with Barker. 2RP 22-23. Isabell said he lived with Poree until he broke up with her in November 2008. Isabell returned the apartment key after they broke up. 4RP 57-61, 71-72. Poree called Isabell while he was talking to Barker. Isabell put Barker on hold to answer Poree's call. 4RP 68. Isabell told Barker he was

at his house on February 1, 2009, and denied the incident occurred. 4RP 61, 67-68, 70, 73-74.

On April 7, 2009, Poree faxed a notarized statement to defense counsel and the prosecutor. 4RP 24-25. In the statement, Poree wrote she and Isabell had agreed to get together on February 1, 2009, and Isabell was surprised to see another man in the apartment when he arrived. Poree said she called police because she was embarrassed by what happened. Poree denied being scared of Isabell and indicated she did not want a no-contact order issued. 4RP 27-29, 74, 77. The statement was admitted at trial as impeachment evidence and not for the truth of the matter asserted. 2R 110-12; 3RP 48, 52-54, 57, 63-66.

Poree did not testify at trial. 4RP 91-93. The State subpoenaed Poree but the prosecutor was uncertain whether Poree had received the subpoena. 2RP 69; 3RP 34-36; 4RP 53, 63-64, 94. The State did not request a material witness warrant. 2RP 86; 3RP 34-36; 4RP 92-93. Isabell had no opportunity to cross-examine Poree. 2RP 86.

### 3. 911 Call

Prior to trial, the State sought to admit the recording of Poree's 911 call. The State asserted Poree's 911 statements were admissible as excited utterances and present sense impressions despite her absence. 2RP 76-77, 102, 105.

Defense counsel objected to the recording, stating Isabell had no prior opportunity to cross-examine Poree. 2RP 81, 85-86. Defense counsel argued Poree's 911 statements were testimonial because the operator's questions concerned past events, not resolution of a present emergency. There was no present emergency because Poree was at her neighbor's apartment across the street during the 911 call. 2RP 93-98. Defense counsel also argued the statements were inadmissible as excited utterances or present sense impressions because Poree was reporting a past event and sounded calm on the recording. 2RP 105-07.

The prosecutor admitted Poree was not crying during the 911 call and was not prevented from leaving the apartment during the incident. 2RP 81, 83. The prosecutor also acknowledged most of Poree's 911 statements were made in response to the dispatcher's questions. 2RP 87, 89.

Finding the 911 call was made for purposes of obtaining immediate assistance, the trial court held Poree's assertions were not testimonial. 2RP 101-02. The court also admitted the statements as excited utterances, noting while Poree was "not crying hysterically or begging and pleading for them [police] to hurry up," "she's clearly shook up." 2RP 107-10. The court also held portions of Poree's 911 call were admissible as present sense impressions, stating: "to the extent that some

of them are describing contemporaneous events like knocking on the door, those would also qualify as present sense impressions.” 2RP 108.

The court made no specific findings regarding which portions of the 911 tape it believed qualified as present sense impressions. The court entered no written findings of fact and conclusions of law regarding the admissibility of the 911 call.

C. ARGUMENT

1. THE COURT VIOLATED ISABELL’S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES BY ADMITTING HEARSAY STATEMENTS FROM POREE’S 911 CALL.

The trial court erred when it admitted Poree’s testimonial statements identifying Isabell as the person who entered her apartment on February 1, 2009. Poree did not testify at trial and Isabell did not have a prior opportunity to cross-examine her. Reversal is required.

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an accused “shall have the right . . . to meet the witnesses against him face to face[.]” Wash. Const. art. I, § 22 (Amend. 10). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d

224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. Crawford, 541 U.S. at 68. This Court reviews confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007) (citing Lilly v. Virginia, 527 U.S. 116, 137, 119 S. Ct. 1887, L. Ed. 2d 117 (1999)).

a. Poree Was Not Unavailable and Isabell Had no Opportunity for Cross-Examination

A witness is unavailable under the Confrontation Clause only if the witness was demonstrably unable to testify in person. Crawford, 541 U.S. at 45. Before a witness can be declared unavailable, the State must make a good-faith effort to obtain the witness' presence and the witness must rebuff that effort. Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002). Good faith requires untiring efforts in good earnest. State v. Rivera, 51 Wn. App. 556, 559, 754 P.2d 701 (1988).

"[C]ourts have required prosecutors to utilize available statutory procedures to produce a witness for trial before the witness may be considered unavailable." Smith, 148 Wn.2d at 133. A witness' mere failure to honor a subpoena is insufficient. Rivera, 51 Wn. App. at 560.

Issuance of a warrant, coupled with other reasonable efforts, may satisfy the standard. Rivera, 51 Wn. App. at 560. Certainly, however, “[i]f it becomes apparent that a witness is no longer cooperating, resort to statutory mechanisms to compel attendance must be utilized.” Rivera, 51 Wn. App. at 560 (citations omitted); see also ER 804(a)(2) (for hearsay exceptions, a witness is unavailable where she persists in refusing to testify . . . despite an order of the court to do so.).

In Rivera, the complaining witness (Pearrow) was subpoenaed by the State to testify, but failed to appear on the day of trial. Pearrow’s tape-recorded and transcribed statement was admitted over Rivera’s objection. Her statement was the only evidence connecting Rivera with the burglary. Rivera, 51 Wn. App. at 558. Finding admission of Pearrow’s statement was error, the court held the State could not claim good faith solely on the issuance of the subpoena, where police failed to question Pearrow’s mother about her daughter’s whereabouts. The court noted police knew of Pearrow’s whereabouts because she called the police station from Ellensburg a week before trial in an attempt to reach her mother. The court further noted “good faith” required more than the issuance of the subpoena, particularly where Pearrow’s statement was the only evidence connecting Rivera with the burglary. Rivera, 51 Wn. App. at 560-61.

Like Rivera, the State failed to establish Poree's unavailability. The only indication is Poree did not want to testify. This is insufficient. Though the State subpoenaed Poree, the prosecutor admitted she was uncertain whether Poree had received the subpoena. 2RP 69; 4RP 94. Moreover, despite being aware of Poree's residential address and her unwillingness to testify, there is no evidence the State requested a material witness warrant. 2RP 86; 3RP 34-36; 4RP 92-93. Additionally, Isabell had no prior opportunity to cross-examine Poree.

As in Rivera, where Poree's 911 statements were the only substantive evidence connecting Isabell to the charged incident, the State cannot claim good faith solely on the issuance of the subpoena. Admission of Poree's 911 statements was error. Rivera, 51 Wn. App. at 561.

b. Poree's Statements were Testimonial

Crawford held "testimonial" statements may not be presented through a hearsay witness when the declarant does not testify, unless there was a prior opportunity to cross examine the declarant about the testimonial statement. Crawford, 541 U.S. at 59. While Crawford did not comprehensively define "testimonial," it explained the Confrontation Clause applies to witnesses who "bear testimony." Crawford, 541 U.S. at 51. Thus, a testimonial statement is one made "for the purpose of

establishing or proving some fact,” as opposed to a casual overheard remark to an acquaintance. Crawford, 541 U.S. at 51. “[T]he common thread uniting testimonial statements is some degree of involvement by a government official, whether that person was acting as a police officer, as a justice of the peace, or as an instrument of the court.” State v. Hopkins, 137 Wn. App. 441, 457, 154 P.3d 250 (2007). The state bears the burden of proving challenged statements are non-testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009). The state cannot meet its burden here.

In Davis the United States Supreme Court clarified that statements made to police officers in the course of interrogation are “testimonial” when the circumstances objectively indicate there is no ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution. Davis, 547 U.S. at 813-14. The Davis Court considered whether a 911 call produced testimonial statements. The court held:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that *there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.*

Davis, 547 U.S. at 822 (emphasis added); accord, State v. Ohlson, 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007). The Davis Court held a 911 call describing events as they occurred, which was a frantic cry for help, was not testimonial because the primary purpose of the call was to enable police to meet an ongoing emergency. Davis, 547 U.S. at 828.

In contrast, the companion case reviewed in Davis, Hammon v. Indiana, involved a situation in which police responded to a report of domestic violence and were told nothing was wrong. The Court held the woman's statements to police who responded to the disturbance call were testimonial. "When the officer questioned [the woman], and elicited the challenged statements, he was not seeking to determine . . . what is happening, but rather what happened." Davis, 547 U.S. at 830. Second, there was no emergency in progress. Davis, 547 U.S. at 829. Finally, while the Crawford interrogation was more formal, the present interrogation was formal enough. Davis, 547 U.S. at 830. The Court concluded, "it is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct, rendering the resulting statements testimonial." Davis, 547 U.S. at 829.

The Court provided four factors to be considered in determining whether a statement is testimonial: (1) the timing relative to the events

discussed; (2) the threat of harm posed by the situation; (3) the need for information to resolve a present emergency; and (4) the formality of the interrogation. Davis, 547 U.S. at 827-30; Ohlson, 162 Wn.2d at 12.

Here Poree's statements were testimonial. Unlike Davis, Poree's responses to the 911 operator's questions were not elicited to address an ongoing emergency but to establish past events. When Poree called 911, the incident was over and there was no present emergency or threat of harm. Poree's tone with the 911 operator was calm, and she gave no indication she needed medical attention or was being threatened or forcibly restrained. 2RP 81, 83. Indeed, when she called 911, Poree was across the street at a neighbor's apartment. Ex. 2. Moreover, although Poree was unsure of Isabell's location and believed he might be in her apartment, that a suspect's "location is unknown at the time of the interrogation does not in and of itself create an ongoing emergency." Koslowski, 166 Wn.2d at 427 (citing State v. Lewis, 361 N.C. 541, 549, 648 S.E.2d 824 (2007)).

In Koslowski, police officers responding to a robbery saw Violet Alvarez on the phone with a 911 operator. After ending the call, Alvarez told police what happened. Alvarez told police she was tied up and forced to lie on the floor. An officer testified Alvarez believed the robbers had a gun, but the officer admitted he was not positive whether Alvarez was

certain about the gun. Koslowski, 166 Wn.2d at 415-16, 422. Finding Alvarez's statements to the officer were testimonial, the court noted that under the third Davis factor, "the mere fact that the suspects were at large and that Sergeant Wentz relayed the information he learned from Ms. Alvarez to officers in the field is not enough to show the questions asked and answered were necessary to resolve a present emergency situation." Koslowski, 166 Wn.2d at 426-27. The court further noted, "evidence about the interrogation discloses only that one of the suspects was likely armed, without any additional evidence indicating that Ms. Alvarez, the officers, or another person, such as an onlooker or potential witness, was in danger." Koslowski, 166 Wn.2d at 428.

Like Koslowski, at the time Poree made the 911 call the incident had already ended. Though Poree indicated she believed Isabell was in her apartment and had a gun, she admittedly never saw a gun. Ex. 2. Without any evidence that Poree or any other person had been harmed or was in danger, there was no present emergency.

Finally, while the police questioning of Poree was not as formal as the questioning in Hammon, "a certain level of formality occurs whenever police engage in a question-answer sequence with a witness." Koslowski, 166 Wn.2d at 429 (citing Davis 547 U.S. at 830). Although the 911 operator spoke to Poree shortly after the incident, the questions posed

were formal enough to reveal Poree was safely at her neighbors' and Isabell's whereabouts were uncertain. Poree was being asked what happened as part of an investigation into past events and not to resolve a present emergency. Therefore, it was testimonial.

Based on the Davis factors, Poree's out-of-court statements were testimonial and prohibited by the confrontation clause. Koslowski, 166 Wn.2d at 426-29; Davis 547 U.S. at 827-30.

c. Admission of Poree's Statements Prejudiced Isabell

Confrontation clause violations are subject to constitutional harmless error analysis. Koslowski, 166 Wn.2d at 431. Prejudice is presumed. The state bears the burden of proving harmlessness. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). An error is prejudicial unless the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Koslowski, 166 Wn.2d at 431. The reviewing court must be convinced beyond a reasonable doubt that "any reasonable jury would reach the same result absent the error." Easter, 130 Wn.2d at 242. The court must assume that the damaging potential of the hearsay testimony was fully realized. State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006), rev. denied, 159 Wn.2d 1017 (2007). Relevant factors include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or

absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case." Saunders, 132 Wn. App. at 604 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 686-87, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

The state cannot show this error was harmless beyond a reasonable doubt. The only substantive evidence tying Isabell to the burglary was Poree's identification of him during the 911 call. The prejudice of Poree's hearsay statements took its full toll on Isabell during closing when the prosecution emphasized the 911 statements to support its case: "so what evidence do we have of who this person is? You have the 911 tape." 4RP 121.

The state had no other witness who saw Isabell enter Poree's apartment or heard anything that could have been the breaking into of the apartment. Crawford, the only other eyewitness to the alleged incident said Isabell was not the person he saw in Poree's apartment. 4RP 86-87, 97. Choi admitted there were no signs of forced entry into Poree's apartment and there was no evidence Poree's apartment was unlocked at the time of the incident. Despite the fact that items were moved, Isabell's fingerprints were not found on any item in the apartment.

Koslowski was convicted of first-degree robbery, first-degree burglary, and first-degree unlawful possession of a firearm. Each conviction required overwhelming untainted evidence Koslowski was armed. The State relied on Alvarez's statements that she believed Koslowski had a gun. The State also relied on evidence Koslowski had made a gun gesture with his hand when discussing stolen property, and that Koslowski attempted to rob another person with a firearm the following day. After finding Alvarez's statements testimonial, the court concluded admission of the statements was not harmless because "without admission of these statements, there is not overwhelming, untainted evidence that Koslowski was armed at the time he committed the offenses involving Ms. Alvarez." The court held Koslowski's convictions must be reversed. Koslowski, 166 Wn.2d at 431-32.

Like Koslowksi, Isabell's conviction for burglary must be reversed. Without admission of Poree's statements, there is not overwhelming, untainted evidence that Isabell committed the charged crime. Though Choi spoke on the phone with someone Poree identified as her "ex," the person did not provide a name or other identifying information. Choi admitted absent Poree's hearsay, he did not know who he talked to on the phone. 3RP 90. Thus, had Poree's 911 hearsay statements not been admitted, the only evidence before the jury would

have supported Isabell's defense that he was not at Poree's apartment on the night of the incident.

Given the importance of the evidence and the prosecutor's emphasis, the state cannot meet its burden to show admission of Poree's 911 statement was harmless beyond a reasonable doubt. Reversal is required. Koslowski, 166 Wn.2d at 431-32; Saunders, 132 Wn. App. at 604.

2. EVEN IF NOT PROHIBITED BY THE  
CONFRONTATION CLAUSE, POREE'S STATEMENTS  
ARE INADMISSIBLE HEARSAY

Assuming, arguendo, Poree's statement was not testimonial, the court erroneously admitted the statements because they constituted hearsay and did not fall within any hearsay exception. The erroneous admission of the statements was prejudicial.

Only "testimonial" statements are prohibited by the right to confrontation. Davis 547 U.S. at 821. The improper admission of a non-testimonial hearsay statement under Washington's evidentiary rules, however, may still constitute reversible error. ER 802. 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 falls within an exception to the hearsay rule. ER 802; State v. Brown, 127 Wn.2d 749,

757, 903 P.2d 459 (1995); State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992).

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Magers, 164 Wn.2d 174, 187-88, 189 P.2d 126 (2008). A trial court abuses its discretion when it is based upon untenable grounds or untenable reasons. State v. Vermillion, 112 Wn. App. 844, 855, 51 P. 3d 188 (2002), rev. denied, 158 Wn.2d 1025 (2007).

a. Poree's Statements Were Not Excited Utterances

Poree's 911 statement is hearsay because it was admitted for the truth of the matter asserted -- that Isabell was the person who entered her apartment on February 1, 2009. 4RP 121. The court admitted Poree's 911 statements under the excited utterance exception to the hearsay rule embodied in ER 803(a)(2). This was error.

The excited utterance exception allows statements "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). The exception requires three conditions: (1) a startling event or condition; (2) a statement made while the declarant was under the stress or excitement caused by the event or condition; and (3) the statement must relate to the event or condition. Brown, 127 Wn.2d at 757; Chapin, 118 Wn.2d at 686. Where the evidence shows that hearsay statements admitted as excited

utterances do not satisfy these requirements, the court has abused its discretion. Brown, 127 Wn.2d at 758-59. Such is the case here.

The excited utterance rule requires more than proximity in time between the startling event and the statement. The crucial question is whether the declarant was under the stress of excitement caused by the event at the time the statement was made. Brown, 127 Wn.2d at 758. Even statements made immediately after the event in question are inadmissible unless the declarant remains in the necessary state of excitement. State v. John Doe, 105 Wn.2d 889, 893, 719 P.2d 554 (1986). Thus, in deciding whether statements qualify as excited utterances, the court must focus on the effect the event had on the declarant. Chapin, 118 Wn.2d at 687.

Statements given in response to leading questions may also fail to qualify as excited utterances. See e.g. Chapin, 118 Wn.2d at 690 (that a statement is made in response to a question is a factor that raises doubt as to whether the statement was truly a spontaneous and trustworthy response to a startling event); State v. Slider, 38 Wn. App. 689, 692-93, 688 P.2d 538 (1984), rev. denied, 103 Wn.2d 1013 (1985) (the passage of time and the leading nature of the mother's questions attenuated the reliability of her daughter's statements such that these did not qualify as excited

utterances). An expression made after reflection or based on self-interest does not qualify as an excited utterance. Chapin, 118 Wn.2d at 686.

In State v. Dixon, the complaining witness ran screaming from her apartment after Dixon attempted to force her to have sexual intercourse. Dixon, 37 Wn. App. 867, 869, 684 P.2d 725 (1984). The neighbors called the police. When the police arrived, the complainant was “quite upset and distraught.” The police described her as “somewhat hysterical, in tears and having a hard time breathing.” The police made efforts to calm the complainant while they took written statement from her concerning the event. Dixon, 37 Wn. App. at 869-70.

This Court held the trial court erred in admitting the complaining witness’ statement as an excited utterance, stating:

A reading of [the complainant] statement makes it obvious that she had the ability to recall and narrate the details of her experience with Dixon. Other than being described as ‘upset’, there is nothing to indicate that her ability to reason, reflect, and recall pertinent details was in any way impeded. The statement gives every indication that, if motivated to do so, [the complainant] could have fabricated some of the details. Under these circumstances, we have no basis for finding a guaranty of trustworthiness, which is the ultimate basic ingredient which must be present in order to qualify a statement as an excited utterance.

Dixon, 37 Wn. App. at 874.

Like the complainant in Dixon, Poree was not without the ability to exercise choice and judgment when she spoke to the 911 operator. As the

State acknowledged, most of the 911 call involves Poree answering questions. 2RP 87-89. Indeed, Poree identified Isabell as the alleged intruder only after being asked for his name by the 911 operator. Unlike the complainant in Dixon however, it is clear from listening to the 911 tape that Poree was not in a state of excitement when she made the call. She was not crying, frantic or hysterical. In fact, she sounds remarkably calm as she tells the operator about the alleged contact with Isabell. Ex 2.

Without evidence Poree was in a state of excitement caused by the event at the time she made her statements, there is no basis for “finding a guaranty of trustworthiness, which is the ultimate basic ingredient which must be present in order to qualify a statement as an excited utterance.” Dixon, 37 Wn. App. at 874. Poree was not so affected by the stress of a startling event that her statements should be deemed trustworthy. The hearsay statements in the 911 tape should have been excluded.

b. Poree’s Statements Were Not Present Sense Impressions

The court also admitted portions of Poree’s 911 statements as present sense impressions. 2RP 108. The trial court erred.

Statements of present impression must be made “while” the declarant is perceiving the event or “immediately thereafter.” ER 803(a)(1). They must be a “spontaneous or instinctive utterance of

thought,” evoked by the occurrence itself, unembellished by premeditation, reflection, or design. Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939). “An answer to a question may not be a present sense impression.” State v. Martinez, 105 Wn. App. 775, 783, 20 P.3d 1062 (2001) (citing State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), overruled, 107 Wn.2d 97, 727 P.2d 239 (1986)), overruled on other grounds, State v. Rangel-Reves, 119 Wn. App. 494, 81 P.3d 157 (2003).

As discussed above, Poree was reporting an event that had ended. Poree’s voice was calm and she did not ask for emergency service or report a need for immediate assistance. Moreover, Poree’s statements to the 911 operator were elicited almost entirely by the operator. Poree’s statement identifying Isabell and his location were offered in response to the 911 operator’s questions.

Because the description of the incident and Isabell’s identity was elicited by the operator, it was not a spontaneous recounting of an event, and thus, not a present sense impression. The court erred in admitting the 911 hearsay statements as present sense impressions.

c. The Trial Court’s Error Prejudiced Isabell

An evidentiary error is prejudicial and requires reversal if, “within reasonable probabilities, the trial’s outcome would have been materially

affected had the error not occurred.” State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

As discussed in argument 1, supra, the hearsay evidence cannot be considered insignificant. The case came down to identity. Without admission of Poree’s statements there is not overwhelming untainted evidence connecting Isabell to the February 1, 2009 incident. No State witnesses identified Isabell as the person who entered Poree’s apartment. Under such circumstances, there is a reasonable probability the hearsay error materially affected the outcome of the trial. Isabell’s conviction should be reversed and his case remanded for a new trial. Brown, 127 Wn.2d at 759; Chapin, 118 Wn.2d at 686.

D. CONCLUSION

For the above reasons, Isabell's conviction should be reversed and the case remanded for further proceedings.

DATED this 14<sup>th</sup> day of April, 2010.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64328-2-I
	)	
TRANAINE ISABELL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TRANAINE ISABELL  
DOC NO. 733930  
AIRWAY HEIGHTS CORRECTIONS CENTER  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

**SIGNED** IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF APRIL, 2010.

x *Patrick Mayovsky*