

64773-3

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NO. 64773-3-1

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

REC'D
MAY 19 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

LOC HOANG,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 MAY 19 PM 3:53

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

The Honorable Regina Cahan, Judge

OPENING BRIEF OF APPELLANT

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ER 801 5

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ER 803 1, 5, 7

A. ASSIGNMENT OF ERROR

The trial court erred in admitting hearsay statements as excited utterances under ER 803(a)(2).

Issue Pertaining to Assignment of Error

After an alleged assault by appellant Hoang Loc, the victim, Kim Le, admitted to police that she drove around for a while, went to her mother's house, and then contacted police. At least a few hours had elapsed between the assault and Le's contact with police. Police noted that Le's primary concern was not reporting the assault itself. Rather, she was very upset about her choice to leave her infant alone with Hoang and wanted officers to accompany her home so that she could check on the infant. Did the trial court err by concluding that Le was still under the stress of events related to the alleged assault and ruling that her statements to the officers about the assault were admissible as excited utterances?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecuting Attorney charged Hoang with assault in the third degree-domestic violence and alleged that the crime had taken place within sight or sound of a child. CP 15-16.

A jury trial commenced in December 2009 before Judge Regina Cahan. The jury found Hoang guilty of the assault and found that the assault did involve domestic violence and had occurred within sight or sound of a child. CP 54-56. Based on an offender score of one, the standard range sentence was three to eight months of confinement. CP 66. The court sentenced Hoang to eight months. CP 68. Hoang filed a timely notice of appeal. CP 80-81.

2. Trial Testimony

a. *The alleged crime*

Kim Le contacted police at Safeway late one night and reported that her boyfriend, Hoang, had been hitting her all day. RP 144. Le is from Vietnam and speaks limited English, so she brought along her nine year old son, Pilot, to help explain events to the police. RP 144-45. Le told police that she was afraid to go back to her apartment. RP 144. The officers noted that Le appeared upset because she had left her young infant in the apartment with Hoang. RP 307. Police noticed a bruise on Le's arm and observed that her face was slightly swollen. RP 145. Le wanted the officers to accompany her back to the apartment. RP 146. The officers decided to go with Le to the apartment to check on the infant. RP 310.

When the officers and Le arrived in the lobby of the apartment building, the officers asked Le to explain what type of assault had occurred. RP 148. Le told officers that she had been hit multiple times on the arm and had been struck with a belt on the top of her head. RP 148. Le stated that this had been an ongoing situation for the past twelve hours or more. RP 148. One officer testified that Le said her boyfriend had hit her several times over the past couple of days. RP 309.

Le walked the officers to her apartment and opened the door with a key. RP 149. Police saw Hoang standing about three feet away from the door inside the apartment. RP 149. Police pushed their way into the apartment and handcuffed Hoang. RP 150. While Hoang was held outside the apartment, another officer interviewed Le. The officer called the Seattle Police Department's language line and had Le speak with someone in Vietnamese, and she described the assault in detail. RP 152.

Le testified at trial that she had lied to police about the assault and that Hoang had never hit her. RP 196. Le said that she only argued with Hoang. RP 182. Pilot testified that he only heard "loud talking to each other." RP 214. Hoang also testified that he had only argued with Le. RP 373-74.

b. *Pretrial ruling*

Defense counsel moved to exclude the State from calling Le as a witness for the primary purpose of impeaching her. CP 18-19, RP 65-73. Since Le had changed her testimony, the State sought to introduce her earlier statements made to the officers and to the language line as excited utterances. RP 65. Defense counsel argued that the ambiguous timing of the alleged assault in relation to Le's statements to the police precluded a ruling that the statements were excited utterances:

And I think what the Court has to look at is, the key is spontaneity. In this case, unfortunately, we don't have a time frame of when this statement was made with respect to when the alleged incident occurred.

The officer didn't know the time of the alleged incident. He didn't know how long it had been since Ms. Le had seen Mr. Hoang. So we don't have a time frame. We don't know if it's 30 minutes, if it's hours, we don't know.

RP 72-73.

The court ruled that Le's statements to the police at Safeway and the apartment building were excited utterances, thus were admissible as substantive evidence. RP 86-87. The court concluded that Le's statement to the language line was not an

excited utterance since it was a full statement, Le had time to reflect, and the statement was not spontaneous. RP 86-87.

C. ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING HEARSAY.

An appellate court reviews for abuse of discretion a trial court's decision to admit a hearsay statement as an excited utterance. State v. Ohlson, 162 Wn.2d 1, 7-8, 168 P.3d 1273 (2007). 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 one of the exceptions to the hearsay rule. ER 802; State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995). An excited utterance is "[a] statement relating to a startling event or condition made while . . . under the stress of excitement caused by the event or condition." ER 803(a)(2).

To determine whether the statement is admissible as substantive evidence, 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 fabrication, intervening actions, or the exercise of choice or judgment." Brown, 127 Wn.2d at 758. The excited

utterance rule “is based on the premise that the speaker has no opportunity to lie before making the utterance, if the speaker in fact did have that opportunity, then by definition the statement cannot be an excited utterance. In such a case, the credibility of the statement is irrelevant.” State v. Briscoeray, 95 Wn. App. 167, 172, 974 P.2d 912 (1999).

In Brown, the victim of an alleged rape delayed calling the police for an undetermined amount of time, but was very upset when she eventually called 911. Brown, 127 Wn.2d at 753, State v. Hochhalter, 131 Wn. App. 506, 515, 128 P.3d 104 (2006). The victim testified at trial that she had an opportunity to, and did in fact, fabricate a portion of her story before making the 911 call. Brown, 127 Wn.2d at 759. The trial court admitted the victim’s statements to 911 as excited utterances, but the Supreme Court reversed because the victim had reflected on and fabricated at least a portion of what she had said to 911. Brown, 127 Wn.2d at 759.

Likewise in State v. Hochhalter, the alleged victims of an assault delayed calling police for an undetermined amount of time, drove to a friend’s house, discussed the situation, and decided to fabricate a portion of the events relayed to police. Hochhalter, 131 Wn. App. at 516. Because the victims had reflected beforehand on

what they told police and had consciously and intentionally omitted part of what they had observed, the court of appeals concluded that their statements were not excited utterances within ER 803(a)(2). Hochhalter, 131 Wn. App. at 516.

In this case, when Le spoke with someone on the language line, she admitted that after she left the apartment with her son Pilot, they first drove to her mother's house. Supp. CP ___ (Sub. no. 25, State's Hearsay Memorandum, attachment at 1). After leaving her mother's house, Le said she went to Safeway. Supp. CP ___ (Sub. no. 25, State's Hearsay Memorandum, attachment at 2). It is unclear how much time elapsed between the last alleged assault and Le's conversation with the police officers, but it was at least a couple of hours where Le had time to reflect on the events and speak to family members about what had happened. This delay in time demonstrates that Le did have an opportunity to lie before talking with police, and Le admitted to lying to police while testifying at trial. RP 196. The lapse in time undermines the trustworthiness of the information Le originally relayed to officers at Safeway and the statements that she made prior to the officers' entry into the apartment.

Further, Officer Griffin testified that Le's upset demeanor at Safeway was primarily due to the fact that her infant was alone in the apartment with Hoang. For example, when asked if Le had said that her boyfriend hit her, Officer Griffin responded: "I think she probably said it a couple times, and then she went on -- she was more concerned about her baby, because she said she had left her baby in the apartment, and he [Hoang] was in the apartment with the baby." RP 307.

Officer Griffin observed that Le's primary concern at Safeway was convincing officers to accompany her home to check on the welfare of her child: "She was more concerned about her child [that] was left in the apartment with her boyfriend. And so our concern was -- and her concern, too, was going back to her apartment." RP 310. The startling event that upset Le while speaking with the officers was her choice to leave her infant alone with a man that she considered to be dangerous, not the alleged assault that had happened hours earlier. Le's decision to leave her child with Hoang is an intervening act that caused her to be upset while talking with police. The trial court erred by finding that Le was still shaken up about the assault when Officer Griffin's first-hand observations directly contradict that conclusion.

The error in admitting hearsay is prejudicial if, within reasonable probabilities, the error affected the outcome of the trial. State v. Dixon, 37 Wn. App. 867, 875, 684 P.2d 725 (1984). Here, Le's statements to police were the only evidence that an assault had occurred. Le, Hoang, and Pilot all testified that there had been an argument, but no assault. RP 182, 213, 373-74 Thus, Le's hearsay statements, within reasonable probabilities, affected the outcome of the trial. Hoang's conviction should be reversed and his case remanded for a new trial. Brown, 127 Wn.2d at 759; Dixon, 37 Wn. App. at 875.

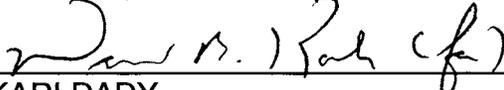
D. CONCLUSION

This Court should reverse Hoang's assault conviction because the trial court erred by admitting hearsay statements as excited utterances. The erroneous admission was highly prejudicial as the statements were the State's only proof that an assault occurred. This Court should reverse.

DATED this 19th day of May 2010.

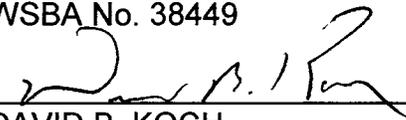
Respectfully submitted,

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v.)	COA NO. 64773-3-I
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Appellant.)	

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 19TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LOC HOANG
NO. 210000996
KINGCOUNTY JAIL
500 5TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF MAY, 2010.

x *Patrick Mayovsky*

COPY

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The officer didn't know the time of the alleged incident. He didn't know how long it had been since Ms. Le had seen Mr. Hoang. So we don't have a time frame. We don't know if it's 30 minutes, if it's hours, we don't know.

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In Brown, the victim of an alleged rape delayed calling the police for an undetermined amount of time, but was very upset when she eventually called 911. Brown, 127 Wn.2d at 753, State v. Hochhalter, 131 Wn. App. 506, 515, 128 P.3d 104 (2006). The victim testified at trial that she had an opportunity to, and did in fact, fabricate a portion of her story before making the 911 call. Brown, 127 Wn.2d at 759. The trial court admitted the victim’s statements to 911 as excited utterances, but the Supreme Court reversed because the victim had reflected on and fabricated at least a portion of what she had said to 911. Brown, 127 Wn.2d at 759.

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what they told police and had consciously and intentionally omitted part of what they had observed, the court of appeals concluded that their statements were not excited utterances within ER 803(a)(2). Hochhalter, 131 Wn. App. at 516.

In this case, when Le spoke with someone on the language line, she admitted that after she left the apartment with her son Pilot, they first drove to her mother's house. Supp. CP __ (Sub. no. 25, State's Hearsay Memorandum, attachment at 1). After leaving her mother's house, Le said she went to Safeway. Supp. CP __ (Sub. no. 25, State's Hearsay Memorandum, attachment at 2). It is unclear how much time elapsed between the last alleged assault and Le's conversation with the police officers, but it was at least a couple of hours where Le had time to reflect on the events and speak to family members about what had happened. This delay in time demonstrates that Le did have an opportunity to lie before talking with police, and Le admitted to lying to police while testifying at trial. RP 196. The lapse in time undermines the trustworthiness of the information Le originally relayed to officers at Safeway and the statements that she made prior to the officers' entry into the apartment.

Further, Officer Griffin testified that Le's upset demeanor at Safeway was primarily due to the fact that her infant was alone in the apartment with Hoang. For example, when asked if Le had said that her boyfriend hit her, Officer Griffin responded: "I think she probably said it a couple times, and then she went on -- she was more concerned about her baby, because she said she had left her baby in the apartment, and he [Hoang] was in the apartment with the baby." RP 307.

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The error in admitting hearsay is prejudicial if, within reasonable probabilities, the error affected the outcome of the trial. State v. Dixon, 37 Wn. App. 867, 875, 684 P.2d 725 (1984). Here, Le's statements to police were the only evidence that an assault had occurred. Le, Hoang, and Pilot all testified that there had been an argument, but no assault. RP 182, 213, 373-74 Thus, Le's hearsay statements, within reasonable probabilities, affected the outcome of the trial. Hoang's conviction should be reversed and his case remanded for a new trial. Brown, 127 Wn.2d at 759; Dixon, 37 Wn. App. at 875.

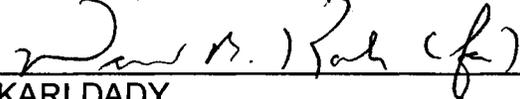
D. CONCLUSION

This Court should reverse Hoang's assault conviction because the trial court erred by admitting hearsay statements as excited utterances. The erroneous admission was highly prejudicial as the statements were the State's only proof that an assault occurred. This Court should reverse.

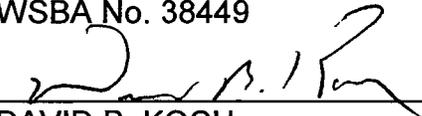
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[X] LOC HOANG
NO. 210000996
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500 5TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF MAY, 2010.

x *Patrick Mayovsky*