

66503-1

66503-1

NO. 66503-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

IRA DEMARIO WASHINGTON,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

- 1. THE DECLARANT WAS CALLING TO REPORT A DOMESTIC VIOLENCE DISTURBANCE. SHE WAS SCREAMING AND ASKED FOR IMMEDIATE HELP. SHE TOLD DISPATCH SHE HAD BEEN THREATENED AND BEAT. SHE SCREAMED OUT HER ADDRESS AND THEN THE LINE WENT DEAD. OFFICERS ARRIVED WITHIN TEN MINUTES OF THE CALL AND THE DECLARANT FRANTICALLY DIRECTED THEM INSIDE THE HOUSE. OFFICERS FOUND THE APPELLANT WITHIN MERE MOMENTS OF THEIR ARRIVAL ON SCENE. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING THE DECLARANT'S EXCITED UTTERANCES TO THE 911 OPERATOR?**

**B. STATEMENT OF THE CASE**

On February 24, 2010 at approximately 2:00am Ira Washington was arrested by the Federal Way Police Department for Domestic Violence Felony Violation of a Court Order. 2RP 136. Ms. Kirkland called 911 at approximately 1:46am asking for help. 2RP 141. Officers were dispatched to the home at 1:48am and arrived at approximately 1:55am. 2RP 141-42, 199. Upon arrival officers recognized a vehicle in the driveway as being driven earlier that night by Ira Washington. 2RP 142-43, 147-48.

Officers also immediately came into contact with Ms. Kirkland. As the officers pulled up to the house they could see Ms. Kirkland looking outside a window. 2RP 163. She came out of the house "very, kind of, frantic." 2RP 148. Ms. Kirkland then told

officers, "He's in there. Get him." 2RP 148-49. Officers did not even have a chance to introduce themselves or say anything before Ms. Kirkland blurted out her statements. 2RP 150. Officers then went inside the house and exited the house through the back door and found Ira Washington on the back deck, half sitting, half lying down, crouched down, as if he slipped and fell on the wet deck. 2RP 150-54, 2RP 201-02, 219. While officers were inside the house or entering the house Ms. Kirkland said, "He just ran out the back." 2RP 200. Ira Washington was then arrested for Domestic Violence Felony Violation of a Court Order. Once Mr. Washington was arrested Ms. Kirkland and others present refused to give the police a statement or further cooperate. 2RP 202-04.

In a pretrial hearing on August 10, 2010 the court listened to the 911 recording, reviewed the briefing and argument of the parties and took the matter under advisement. The following day, August 11, 2010 the court ruled that the 911 recording for this incident was admissible, noting:

It's clearly what the case law tends to refer to as a cry for help. The caller sounds very excited or frantic. She says she needs the police to respond immediately, and she gives an address, and certainly the implication, the reasonable implication to be drawn from the recording is that the caller feels that she's in imminent danger.

1RP 54. The court further ruled that the statements are non-testimonial and excited utterances. 1RP 54-57.

However, based on the court's ER 403 balancing, the court initially ruled that the actual recording was not admissible in the State's case-in-chief but was admissible to impeach Ms. Kirkland's testimony. 1RP 57-59. The Court reasoned that the portion of the call where Ms. Kirkland states, "I've been threatened. I've been beat up" made the recording unfairly prejudicial and thus only admissible for impeachment and rebuttal should Ms. Kirkland testify. 1RP 57-59. The State then offered to redact that portion of the call, so that the jury would still hear the caller screaming the address and screaming "I need police here immediately!" but would not hear the statements about being threatened and beaten. 1RP 59-60. After lengthy argument the court concluded that the 911 recording, with the proffered redaction completed, would be admissible as non-testimonial excited utterances. 1RP 72-73.

When the issue was re-addressed on August 12, 2010, the Court stated,

"But the caller does state that there's a domestic disturbance, that she's been threatened, and beaten up. That would certainly be some kind of event that might cause a participant in the event to be under the

stress of the excitement, or the anxiety or the fear that the caller is expressing."

2RP 116. Defense then argued that there was no proof that a startling event had occurred. However, as stated in the un-redacted 911 recording, Ms. Kirkland is screaming and yelling for help and screams in the phone, "I've been threatened. I've been beat up." See, Exhibit No. 2. Further, the court responded by pointing out that as soon as the police arrived at the address the call was made from Ms. Kirkland said to them, "He's in there, go get him." While saying this she was frantic and as the court concluded, "So that would certainly indicate that the speaker was under the stress of some kind of startling, frightening event." 2RP 118. At a minimum, Ira Washington was present and as the court noted, his presence alone could have been a startling and frightening event. 2RP 118-19. When further pressed by defense, the court reiterated:

Well, what we have is we have a caller who describes having been involved in a domestic dispute, having been threatened, and having been beaten up. The jury is not going to hear that, but I can't ignore the fact that that's what the recording says, and saying she needs assistance from the police immediately.

2RP 122-23.

C. **ARGUMENT**

1. **THE DECLARANT WAS CALLING TO REPORT A DOMESTIC VIOLENCE DISTURBANCE. SHE WAS SCREAMING AND ASKED FOR IMMEDIATE HELP. SHE TOLD DISPATCH SHE HAD BEEN THREATENED AND BEAT. SHE SCREAMED OUT HER ADDRESS AND THEN THE LINE WENT DEAD. OFFICERS ARRIVED WITHIN TEN MINUTES OF THE CALL AND THE DECLARANT FRANTICALLY DIRECTED THEM INSIDE THE HOUSE. OFFICERS FOUND THE APPELLANT WITHIN MERE MOMENTS OF THEIR ARRIVAL ON SCENE. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE DECLARANT'S EXCITED UTTERANCES TO THE 911 OPERATOR.**

A trial court's decision to admit a hearsay statement as an excited utterance is reviewed on appeal for abuse of discretion. State v. Young, 160 Wash.2d 799, 805, 161 P.3d 967 (2007). A trial court abuses its discretion only if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State Ex. Rel. Carrol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard; if the record does not support the factual findings; or if the court misapplies the law. Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 136 (1997), State v. Olivera-Avila, 89 Wn.App. 313, 949 P.2d 824 (1997).

ER 803(a)(2) provides a hearsay exception for, "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." Excited utterances are spontaneous statements made while under the influence of external physical shock before the declarant has time to calm down enough to make a calculated statement based on self interest. State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997), citing State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

Three requirements must be met for hearsay 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 still under the stress of startling event; and (3) the statement must relate to the startling event or condition. Hardy, 133 Wn.2d at 714, citing Chapin, 118 Wn.2d at 686. The excited utterance exception is premised on the idea that the declarant made the statement before the opportunity to fabricate arose. Id. The above three-part inquiry is a factual one. State v. Brown, 127 Wn.2d 749, 757, 903 P.2d 459 (1995). Whether the statement occurred while the declarant was in a state of excitement is left to

the sound discretion of the trial court. State v. Doe, 105 Wn.2d 889, 893, 719 P.2d 554 (1986).

When considering whether the declarant is still under the stress of a startling event at the time of the statement, Washington case law does not require any particular indicia of distress. Indeed, shock is as likely a reaction to a traumatic experience as is hysteria. State v. Bryant, 65 Wn. App. 428, 434 n.4, 828 P.2d 1121 (1992). To qualify as an excited utterance, the statement need not be completely spontaneous and the statement may be made in response to a question. Bryant, 65 Wn. App. at 433, citing Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969). "An excited utterance can be prompted by a question which itself follows an exciting event, such as asking a crime victim what happened." State v. Owens, 128 Wn.2d 908, 913, 913 P.2d 366 (1996).

Several cases have held that statements by a declarant were "excited utterances" when the declarant was "crying" and "upset" when she made statements about the event. See, e.g., State v. Saunders, 132 Wn.App. 592, 602-03 (2006) (admitting statement as excited utterance when defendant was crying and audibly distressed on the 911 phone call); State v. Briscoeray, 95

Wn.App. 167 (1999) (admitting statements as excited utterances when the victim was described as “upset” and “crying”); State v. Fleming, 27 Wn.App. 952, 958 (1980) (admitting statements as excited utterances because the victim was “crying, sobbing, and upset” when the statements were made).

Here, the declarant, Ms. Kirkland, is clearly upset and distraught over what has just occurred. She is screaming on the phone and is frantic when police arrive within minutes. Her statements relate to the startling event and her need for help and protection from law enforcement and her statements were made within minutes of the startling event. The victim's statements to the 911 dispatcher are admissible as excited utterances and the trial court did not abuse its discretion in so ruling.

However, Mr. Washington argues on appeal that the statements contained on the redacted 911 recording should not have been admitted because the State did not corroborate the existence of a startling event or condition that prompted the 911 call. See Brief of Appellant, 1, 5. Mr. Washington relies largely on State v. Young, 160 Wash.2d 799, 805, 161 P.3d 967 (2007). In Young, an 11 year-old victim came running to her mother and told her mother and other witnesses the details of an attempted first

degree child molestation incident at the hands of her mother's boyfriend. Young, 160 Wash.2d at 802, 161 P.3d 967. The child was crying throughout the conversation with her mother and appeared upset and really scared. Id. Witnesses went to confront Young and he was seen jumping a fence and running away. Id. at 803. Later that day the police were called. Id.

In pre-trial hearings the mother and other witnesses testified about the child's excited utterances made to them shortly after the attempted molestation, but the child did not. Id. at 804. The court found the child's statements admissible as excited utterances. Id. While Young was in-custody pending trial the child victim wrote him a letter, recanting her allegations. Id. At trial the child testified that Young did not touch her and, "that she appeared to cry to make her story look real so that" Young would be forced to leave the house. Id.

On appeal one of the issues before the Supreme Court was whether the trial court properly admitted the excited utterances in light of her recantation. Id. at 805. As the court noted, "when there is undisputed evidence that a declarant fabricated her hearsay statements, the second element of an excited utterance - that the statement was made under the influence of a startling event - is not

satisfied." Id. at 807; *citing State v. Brown*, 127 Wash.2d 749, 903 P.2d 459 (1995).

The key determination in excited utterance cases "is whether the statements 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." Id. at 807-08; *quoting Brown*, 127 Wash.2d at 758 (further citations omitted). Thus, the trial court may weigh the reliability of the excited utterance against the credibility of the recantation. Id. at 808.

As in Young, "In this case, the trial court, after considering both [the declarant's] statements and her recantation, determined that the statements were admissible as excited utterances notwithstanding the recantation. In so doing, the trial court did not abuse its discretion." Id. at 809.

As in Young, Mr. Washington argues here that the State did not produce sufficient corroborating proof of a startling event to warrant admission of Ms. Kirkland's excited utterances to the 911 operator. As the Supreme Court has ruled, the declarant's words alone are insufficient but "circumstantial evidence, independent from those bare words, can corroborate that a startling event

occurred, and such corroboration can be sufficient to satisfy the first element of the excited utterance exception." Id. Such circumstantial evidence may include, "declarant's behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made." Id. at 810.

Here, Ms. Kirkland called 911 from inside of the home where Mr. Washington was present. In general people use 911 to summon emergency help. She was screaming on the phone and she said "there's a domestic disturbance, that she's been threatened, and beaten up." 2RP 116. She then told the 911 operator that she needed police "immediately" and screamed the address before the line went dead.

As the trial court observed, "That would certainly be some kind of event that might cause a participant in the event to be under the stress of the excitement, or the anxiety or the fear ***that the caller is expressing.***" 2RP 116 (emphasis added). Further, when police arrived just minutes later Ms. Kirkland came out of the house, frantic, and before the police could say anything, before any introductions were even made, she blurted out, "He's in there. Get him." 2RP 148-49.

The circumstances under which the statements were made, to a 911 emergency operator, corroborate the fact that a startling event has occurred, or is just occurring. The tone of Ms. Kirkland's statements corroborates the reliability of her report to the 911 operator. The apparent unintentional hang-up of the line corroborates the urgent circumstances the officers felt they were in.

Finally, Ms. Kirkland's demeanor and actions and words once police arrived on scene and the arrest of Mr. Washington where Ms. Kirkland blurted out he would be further corroborate that a startling or stressful event had occurred or was still occurring. Given all of the evidence before the court the trial court did not abuse its discretion in admitting the redacted 911 recording.

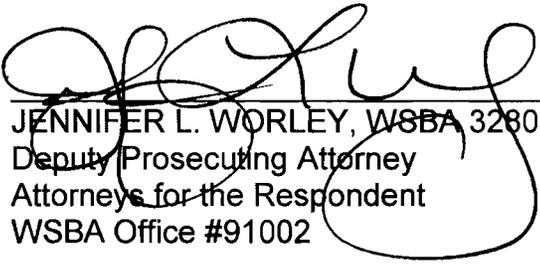
**D. CONCLUSION**

For the foregoing reasons the respondent respectfully requests that this court affirm the defendant's conviction.

DATED this 7<sup>th</sup> day of November, 2011.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan F. Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. IRA DEMARIO WASHINGTON, Cause No. 66503-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
Name

11-7-11  
Date

Done in Seattle, Washington

  
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