

68030-7

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COURT OF APPEALS NO. 68030-7-I

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

DIVISION ONE

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STATE OF WASHINGTON

Respondent,

v.

FELIX SITTHIVONG

Appellant.

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

THE HONORABLE JEAN RIETSCHER, JUDGE

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**APPELLANT'S STATEMENT OF ADDITIONAL**

**GROUND'S FOR REVIEW**

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FELIX SITTHIVONG #354579  
Washington State Penitentiary  
1313 N. 13th Ave.  
Walla Walla, WA 99362

*[Handwritten signature]*  
19:51

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## A. ASSIGNMENTS OF ERROR

I. The trial court abused its discretion by not admitting the 911 tape of witness Kevin Lessig, as excited utterance under ER 803 (a)(2).

II. The trial court denied Sitthivong's Sixth Amendment Rights by not admitting the 911 tape of witness Kevin Lessig, for impeachment purposes.

### Issues Pertaining to Assignment of Error

I. Did the trial erred by not admitting Kevin Lessig's 911 tape as an excited utterance, under ER 803(a)(2)?

II. Did the trial court violated Sitthivong's Sixth Amendment Rights by not admitting the 911 tape of witness Kevin Lessig, for impeachment purposes?

## **B. STATEMENT OF THE CASE**

Mr. Sitthivong agrees with the statement of the case as presented by Attorney Christopher H. Gibson, Esquire in the Appellant's Opening Brief and adopts and incorporates it herein by reference. Mr. Gibson has fairly and adequately develop this section and Mr. Sitthivong is compelled per RAP 10. 3(d) not to duplicate his work.

Mr. Sitthivong will only add the substantive facts pertinent to the issues below.

### **Substantive Facts**

Kevin Lessig was a manager at the Rivoli apartment complex for ten years. 5RP 42. It's located in an area called "Belltown" in Seattle, Washington.

On June 6th of 2010, he was up watching the area around his apartment, particularly a bar across the street named the "V-Bar". 5RP 43. Lessig explained that the bar has been a problem, where fights and violence are constant. And that it's been a nuance and dangerous thing in his neighborhood. 5RP 44-45.

Lessig testified that around 2:45am, he heard shots fired. He was also able to videotape part of the event as it was happening. 5RP 45. Lessig also imediately called 911 and was describing to the police as to what he was witnessing at the time of the call. 5RP 48-49.

However, Kevin Lessig later recanted his statements

he made during the 911 call. 5RP 74. Therefore, his version of event became an issue, and the 911 recording became a crucial part of evidence for the defense.

Lessig was called as the State's witness at the appellant's trial. 5RP 41-85. He was also called again by the defense about the 911 call. 12RP 16-39.

### C. ARGUMENT

#### I. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ADMITTING THE 911 TAPE OF WITNESS KEVIN LESSIG, AS EXCITED UTTERANCE UNDER ER 803 (a)(2).

Under ER 803 (a)(2), an out-of-court statement offered to prove the truth of the matter asserted is admissible at trial if the statement relates to a "startling event or condition made while the declarant was under the stress of excitement caused by the event or condition". State v. Young, 123 Wn.App. 854, 99 P.3d 1244.

This "excited utterance exception to the rule against hearsay evidence is grounded in the notion that under stress of excitement caused by a startling event, a declarant may spontaneously blurt out a statement and, because of circumstances, will not have the opportunity to fabricate". Nationwide INS. v. Williams, 71 Wash.App. 336, 858 P.2d 516 (Div. 1993).

In the present case, the defense moved to introduce the 911 tape recording of Mr. Lessig as excited

utterance. It was offered as substantive evidence to prove self-defense. 12RP 8-9, 11.

Of course, the State did oppose, and believed that since Mr. Lessig testified in trial to his 911 statements being "inaccurate", then that alone "defeats the whole purpose of admitting something as an excited utterance. 12RP 9.

Ultimately, the court denied the motion and ruled in favor of the state.\*<sup>1</sup> 12RP 12.

However, this appellant disagrees. A hearsay statement may still be admitted as excited utterance, even if the declarant later recants the statement. State v. young, supra; see also State v. Briscoeray, 95 Wn.App. 167, 974 P.2d 912. In addition, 911 tape recordings are still admissible even if the declarant later recants or testifies at trial. State v. Ohlson, 162 Wn.2d 1; U.S. v. Campbell, 782 F.Supp. 1258 (N.D. ILL. 1991).

Furthermore, Washington Courts have previously set out three closely connected requirements that must be satisfied in order for a hearsay statement to qualify as an excited utterance under ER 803(a)(2):

- 1) a startling event or condition must have occurred;

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\*<sup>1</sup> It should be noted that although the court denied admission of the tape recording as excited utterance, it did agreed to allow it in for impeachment purposes. However, the court later changed it's ruling and disallowed it for impeachment purposes as well. See "Argument II".

- 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.

**see State v. Woods**, 143 Wn.2d 561, 23 P.3d 1046.

When the above requirements are met, only then can an out-of-court statement be offered to prove the truth of the matter asserted. ER 803(a)(2).

In the case at hand, State witness, Kevin Lessig, testified that in the early morning of June 6th 2010, he called 911 to report a shooting. 5RP 49. He told the police to seeing a shooter by the V-Bar, that this shooter "looked like he could have been shooting, and then he runs into the bar". 5RP 49.

During the 911 call, Mr. Lessig was emphatic and upset, and scared. He was also screaming and directing the police. 12RP 9, 21. Even the court had to admit Mr. Lessig sounded upset on the 911 tape. 12RP 12.

The 911 tape met all the above requirements and should have been admitted as an excited utterance.

In similar cases, the court have ruled that statements on tape that were clearly made during and immediately after a startling event and related to that event, should be admitted. **State v. Davis**, 116 Wn.App. 81, 64 P.3d 661; **State v. Jackson**, 113 Wn.App. 762, 54 P.3d 739.

Mr. Lessig 911 statements was crucial because it proved that this appellant was acting out in self-defense.

The appellant had fired the gun towards the men near the V-Bar only when he believed they had turn around with guns pointing at him. 12RP 69-70, 72, 135. This reaction was out of fear for his life due to earlier threats to kill by these same men. 7RP 179-181, 12RP 60-61.

Mr. Lessig's 911 statements of what he saw clearly support what the appellant saw: that there was a man near the V-Bar with his arms out "like he could be shooting...". 5RP.

During that startling event, Mr. Lessig had no time to fabricate or misrepresent in that 911 call. He was just describing as to what he was seeing. 5RP 70-71.

By not allowing the tape in, and allowing the jury to hear the strong belief and truth to what Mr. Lessig was witnessing was abuse of discretion by the trial court. Therefore, the conviction should be reversed.

**II. THE TRIAL COURT DENIED SITHIVONG'S SIXTH AMENDMENT RIGHTS BY NOT ADMITTING THE 911 TAPE OF WITNESS KEVIN LESSIG, FOR IMPEACHMENT PURPOSES.**

The Sixth Amendment to United States Constitution and article I, section 22 of our state constitution guarantee a criminal defendant a right to confront and

cross-examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 1445, 659 P.2d 514 (1983)(citing Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974)). The denial of a defendant's right to cross-examine a witness adequately as to relevant matters tending to show bias or motive violates his right of confrontation. State v. Buss, 76 Wn.App. 780, 788-89, 887 P.2d 920 (1995).

It is also well established that a criminal defendant is given extra latitude in cross-examination to show motive or credibility, especially when the particular prosecution witness is essential to State's case. State v. Tate, 2 Wn.App. 241, 469 P.2d 999 (1970). To allow a defendant no cross-examination into an important area is abuse of discretion. State v. Fluhart, 123 Wash. 175, 212 P.245 (1923).

In the present case, the defense had motion the court to offer the 911 tape as substantive evidence under the excited utterance exception. see Argument 1.

The court denied it as excited utterance. Instead, it was allowed in for impeachment purposes only. 12RP 12-13.

During direct-examination, the defense moved to admit it to the Jury as Defendant's Exhibit 83. 12RP 21. Again, the state objected. They argued the tape should be excluded because Mr. Lessig already testified to its content. 12RP 21-27.

If this argument is true then most of the State's exhibit would have been inadmissible as well. Including many photographs and a cellphone video also made by Kevin Lessig. 5RP 53.

The court's denial violated Mr. Sitthivong's Six Amendment rights. The defense was not able adequately impeach Mr. Lessig without allowing the Jury to hear his 911 call. It would have shown the jury some bias on Mr. Lessig's part.

Lessig seem to be acting as an unofficial neighborhood watchmen. 5RP 42-44.

The last thing Mr. Lessig would want to do is help the defense prove self-defense. see Argument 1. And it's clear the state doesn't want the Jury to hear the 911 tape for that same reason.

The court should have allowed the defense the use of the 911 tape for impeachment. By not doing so is a violation of Mr. Sitthivong's Sixth Amendment and the convictions should be reversed.

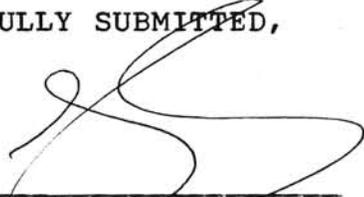
#### **D. CONCLUSION**

As stated above, the court abused it's discretion by not allowing the 911 tape as excited utterance. The court also violated Mr. Sitthivong's Six Amendment right by not allowing the 911 tape in for impeachment

purposes as well. Therefore, this appellant ask that  
the convictions be reversed.

DATED this 04 of September 2012.

RESPECTFULLY SUBMITTED,



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Felix Sitthivong, Appellant  
WA State Penitentiary  
1313 N. 13th Ave.  
Walla Walla, WA 99362

