

NO. 34949-3

---

---

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KEITH EDWARD BERRY, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Frank E. Cuthbertson

No. 05-1-02697-1

---

**BRIEF OF RESPONDENT**

---

GERALD A. HORNE  
Prosecuting Attorney

By  
MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

FILED  
COURT OF APPEALS  
DIVISION II  
07 FEB 12 PM 1:40  
STATE OF WASHINGTON  
BY [Signature]

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Did the trial court properly exercise its discretion in admitting the victim's excited utterances? (Appellant's Assignment of Error No. 3)..... 1

2. Should this court decline to reach the issue of whether the trial court properly admitted F.N.'s statements to Ethel Smith when no argument is provided in support of his position; if the court does reach this issue, were F.N.'s statements properly admitted? (Appellant's Assignment of Error No. 3) ..... 1

3. Was the defendant's right to confrontation protected where the victim testified at trial? (Appellant's Assignment of Error No. 2) ..... 1

4. Did the prosecutor commit, at most, harmless error, during cross-examination of the defendant when the questions were not material to the trial's outcome and could have been remedied if an objection had been made? (Appellant's Assignment of Error No. 4)..... 1

5. Did the trial court properly exercise its discretion when it admitted the 911 tape after the defendant opened the door to its admission? (Appellant's Assignment of Error No. 5)..... 1

6. When taken in the light most favorable to the State, was there sufficient evidence presented to support a conviction for assault in the second degree while armed with a deadly weapon? (Appellant's Assignment of Error No. 1)..... 2

B. STATEMENT OF THE CASE..... 2

1. Procedure..... 2

2. Facts ..... 2

C.	<u>ARGUMENT</u> .....	11
1.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE VICTIM’S EXCITED UTTERANCES.....	11
2.	THIS COURT SHOULD DECLINE TO REACH THE ISSUE OF WHETHER THE TRIAL COURT PROPERLY ADMITTED F.N.’S STATEMENTS TO ETHEL SMITH BECAUSE NO ARGUMENT IS PROVIDED TO SUPPORT HIS POSITION, BUT IF THIS COURT DOES REACH THE ISSUE, THE TRIAL COURT PROPERLY CONCLUDED THAT THE STATEMENTS WERE EXCITED UTTERANCES.....	17
3.	THE DEFENDANT’S RIGHT TO CONFRONTATION WAS PROTECTED WHERE THE VICTIM TESTIFIED. ....	18
4.	THE PROSECUTOR DID NOT COMMIT REVERSIBLE ERROR DURING CROSS-EXAMINATION OF THE DEFENDANT BECAUSE THE QUESTIONS WERE NOT MATERIAL TO THE TRIAL’S OUTCOME AND COULD HAVE BEEN REMEDIED IF AN OBJECTION HAD BEEN MADE. ....	23
5.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE 911 TAPE BECAUSE THE DEFENDANT OPENED TO THE DOOR TO ITS ADMISSION.....	32
6.	WHEN TAKEN IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILTY FOR ASSAULT IN THE SECOND DEGREE WITH A DEADLY WEAPON. ....	39
D.	<u>CONCLUSION</u> . ....	44

## Table of Authorities

### Federal Cases

<u>California v. Green</u> , 399 U.S. 149, 162, 90 S. Ct 1930, 26 L. Ed. 2d 489 (1970).....	19
<u>Crawford v. Washington</u> , 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	18, 19, 21, 23
<u>Harris v. New York</u> , 401 U.S. 222, 224, 91 S.Ct. 643, 28 L. Ed. 2d 1 (1971).....	33, 34
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	39
<u>Kentucky v. Stincer</u> , 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).....	19
<u>United States v. Owens</u> , 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988).....	19, 21
<u>Walder v. United States</u> , 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954).....	34

### State Cases

<u>In re Sego</u> , 82 Wn.2d 736, 513 P.2d 831 (1973).....	40
<u>Maehren v. Seattle</u> , 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), <u>cert. denied</u> , 452 U.S. 938, 101 S. Ct. 3079, 69 L. Ed. 2d 951 (1981).....	32
<u>Nissen v. Obde</u> , 55 Wn.2d 527, 348 P.2d 421 (1960).....	40
<u>O'Neill v. Dept. of Licensing</u> , 62 Wn. App. 112, 117, 813 P.2d 166 (1991) .....	32
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	39
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <u>review denied</u> , 111 Wn.2d 1033 (1988) .....	39

<u>State v. Binkin</u> , 79 W. App. 284, 293-294, 902 P.2d 673 (1995), overruled in part by, <u>State v. Kilgore</u> , 147 Wn.2d 288, 53 P.3d 972 (2002) .....	24
<u>State v. Boyer</u> , 19 Wn. App. 338, 347-348, 576 P.2d 902 (1978).....	35
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	40
<u>State v. Casbeer</u> , 48 Wn. App. 539, 542, 740 P.2d 335, <u>review denied</u> , 109 Wn.2d 1008 (1987).....	40
<u>State v. Casteneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74 (1990) .....	27, 28, 30, 31
<u>State v. Chapin</u> , 118 Wn.2d 681, 686, 826 P.2d 194 (1992).....	13, 14, 15
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	40
<u>State v. Crane</u> , 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991).....	25
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980) .....	40
<u>State v. Downey</u> , 27 Wn. App. 857, 861, 620 P.2d 539 (1980) .....	14
<u>State v. Flett</u> , 40 Wn. App. 277, 699 P.2d 774 (1985) .....	13
<u>State v. Gefeller</u> , 76 Wn.2d 449, 458 P.2d 17 (1969) .....	33, 35
<u>State v. Gentry</u> , 125 Wn.2d 570, 640, 888 P.2d 570 (1995) .....	24
<u>State v. Green</u> , 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) .....	39
<u>State v. Guloy</u> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	12
<u>State v. Hayes</u> , 73 Wn.2d 568, 439 P.2d 978 (1968).....	34, 35
<u>State v. Hettich</u> , 70 Wn. App. 586, 592, 854 P.2d 1112 (1993).....	12
<u>State v. Hieb</u> , 39 Wn. App. 273, 278, 693 P.2d 145 (1984), <u>rev'd on other grounds</u> , 107 Wn.2d 97, 727 P.2d 239 (1986).....	14
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965) .....	39

<u>State v. Hopson</u> , 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).....	26
<u>State v. Hubbard</u> , 37 Wn. App. 137, 146, 679 P.2d 391 (1984).....	14
<u>State v. Jerrels</u> , 83 Wn. App. 503, 508, 925 P.2d 209 (1996).....	26, 27, 31
<u>State v. Johnson</u> , 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).....	17
<u>State v. Jones</u> , 111 Wn.2d 239, 759 P.2d 1183 (1988).....	34
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	39
<u>State v. Kendrick</u> , 47 Wn. App. 620, 736 P.2d 1079 (1987).....	34
<u>State v. Knight</u> , 54 Wn. App. 143, 153-154, 772 P.2d 1042 (1989).....	35
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	39
<u>State v. Majors</u> , 82 Wn. App. 843, 848, 919 P.2d 1258 (1996).....	14
<u>State v. Mak</u> , 105 Wn.2d 692, 726, 718 P.2d 407, <u>cert. denied</u> , 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).....	23, 25
<u>State v. Manthie</u> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	25
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	39
<u>State v. Medina</u> , 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).....	19
<u>State v. Olson</u> , 126 Wn.2d 315, 321, 893 P.2d 629 (1995).....	17
<u>State v. Padila</u> , 69 Wn. App. 295, 299, 846 P.2d 564 (1993).....	26
<u>State v. Rehak</u> , 67 Wn. App. 157, 162, <u>review denied</u> , 120 Wn.2d 1022 (1992).....	12
<u>State v. Rempel</u> , 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990).....	39
<u>State v. Rohrich</u> , 132 Wn.2d 472, 939 P.2d 697 (1997).....	22, 23
<u>State v. Russell</u> , 125 Wn.2d 24, 85, 882 P.2d 747 (1994).....	25
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	40
<u>State v. Sims</u> , 77 Wn. App. 236, 890 P.2d 521 (1995).....	16

<u>State v. Strauss</u> , 119 Wn.2d 401, 417, 832 P.2d 78 (1992).....	13, 14
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 366, 864 P.2d 426 (1994).....	26
<u>State v. Swan</u> , 114 Wn.2d 613, 658, 790 P.2d 610 (1990).....	12
<u>State v. Thetford</u> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987).....	12
<u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	39
<u>State v. Weber</u> , 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983).....	25
<u>State v. Weekly</u> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	25
<u>State v. Whelchel</u> , 115 Wn.2d 708, 801 P.2d 948 (1990).....	33

**Constitutional Provisions**

Fifth Amendment, United States Constitution .....	34
Sixth Amendment, United States Constitution.....	18

**Statutes**

RCW 9A.44.120 .....	23
RCW 9A.44.120(2)(a) .....	23

**Rules and Regulations**

CrR 3.5.....	3, 4
CrR 3.6.....	3, 4
ER 103 .....	12
ER 401 .....	12
ER 403 .....	12
ER 613 .....	5, 36, 38

ER 801(d)(1).....5, 36, 37, 38  
ER 803(a)(2).....13, 15

**Other Authorities**

K. Teglund, 5 Washington Practice, Evidence Law and Practice,  
    § 103.14 .....32, 33

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in admitting the victim's excited utterances? (Appellant's Assignment of Error No. 3)
2. Should this court decline to reach the issue of whether the trial court properly admitted F.N.'s statements to Ethel Smith when no argument is provided in support of his position; if the court does reach this issue, were F.N.'s statements properly admitted? (Appellant's Assignment of Error No. 3)
3. Was the defendant's right to confrontation protected where the victim testified at trial? (Appellant's Assignment of Error No. 2)
4. Did the prosecutor commit, at most, harmless error, during cross-examination of the defendant when the questions were not material to the trial's outcome and could have been remedied if an objection had been made? (Appellant's Assignment of Error No. 4)
5. Did the trial court properly exercise its discretion when it admitted the 911 tape after the defendant opened the door to its admission? (Appellant's Assignment of Error No. 5)

6. When taken in the light most favorable to the State, was there sufficient evidence presented to support a conviction for assault in the second degree while armed with a deadly weapon? (Appellant's Assignment of Error No. 1)

B. STATEMENT OF THE CASE.

1. Procedure

On June 2, 2005, KEITH EDWARD BERRY, hereinafter "defendant," was charged with assault in the second degree, assault in the fourth degree, and harassment (bodily injury)<sup>1</sup>. CP 1-3. The assault in the second degree charge was alleged to have been committed with a deadly weapon, a baseball bat. Id. On April 10, 2006, both parties appeared for trial. RP 4.

2. Facts

a. Motions

The court heard pretrial motions the day of trial. RP 4. The defendant made a motion that the victim, Lukia Neal, not be referred to as a "victim" to the jury. RP 5. The motion was granted. RP 6. The defendant made a motion to suppress the evidence of the bat seized and to exclude admission of two 911 calls that were made. RP 7-9. The defendant also made a

---

<sup>1</sup> The State later dismissed the assault in the fourth degree charge.

motion to suppress any reference to the defendant having an outstanding warrant at the time of the incident. RP 9. The State initially agreed to suppression of one 911 call and the outstanding warrant. Id.

At the CrR 3.5 and 3.6 hearing, Tacoma Police Officer Barbara Salinas testified that she responded to the scene and was directed to speak to the victim, who appeared distraught. RP 17-18. The victim was concerned about the location of her daughter. RP 21. She was crying, distraught, and almost speechless. RP 22, 38. The victim had sent her daughter away to run for help. RP 21. Officer Salinas believed the victim's daughter was approximately ten years old. RP 21. The victim wanted the police go find her daughter. RP 22.

Officer Salinas took a statement from the victim. RP 23. She was afraid, crying, and fearful. RP 23. She stated that she and the defendant had been arguing all night, that she and her daughter were going to leave, and that the defendant grabbed a baseball bat and threatened to flatten her tires and smash out the car windows. RP 24-25. The victim indicated that the defendant grabbed her by the hair and began dragging her back to her residence. RP 36, 39. The defendant brandished a bat at her. RP 39.

The victim also reported that the defendant told her that if the police were coming, he was going to hit her head with the bat. RP 25. Officer

Salinas stated that she recovered the baseball bat, which was located either outside the front doorway or in the landing. RP 26.

The defendant testified that he did not grab or touch the victim. RP 64. He later stated that he grabbed the victim's hair when he thought she was falling down. RP 81-82. He stated that he was not mad at her. RP 64. He stated that he placed the baseball bat inside the home when police arrived. RP 70-71. At the conclusion of the CrR 3.5 and 3.6 hearing, the court excluded the baseball bat seized by Officer Salinas, but allowed testimony regarding the bat. RP 97, 107. The court then made the following ruling regarding the victim's statements to Officer Salinas:

It would appear that Ms. Neal's statements fall within the hearsay exception for excited utterance. There's evidence that she was distraught, crying. There's sufficient indicia of reliability in those statements. The fact that she sent her child to go help. She was upset about where her child was. All of the circumstances in this case suggest that those statements were reliable statements and they fall within the excited utterance exception to the hearsay rule.

RP 100-101.

During the State's case, the State sought admission of a 911 call made by Yuri Kosiuga. RP 218. The defendant objected to the admission of the tape on the basis that it contained hearsay statements. Id. The State asserted that the tape contained present sense impressions and was relevant. RP 219. The court denied the admission of the call made by

Kosiuga as cumulative. RP 220. The court later admitted the tape under ER 613 and 801(d)(1), in the State's rebuttal case. CP 81 (exhibit 5); RP 523.

At the close of the State's case, the defendant moved to dismiss the charges on the basis that there was insufficient evidence presented. RP 243. The court denied the motion and held that a reasonable jury could find beyond a reasonable doubt that the defendant was guilty of assault in the second degree and harassment. RP 243.

b. Trial

On June 1, 2005, Ronald Surrett was working as a maintenance painter for Tacoma School District at McCarver Elementary school. RP 120-121. At approximately 8:00 a.m., Surrett heard screaming and observed a man, later identified as the defendant pulling a woman by her hair<sup>2</sup>. RP 122-124. The woman was screaming at the top of her lungs. RP 151. The defendant was swinging a bat and had a "big whole handful" of the woman's hair. RP 124, 129. The victim was trying to get away from the defendant. RP 126. It appeared to Surrett that the defendant was trying to intimidate the victim. RP 127. Surrett observed a police officer approach the defendant and the defendant drop the bat, run into a house, and shut

---

<sup>2</sup> The defendant concedes on appeal that identity is not an issue.

the door. RP 131-132. The victim was crying. RP 153. Surrett called the school's security and asked them to call 911. RP 130.

Yuri Kosiuga was working at McCarver Elementary on June 1, 2005, when he heard a disturbance. RP 157-158. He heard a scream from a female and observed the defendant, dragging the victim, and swinging a bat. RP 156, 161. The defendant appeared upset. RP 163. Kosiuga called the police. RP 164. Kosiuga heard the victim scream, "let me go." RP 163.

Tacoma Police Officer Barbara Salinas responded to the scene. RP 187, 190. Officer Salinas was directed to contact the victim. RP 193. The victim was distraught and upset. RP 194. The victim's primary concern was for her daughter, F.N., a minor. RP 195. The victim indicated that she had sent F.N. for help and had not come back. Id. Once F.N. was found, the victim was able to calm down enough tell her story. RP 196. The victim was, however, still relatively upset. RP 197. The victim was still crying. RP 207. Officer Salinas described the victim's demeanor as going from "hysterical" to "upset." RP 207.

The defendant raised an objection to the admission of the victim's statements to Officer Salinas on the basis of hearsay. RP 200. The State responded that the statements were made in a relative short period of time

to the event and that the victim was still crying. RP 200. The court overruled the objection. RP 206.

The victim told Officer Salinas that she and the defendant were arguing overnight about a barbeque. RP 208. She indicated that she was preparing to leave with F.N. and the defendant began to chase her with a bat. Id. She stated that she gave F.N. her purse and told her to go get help. Id. She then indicated that the defendant grabbed her by the hair and started pulling her back into the home. Id. When the defendant saw a police car, he told the victim that if it was the police he was going to hit her upside the head. Id. The victim also indicated that the defendant threatened to slash the tires and break the windows of her vehicle. RP 210.

Tacoma Police Lieutenant Frank Feddersen responded to the scene on June 1, 2005. RP 224. He responded to a report of a fight between a male and a female, and the male had a baseball bat. Id. Lieutenant Feddersen responded even though he was not on active patrol because it was a life-threatening call. RP 225. When Lieutenant Feddersen arrived at the scene he observed the defendant and victim talking with each other. RP 226-227. The defendant had an aluminum baseball bat over his shoulder. RP 227, 236. Lieutenant Feddersen asked the defendant to drop the bat and the defendant became argumentative. RP 229. The defendant

began to use profanities. Id. The defendant walked to a nearby apartment and put the bat on the walkway. Id. The defendant was ordered to take his hand out of his pocket, which he refused to do. RP 230. The defendant then returned to the bat and picked it up. Id. Lieutenant Feddersen believed the defendant was going to reengage him with the bat, so he drew his firearm and told the defendant to drop the bat. RP 231. The defendant responded by yelling and walking into the apartment. Id.

Lieutenant Feddersen contacted the victim, who was upset. RP 232. The defendant had been in the apartment for less than a minute when he returned. RP 233. The defendant took his shirt off as if he was preparing to fight. Id. Because the defendant no longer had the bat, Lieutenant Feddersen holstered his firearm and took out his mace. RP 234. The defendant was uncooperative. Id. Lieutenant Feddersen had to threaten to mace him if he did not cooperate. RP 234-235.

The defendant testified on his own behalf. RP 244. The defendant stated that the victim was his girlfriend, and that they co-parented the victim's child, F.N.. RP 246-247. According to the defendant, the events of June 1, 2005, were precipitated by a "heated argument" between himself and the victim. RP 247. The defendant stated that the argument had resolved. RP 249. He indicated that the victim left the house and he went after her. RP 253-254. The defendant stated that as he walked out of

the house he picked up the baseball bat. RP 254. He stated that he ran up to her. RP 255. The defendant stated that he saw a school custodian and started walking toward the house so that “nobody will get the impression that we are arguing or having a fight or something.” RP 259. The defendant indicated that he did not want to look suspicious because it was early in the morning, he had a bat in his hands, and that it “didn’t look good.” RP 260-261. He stated that he grabbed the victim when she tripped. RP 261. The defendant indicated that the victim was not yelling or screaming. RP 263.

The defendant stated that when the police arrived he was leaning on the bat. RP 267-268. He stated that Lieutenant Feddersen immediately pointed his gun at him and told him to drop the bat. RP 268. The defendant testified that he put the bat against the catwalk and put his hands in the air. RP 268-269. The defendant denied using profanity. RP 269. The defendant stated that Lieutenant Feddersen acted like he was going to shoot him so he put the bat inside the residence. RP 270.

The defendant stated that he did threaten to knock the headlights of the truck so that the victim would be home on time. RP 313. The defendant acknowledged that he ran after the victim with the baseball bat in his hand. RP 317. He stated that he had just picked up the bat because it had fallen across the doorway. RP 341.

Glenn Glover, a private investigator, testified at trial. RP 344.

Glover testified that he interviewed Mr. Kosiuga and Mr. Surrect. RP 345. He stated that many of Kosiuga's answers were "I don't remember." RP 347. During Glover's testimony, the defendant sought to admit statements made to him by Kosiuga that were inconsistent with Kosiuga's trial testimony. RP 348. The court allowed such testimony. RP 349

The defendant then called the victim as a witness. RP 390. She testified that she did not want to be in court. RP 428. The victim testified that the defendant is her boyfriend, and that on June 1, 2005, they resided together. RP 391, 393. The victim stated that on June 1<sup>st</sup>, the victim was getting ready for work and was upset because she was running late. RP 397. She stated that the defendant told her he wanted her home right after work, and that if he broke the headlights on the truck or slashed the tires, she would be home on time because she could not drive the truck at dark without headlights. RP 401. The victim stated she began to walk. RP 402. She looked around and saw the defendant jogging up to her carrying a bat. RP 402-403. She testified she sent her daughter F.N. to call for a ride. RP 403. She stated that both she and the defendant were using elevated voices. RP 405. The victim asserted that the only physical contact between her and the defendant was the defendant's hand on the small of her back. RP 406. She stated that she had reported that the defendant pulled her hair, but that it was to prevent her from falling. RP

407. During questioning of the victim, defense counsel asked her about a statement she had written at the time of the incident. RP 424.

The victim testified at trial that she was calm at the time of the incident. RP 441. She did acknowledge that she told Mr. Glover that the defendant threatened to hit her upside the head with the bat. RP 448. She also stated that when she told Mr. Glover that the defendant threatened to hit her upside the head with the bat, that it was the truth. RP 451-452. She testified that the defendant did not grab her and make her walk back to the house, but that it could have been interpreted that way. RP 457-458. The victim also stated, however, that she had initially reported that the defendant grabbed her and made her walk back to the house and that it was “probably” the truth. RP 458.

F.N. testified that as she and the victim were getting ready, her mother and the defendant were arguing. RP 482. Ethel Smith testified that she received a telephone call from F.N., who was crying. RP 490. F.N. asked Ms. Smith to pick her up. RP 490-491. Ms. Smith stated that F.N. sounded scared. RP 492.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED  
ITS DISCRETION IN ADMITTING THE  
VICTIM’S EXCITED UTTERANCES.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d

610 (1990); State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). For example, in State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), the court held that Hettich could not raise a Frye objection on appeal because he did not make a Frye objection at trial. In the case before the court, the defendant assigns error

the court admitting statements made by the victim under the excited utterance exception to the hearsay rule found at ER 803(a)(2).

Under ER 803(a)(2), “[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition” is admissible as a hearsay exception.

A statement must satisfy three qualifications before it qualifies as an excited utterance. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). “First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition.” Id.

A statement can qualify as an excited utterance, despite various intervening factors. Thus, the fact that a significant amount of time has passed between the event and the statement is not dispositive. State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992) (holding that a statement made 3 ½ hours after the event was still an excited utterance). As the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases; consequently, the longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought. See, e.g., State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985) (statement made 7

hours after rape deemed properly admitted upon finding of “continuing stress” between time of rape and statement).

Likewise, statements can still qualify as an excited utterance even if, after the event, but before making the statements, the declarant has talked with other people. State v. Majors, 82 Wn. App. 843, 848, 919 P.2d 1258 (1996) (declarant spoke to four people prior to the excited utterance). Statements can still be excited utterances even if the statements are made in response to questions. State v. Hubbard, 37 Wn. App. 137, 146, 679 P.2d 391 (1984) (statements made to investigating officer qualified as excited utterances); see also State v. Downey, 27 Wn. App. 857, 861, 620 P.2d 539 (1980); State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), rev’d on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986). Finally, a statement can qualify as an excited utterance even if the declarant has calmed down after the event, but has become re-agitated and put back under the stress of the event by a subsequent event. Chapin, 118 Wn.2d at 686-87.

When analyzing the second Chapin element, “[t]he crucial question ... is whether the statements were made while the declarant was still under the influence of the event.” Hieb, 39 Wn. App. at 278. Thus, in Strauss, 118 Wn.2d at 416, evidence that the declarant was “very distraught, very red in the face and crying” and “appeared to be in a state

of shock” was held sufficient evidence from which the trial court could have ruled that the declarant’s statement qualified as an excited utterances.

For purposes of 803(a)(2), an utterance may “relate to” the startling event even though it does not explain, elucidate, or in any way characterize the event. Under Washington law any “utterance that may reasonably be viewed as having been about, connected with, or elicited by the startling event meets this requirement.” State v. Chapin, 118 Wn.2d at 688.

The record shows that the victim’s statements to Officer Salinas were clearly made at a time when she was under the stress of the assault. Officer Salinas described the victim as crying, upset, and distraught. RP 22, 194. When the victim was initially contacted, she was upset to the point that she could not speak. RP 22, 206. She appeared afraid. RP 24, 206. Once her child was located, the victim’s demeanor changed from hysterical to upset. RP 207. She was still crying. RP 207. She was then able to make the following statement:

She indicated that she and Mr. Berry were arguing overnight about some barbeque, and as she was preparing to leave with her daughter, Forest, Mr. Berry became angry and was going to vandalize her car, and then as she went outside with Forest, he began to chase her with a bat, and she gave Forest her purse, told Forest to go to the store or go to get help and the child ran off. And then she said that Mr. Berry grabbed her by the hair and started pulling her back to the house. And then somewhere along the line, she said that when he saw what he believed to be a police car,

he told her if that's the police coming here, I'm going to hit you upside the head.

RP 208.

The victim also told Officer Salinas that he threatened to vandalize her vehicle by breaking out the windows and slashing the tires. RP 210.

The defendant now asserts that the victim was upset only because her daughter was missing, not because of any incident involving the defendant. Br. of Appellant at p. 23. Such assertion is without merit on several grounds. First, the victim merely went from "hysterical" to "upset" when her daughter was located. She did not return to a calm state. Moreover, the missing child was linked to the assault—the victim sent the child for help during the assault.

In State v. Sims, 77 Wn. App. 236, 890 P.2d 521 (1995), the court held that the victim's description of an assault to a police officer was admissible when (1) the officer arrived within minutes after being dispatched, (2) the victim was crying and upset, and (3) the victim made her statements "right after" the assault occurred. Id. at 239. Similarly, in the case at bar Officer Salinas arrived at the scene within two to three minutes of being dispatched, the victim was crying and upset, and the victim's statements were close in time to the assault. RP 190, 194.

The victim was clearly still under the stress of the assault. The defendant appears to assert that because the victim was upset that her child was missing, she could not also be upset about the assault. Such assertion

is without merit. It is clear from the testimony of Officer Salinas that the victim was upset about *both* her child being missing and the assault. Both incidents are inextricably linked. The victim was hysterical, then upset. The fact that the victim remained upset after her child was located supports the conclusion that she was also under the stress of the assault. All of the victim's statements to Officer Salinas relate to the assault committed by the defendant and were properly admitted as the statements were made while the victim was still under the influence of the event.

2. THIS COURT SHOULD DECLINE TO REACH THE ISSUE OF WHETHER THE TRIAL COURT PROPERLY ADMITTED F.N.'S STATEMENTS TO ETHEL SMITH BECAUSE NO ARGUMENT IS PROVIDED TO SUPPORT HIS POSITION, BUT IF THIS COURT DOES REACH THE ISSUE, THE TRIAL COURT PROPERLY CONCLUDED THAT THE STATEMENTS WERE EXCITED UTTERANCES.

An issue raised on appeal that is raised in passing or unsupported by authority or persuasive argument will not be reviewed. State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995); State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). In the present case, defendant assigns error to the court admitting statements made by F.N. Br. of Appellant at p. 26-27. Defendant provides no argument or authority to support his claim, and therefore this court should decline to review the issue.

The defendant does not specify which statements by F.N. were allegedly improperly admitted. If the defendant is disputing the admission of the statements F.N. made to Ethel Smith, the statements were excited utterances.

Ethel Smith testified that at the time F.N. made statements to her, F.N. was crying and sounded scared. RP 490, 492. F.N. then told Smith that “Mom and Keith are fighting. So I ran up here to the convenience store.” RP 492. F.N. was clearly upset at the time she made the statement, which was made immediately after she left the victim and the defendant. The court properly found that the statement was an excited utterance.

3. THE DEFENDANT’S RIGHT TO  
CONFRONTATION WAS PROTECTED WHERE  
THE VICTIM TESTIFIED.

Defendant asks this court to apply the ruling in Crawford<sup>3</sup> to this case. However, because the victim testified at trial, Crawford does not apply.

“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI. The Confrontation Clause prohibits admission of testimonial statements made out of court by a witness who is *unavailable* for trial unless there has

---

<sup>3</sup> Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

been a prior opportunity for cross-examination. Crawford, 541 U.S. 68. Whether a trial court has violated an accused's confrontation rights is an issue reviewed de novo. State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

“The Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’” United States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) (quoting Kentucky v. Stincer, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)). “It is sufficient that the defendant has the opportunity to bring out such matters as the witness’ bias, [her] lack of care and attentiveness . . . and even . . . the very fact that [she] has a bad memory.” Id.

But Crawford has no relevance in this case where the victim testified at trial and was available for cross-examination. The court in Crawford specifically stated:

Finally, re reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.

Crawford, 541 U.S. 36 at 59, see also California v. Green, 399 U.S. 149, 162, 90 S. Ct 1930, 26 L. Ed. 2d 489 (1970).

The State acknowledged to the court that it did not anticipate the victim appearing for trial. RP 110, 199. At the start of the State's case,

the victim had not appeared. RP 113. The defendant also attempted to contact the victim. RP 198. During the defense case, the victim appeared in court. RP 350. There was discussion among the parties about who was going to call the victim as a witness. Defense counsel made the following representation:

Well, Your Honor, I certainly think we need to hear from her since she showed up, so yes, we would call her. And I thought that the State—in fact, I asked Mr. Sheeran: Do you plan to reopen and call her before we resolve, because this would be—and he said, no, if you're going to call her, I'll use her at that point, so I wasn't —you know, when she showed up, I quite frankly was as surprised as everyone else because she didn't sound committed to showing up when I spoke to her on the phone and did not tell me—I told her what department we were in. She didn't make any inquiry how to find this court or she said you want me to just get dressed and go right there, and I said that's what I'm asking you to do and she didn't indicate she planned to do that.

RP 363.

The court inquired as to whether the victim was listed on a defense witness list, and the defendant indicated that she was not. RP 365-366.

The following discussion followed:

The Court: So if the State doesn't call her, you haven't put her down as a witness.

Ms. Jardine: No, I haven't.

Mr. Sheeran: At this point, Your Honor, the State would end up calling her, ask to reopen, if necessary. I just

decided not to bother with that because counsel said they'd call her.

Ms. Jardine: We talked earlier about that this morning, about whether they would be reopening.

RP 366.

The Court indicated that it was its understanding that the State was going to reopen its case. RP 387. The State indicated that the defendant was going to call the victim. Id.

This court need not reach the issue of whether the statements by the victim to Officer Salinas were testimonial or non-testimonial because the victim testified at trial. The defendant in this case had the opportunity to confront the victim in this case—the right that Crawford seeks to protect. The court in Crawford was clear that there is no prohibition to the use of hearsay rules, even for a testimonial statement, once the declarant testifies. Here, the defendant was given the opportunity to bring out any potential bias, lack of care, or inattentiveness the victim may have had. Such opportunity is exactly what the court in Owens, supra, held was critical in affording a defendant the right to confront a witness.

In the case at bar the defendant seeks to distinguish the right to confront the victim on direct examination and cross-examination. The defendant does not articulate any questions or information that the defendant sought to admit on a cross-examination of the victim that he was unable to elicit on direct examination.

The defendant also asserts that he was forced to call the victim as a witness because statements were already admitted, but would have had less of an incentive to call the victim as a witness had the statements not already been admitted. Br. of Appellant at p. 17. Such assertion is without merit.

First, it is pure speculation for the defendant to now allege that but for the statements being admitted, he would not have called the victim to testify. In fact, defendant, at trial, stated that "I certainly think we need to hear from her since she showed up." RP 10. The defendant did not represent to the trial court that he felt compelled to call the victim as a witness because statements had already been admitted.

Second, there was a discussion about whether the defendant was going to call the victim or if the State was going to reopen its case. RP 366. At that point, the State represented that it was not going to be reopening because the defendant was going to call the victim as a witness. Id. Clearly, if the defendant had not wanted to call the victim, the State was prepared to do so. The defendant elected to call the victim.

The defendant cites to State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997). In Rohrich, the Washington State Supreme Court addressed the issue of what it means for a child to "testify" thereby permitting the admission of the child hearsay statements without corroboration.

In Rohrich, the prosecutor called the victim to the stand and asked her questions only of a general nature; no questions were asked about the

defendant abusing her. The trial court admitted several hearsay statements, pursuant to RCW 9A.44.120, implicating Mr. Rohrich. The Supreme Court reversed the conviction holding, that “testifies,” as used in RCW 9A.44.120(2)(a), means the child takes the stand and describes the acts of sexual contact alleged in the hearsay. Rohrich, 132 Wn.2d at 474,477-478. Rohrich is distinguishable on its facts. Rohrich is a case involving RCW 9A.44.120 and child hearsay. Neither is implicated in the case at bar.

The defendant had the opportunity to question the victim. He does not assert that there was anything he was precluded from asking the victim by conducting a direct examination instead of a cross-examination. It is also clear from the record that if the defendant had not called the victim, the State would have done so. The defendant cannot establish a Crawford violation.

4. THE PROSECUTOR DID NOT COMMIT REVERSIBLE ERROR DURING CROSS-EXAMINATION OF THE DEFENDANT BECAUSE THE QUESTIONS WERE NOT MATERIAL TO THE TRIAL’S OUTCOME AND COULD HAVE BEEN REMEDIED IF AN OBJECTION HAD BEEN MADE.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State

v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 570 (1995). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. State v. Binkin, 79 W. App. 284, 293-294, 902 P.2d 673 (1995), overruled in part by, State v. Kilgore, 147 Wn.2d 288, 53 P.3d 972 (2002). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

In this case, the State asked defendant the following questions:

Q: When the police rolled up—so before that—I’m sorry. So Yuri couldn’t have seen what he believes he saw?

A: I didn’t say—I can’t tell you what Yuri saw.

Q: Well, you heard what Yuri testified to?

A: I heard Yuri lie too.

Q: Yuri lied?

A: Yeah. When he said he saw me swinging a bat, that was a lie.

Q: Did Yuri testify that he also told the 911 operator that he saw you swinging a bat?

A: Yeah, on the 911 tape.

Q: And so then and nine months later, and there’s no reason for him to do it, is there?

A: There's no reason for him to do what?

Q: For him to lie.

A: I guess—I guess not. I don't know. I don't know what his motive.

RP 310-311.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only

when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Where there is no objection to the State's questioning, misconduct is reversible error only if it is material to the trial's outcome and could not have been remedied. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996), citing State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994) (emphasis added). The misconduct must have been so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice. Id. In order to determine whether the misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect. Id.

In State v. Jerrels, supra, the court held that a prosecutor commits misconduct when his or her cross-examination seeks to compel a witness' opinion as to whether another witness is telling the truth. Id. at 507, citing State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994); State v. Padila, 69 Wn. App. 295, 299, 846 P.2d 564 (1993). In Jerrels, the defendant was accused of rape of a child, child molestation, and assault. Id. at 504. The prosecutor in Jerrels asked a witness multiple times if she believed the complaining witness, a minor, was telling the truth to their counselors. Id. at 506-507. On cross-examination, the prosecutor asked the witness if she had made a decision about whether the victims were telling the truth and whether she believed one of the victim's was telling the truth about inappropriate sexual activity occurring while he was in bed

under the covers with the defendant. Id. at 507. On re-cross, the prosecutor again asked the witness if she believed the victims were telling the truth. Id. The court held that because credibility played such a crucial role in that specific case, the prosecutor's questions were material and highly prejudicial. Id. at 508.

The case at bar is distinguishable from Jerrels on its facts. In Jerrels, the witness was asked to comment on the credibility of statements a victim child made to a counselor, not statements made directly to the jury from the child. In the present case, the questions asked by the State were not as prejudicial. The State asked questions of the defendant regarding another witness who had already testified in the case, and it was already clear to the jury that Kosiuga's testimony differed from that of the defendant.

In State v. Casteneda-Perez, 61 Wn. App. 354, 810 P.2d 74 (1990), the prosecutor asked a witness if officers who testified in the case were lying. Id. at 358. The prosecutor asked similar questions multiple times. Id. at 358-358. The following questions were asked by the State at various times:

So, if the officer who bought the cocaine from you testified that there were two other persons facing inward as those arrows on the drawing indicate, you would say that she's lying?

...

So, Mr. Rodriguez, what you are telling this jury is that

Officer Barnett's testimony that there were yourself, her and two other persons all facing inward that Officer Barnett was telling a lie when she testified to that?

...

So the officer is lying when she testifies that someone else took the money?

...

Okay. Now, Mr. Rodriguez, if Officer Grady testified that she saw two other persons standing with you and Officer Barnett, you would say that he was lying?

...

So, if Officer Grady testified that you were with someone else when you were arrested, he would not be telling the truth?

...

Id. at 357-359.

The prosecutor in Casteneda-Perez then repeated a similar line of questioning with the defendant directly:

Then what you are telling this jury, Mr. Casteneda-Perez, is that Officer Grady is lying when she [sic] says that you stood facing Officer Barnett for approximately a minute?

...

Mr. Casteneda-Perez, yes or no, Officer Unger is lying when he says he say you or at least your white tennis shoes contacting Officer Barnett for an extended period of time? Yes or no.

...

Is Officer Grady telling the truth or not?

...

The question again Mr. Casteneda-Perez, let me try to rephrase it. Officer Grady testified that he say you facing Officer Barnett for approximately one minute. Is that true or false?

...

That's a lie?

Id. at 358-360.

The prosecutor then continued a similar line of questioning with the other defendant. Id. at 359. The court ultimately found that while the questioning was improper, the error was not of constitutional magnitude, and was harmless. Id. at 363. The court held that the objections made were inadequate to preserve the issue. Id. The court also held that “most of the time, the witnesses answered the questions about ‘lying’ by saying that they did not know one way or another, or perhaps the witness was only mistaken.” Id. at 364. The court concluded that any error was harmless. Id. at 363-365.

In the case at bar, the State asked defendant the following questions on cross-examination:

Q: When the police rolled up—so before that—I’m sorry. So Yuri couldn’t have seen what he believes he saw?

A: I didn’t say—I can’t tell you what Yuri saw.

Q: Well, you heard what Yuri testified to?

A: I heard Yuri lie too.

Q: Yuri lied?

A: Yeah. When he said he saw me swinging a bat, that was a lie.

Q: Did Yuri testify that he also told the 911 operator that he saw you swinging a bat?

A: Yeah, on the 911 tape.

Q: And so then and nine months later, and there's no reason for him to do it, is there?

A: There's no reason for him to do what?

Q: For him to lie.

A: I guess—I guess not. I don't know. I don't know what his motive.

RP 310-311.

No objections were made during this line of questioning. The first question asked by the State, whether Kosiuga could not have seen what he thought he saw, was answered by the defendant in a manner similar to many of the answers given in Casteneda-Perez—that he did not know. As the court in Casteneda-Perez held, this type of answers could only have alerted the jury to the fact that there can be conflicts in testimony based on many reasons other than deliberate false testimony.

In the present case, any error was harmless. The questioning by the State did not rise to the same level as the questioning in Casteneda-Perez. Even in Casteneda-Perez, where the questions asked were more

serious and greater in number, the court found a harmless error. The State's initial question to the defendant did not elicit a response from the defendant that Yuri was lying—the defendant answered that he could not say what Yuri saw. The defendant's statement that Yuri lied was a non-responsive answer to a question by the State that could have been answered by a yes or a no. When the State asked the defendant if Yuri had lied, it was a follow-up question to the defendant's previous non-responsive answer.

In Casteneda-Perez, the court did not find reversible error, despite the prosecutor asking at least eight questions which sought to elicit a comment from the witness on the credibility of a police officer witness. In Jerrels, the prosecutor also sought to ask multiple questions regarding credibility. In the present case, the State asked very few questions of this nature. The court in Casteneda-Perez found that there was not a substantial likelihood that the prosecutor's questions influenced the outcome of the trial<sup>4</sup>. Casteneda-Perez, 61 Wn. App. at 364. Similarly, the State's questions in the present cases did not create a substantially likelihood of influencing the outcome of trial. The defendant did not

---

<sup>4</sup> The court in Casteneda-Perez also held that another reason the questioning was not prejudicial was because the jury was unable to reach a verdict on co-defendant Gonzalez. Casteneda-Perez, 61 Wn. App. at 364-365. In the present case, the defendant was convicted as charged. The court in Casteneda-Perez did not indicate that the jury's failure to reach a verdict on Gonzalez was the sole dispositive factor in their determination that the questioning was harmless.

object the questions asked by the State, and Yuri's testimony was corroborated by the statements the victim made to police. In this case, there was persuasive, corroborated testimony that the assault occurred. Any error committed by the State in its questioning of the defendant was harmless.

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE 911 TAPE BECAUSE THE DEFENDANT OPENED TO THE DOOR TO ITS ADMISSION.

Decisions as to the admissibility of evidence are within the sound discretion of the trial court and are reversible only upon a showing of abuse of discretion. Maehren v. Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938, 101 S. Ct. 3079, 69 L. Ed. 2d 951 (1981). The reviewing court will find an abuse of the trial court's discretion only where there is a clear showing that the discretion was exercised on manifestly unfair, unreasonable or untenable grounds. O'Neill v. Dept. of Licensing, 62 Wn. App. 112, 117, 813 P.2d 166 (1991).

A party who chooses to introduce inadmissible evidence "opens the door" to the opposing party's inquiry into the subject matter and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence. K. Teglund, 5 Washington Practice, Evidence Law and Practice, ¶ 103.14, at 52-53 (Fourth Edition 1999).

The door is generally opened only by the introduction of evidence; it is not opened by counsel's opening statements to the jury. State v. Whelchel, 115 Wn.2d 708, 801 P.2d 948 (1990). The rule is based upon the belief that an adversary system is essential to determining the truth. State v. Gefeller, 76 Wn.2d 449, 458 P.2d 17 (1969). The trial court has considerable discretion as the keeper of the open door. K. Teglund, 5 Washington Practice, Evidence Law and Practice, ¶ 103.14, at 58.

In State v. Gefeller, the Supreme Court further explained the rationale for the open door rule, as follows:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

Gefeller, 76 Wn.2d at 455.

The rule is powerful enough that it is possible for a criminal defendant to open the door to evidence that would otherwise be excluded on constitutional principles. In Harris v. New York, 401 U.S. 222, 224, 91 S.Ct. 643, 28 L. Ed. 2d 1 (1971), the Supreme Court of the United States

held that a voluntary statement made by a defendant that is constitutionally inadmissible as a part of the State's case-in-chief could nevertheless be used for impeachment purposes because "the shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, . . ." Harris, 401 U.S. at 226, 91 S. Ct. at 646, relying on Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954); see also State v. Jones, 111 Wn.2d 239, 759 P.2d 1183 (1988) (testimony by the defendant's psychiatrist, regarding the defendant's invocation of his Fifth Amendment privilege during examination by the State psychiatrist, opened the door to allow the State psychiatrist to comment on the defendant's invocation of self-incrimination privilege in the defendant's homicide trial); State v. Kendrick, 47 Wn. App. 620, 736 P.2d 1079 (1987) (the defendant portrayed his cooperation with police as evidence of his innocence and in so doing, he "opened the door" to further inquiries about the subject. The State was, therefore, allowed to elicit testimony that the defendant made no statements to police following his arrest, which was otherwise inadmissible as an unconstitutional comment on the defendant's right to remain silent).

The rule also applies to evidence that is otherwise inadmissible on non-constitutional grounds. Applying the open door rule, the Washington Supreme Court in State v. Hayes, 73 Wn.2d 568, 439 P.2d 978 (1968), allowed the use of evidence suppressed by a pretrial order where the defendant opened the door to its admissibility by seeking to gain

extraordinary advantage from the fact of suppression of that evidence. The appellate court upheld the trial court's admission of the previously suppressed evidence because the defendant had himself opened up the subject of the degree of his intoxication. The Court stated:

It is one thing to say the State cannot make affirmative use of evidence which has been suppressed by pretrial order. It is quite another to say that a defendant can turn the pretrial order into a shield against contradiction.

State v. Hayes, 103 Wn.2d at 571.

A criminal defendant can open the door during the cross-examination of a State's witness. Gefeller, supra, (asking detective whether the defendant had taken a polygraph and what the results were opened the door to the State's question as to what was meant by "inconclusive results"); State v. Knight, 54 Wn. App. 143, 153-154, 772 P.2d 1042 (1989) (asking detective if he paid informant to move out of town opened the door to the State eliciting that it was because the informant and his family had been threatened); State v. Boyer, 19 Wn. App. 338, 347-348, 576 P.2d 902 (1978) (asking an officer about the purpose of his call to the defendant allowed the State to elicit on redirect that the officer had received information that the defendant had a gram of heroin).

In the State's rebuttal case, the State sought to admit the 911 call made by Kosiuga. RP 504. The State asserted that the defendant had attacked Kosiuga's credibility through Glover. RP 504.

Glover testified that he interviewed Kosiuga and that many of his answers were “I don’t remember.” RP 345, 347. During Glover’s testimony, the defendant sought to admit statements made to him by Kosiuga that were inconsistent with Kosiuga’s trial testimony. RP 348. The court allowed such testimony. RP 349. Kosiuga told Glover that the defendant had carried an aluminum bat in his left hand. RP 369. Kosiuga stated that the defendant had been moving the bat around. RP 372. The defendant questioned Kosiuga about statements he made to Glover regarding the approximate height of both the victim and defendant, and their race. RP 348. During Kosiuga’s testimony at trial, he stated he could not recall the defendant’s height, despite having given an approximate height to Glover. RP 170, 348. Glover also stated that Kosiuga told him he was unable hear what the parties were saying, but during his testimony Kosiuga stated that the victim had screamed “let me go.” RP 163.

The State argued that because the defendant was attacking Kosiuga’s memory and motive, the 911 call is admissible. RP 505. The court then made the following ruling:

Okay. Well, I believe that the tape would be admissible under 613 to rehabilitate the witnesses’ credibility. In this case, it does more, and I believe would be admissible under 801(d)(1) since it is arguably consistent with the declarant’s testimony and is offered to rebut a statement that the declarant recently fabricated or their story about what happened, so I’ll allow it to be introduced.

I am also going to make a finding that the statement by Mr. Kosiuga falls within a –well, I don't think in this context the prior statement by the witness is in fact hearsay under 801(d)(1). The statement is also admissible as an exception under the present sense impression of the hearsay rule, so I'll allow it. . .

RP 510.

The State then recalled Kosiuga. RP 522. Kosiuga stated that on the 911 tape, he was relating exactly what he observed. RP 524. He stated that he did not have an independent recollection of the defendant swinging a bat, but that if he said it on the tape, that is what occurred. RP 524-525. Kosiuga stated that when he listened to the tape, it brought a different recollection to his memory, and that the defendant had been swinging the bat around his side. RP 528.

Defendant contends that it is the prosecutor's fault that the door was opened because it occurred on cross-examination. Br. of Appellant at p. 31. It is clear, however, that the door was opened by the defendant. It was the defendant who questioned Glover about the statements Kosiuga made to him. It is unclear from the defendant's brief which questions by the State he is alleging were the questions that improperly opened the door the admission of the 911 tape. The defendant, over the State's objection, elicited statements that Kosiuga made to Glover. RP 348, 368-371. Additionally, the defendant himself attacked Kosiuga's testimony and stated that he did not know what Kosiuga's motive was to lie. RP 311.

The court properly allowed the admission of the 911 tape in order for the State to rehabilitate Kosiuga and as a prior consistent statement under ER 801(d)(1). The defendant now asserts that ER 801(d)(1) is inapplicable because the 911 tape was not made before any motive to fabricate arose. Br. of Appellant at p. 31. Such assertion is made without any argument applied to the facts of this case. It is clear that the 911 tape was made while Kosiuga was watching events unfold. RP 506, 524.

The defendant had put in issue Kosiuga's credibility. Defendant was attacking inconsistencies in Kosiuga's testimony. Defendant even informs the court that he is seeking to question Glover regarding inconsistencies. RP 348. The defendant called into question Kosiuga's credibility, and then complains when the State properly seeks to admit a prior consistent statement under ER 613 and ER 801(d)(1). The trial court is acting outside the scope of the rules to determine the appropriate scope of the open door evidence. This is why the court has great discretion in acting as the "keeper" of the open door. The record below indicates the court was properly exercising its discretion.

6. WHEN TAKEN IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILTY FOR ASSAULT IN THE SECOND DEGREE WITH A DEADLY WEAPON<sup>5</sup>.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must

---

<sup>5</sup> The defendant was also convicted of harassment, but the defendant is not challenging the sufficiency of the evidence on that count.

be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. Id.; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case defendant challenges the sufficiency of the evidence regarding his convictions of assault in the first degree. The jury was

instructed that the State had to prove the following four elements for each count of assault in the second degree:

1. That on or about the 1<sup>st</sup> day of June, 2005, the defendant assaulted Lukia Neal with a deadly weapon; and
2. That the acts occurred in the State of Washington.

CP 22-46, Instruction No. 7.

The jury was also instructed on the definition of assault:

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend any ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that the bodily injury be inflicted.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 22-46, Instruction No. 10.

In the case before this court, the jury was presented with sufficient evidence that the defendant acted with the intent to create apprehension and fear of bodily injury to Lukia Neal. Ron Surrett testified that he observed the defendant swinging a bat and the victim screaming at the top

of her lungs. RP 151. Kosiuga testified that he observed the defendant dragging the victim and swinging a bat. RP 156, 161. The victim was heard screaming “let me go.” RP 163. The defendant had a handful of the victim’s hair. RP 124, 129. The defendant was swinging the bat 360 degrees around his side. RP 528-529. The victim was trying to get away from the defendant. RP 126. It appeared to Surret that the defendant was trying to intimidate the victim. RP 127.

The defendant asserts that the evidence presented supports the conclusion that the defendant only threatened to vandalize the vehicle, and that he did not hit the victim with it. Br. of Appellant at p. 14. First, the jury was properly instructed that the actor does not have to actually intend to create bodily injury. The State concedes that there is no evidence that the defendant hit the victim with the bat, but physical contact is unnecessary to establish the elements of assault. The jury was presented with circumstantial evidence that the victim had fear and apprehension of bodily injury—she was screaming for the defendant to let her go, and the defendant had her by her hair. Moreover, the victim was so fearful, that she sent her child to get help. RP 208. The defendant was seen swinging a metal bat at her. RP 156, 161.

Moreover, the defendant told the victim that if the police were coming, he was going to hit her upside the head. RP 208. Clearly, such statement, in the ongoing assault, also caused fear and apprehension. The victim was hysterical when officers arrived. RP 207.

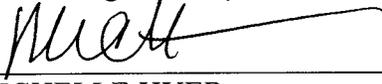
The defendant also states that there is “unrebutted” testimony by the victim that she did not believe the defendant was going to hit her with the bat. Br. of Appellant at p. 15. However, it is clear that the jury did not find this testimony credible. The jury was told that the victim had initially reported that the defendant chased her with a bat and that she sent her child for help. RP 208. It is not being alleged by the defendant on appeal that a metal baseball bat is not a deadly weapon. Clearly, a bat is readily capable of causing death or substantial bodily injury. There was sufficient evidence for the jury to find that the defendant acted with the intent to cause the victim apprehension and fear of bodily injury, and he did so. There was also sufficient evidence for the jury to find that the victim’s fear and apprehension was reasonable. There was sufficient evidence for the jury to find the defendant guilty of assault in the second degree with a deadly weapon enhancement.

D. CONCLUSION.

For the above reasons, the State respectfully requests that the defendant's convictions be affirmed.

DATED: February 12, 2007.

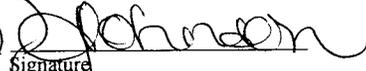
GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



MICHELLE HYER  
Deputy Prosecuting Attorney  
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/12/07   
Date Signature

FILED  
COURT OF APPEALS  
DIVISION II  
07 FEB 12 PM 1:40  
STATE OF WASHINGTON  
BY  MENDY