

COURT OF APPEALS
STATE OF WASHINGTON
JUDGE
BY: *[Signature]*

No. 35844-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

VICTOR ELROY MARTINEZ,

Appellant.

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

The Honorable Beverly G. Grant

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

 1. THE JURY’S VERDICT OF SECOND DEGREE INTENTIONAL MURDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE 4

 a. A conviction for second degree murder as charged required an intent to kill. 4

 b. Mr. Martinez’s shooting constituted excusable homicide as it was the result of an accident. 5

 c. Alternatively, Mr. Martinez was guilty of manslaughter as the evidence showed he acted recklessly or negligently. 6

 2. THE COURT’S EXCLUSION OF MR. MARTINEZ’S STATEMENTS TO THE RESPONDING FIREFIGHTERS VIOLATED HIS RIGHT TO DUE PROCESS AS THEY WERE ADMISSIBLE AS EXCITED UTTERANCES..... 9

 a. Hearsay statements are generally inadmissible as substantive evidence. 9

 b. Mr. Martinez’s hearsay statement was made while he was still under the stress of the shooting of Ms. Dixon..... 10

 c. The error in excluding Mr. Martinez’s statement was not harmless. 13

E. CONCLUSION 15

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 1, 4

WASHINGTON CONSTITUTIONAL PROVISIONS

Art. I, § 3 1

FEDERAL CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147
L.Ed.2d 435 (2000) 4

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368
(1970) 4

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560
(1979) 4

WASHINGTON CASES

In re the Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d
380 (2000) 7

State v. Anderson, 44 Wn.App. 644, 723 P.2d 464 (1986)..... 12, 13

State v. Britton, 27 Wn.2d 336, 178 P.2d 341 (1947) 14

State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995) 13

State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) 5

State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992) 10, 11, 12

State v. Cunningham, 93 Wn.2d 823, 613 P.2d 1139 (1980) 14

State v. DeRosia, 124 Wn.App. 138, 100 P.3d 331 (2004) 7

State v. Gamble, 118 Wn.App. 332, 72 P.3d 1139 (2003), *aff'd in
part, rev'd in part on other grounds*, 154 Wn.2d 457, 114 P.3d
646 (2005) 7

<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	4
<i>State v. Hughes</i> , 118 Wn.App. 713, 77 P.3d 681 (2003), <i>review denied</i> , 151 Wn.2d 1039, 95 P.3d 758 (2004)	7
<i>State v. Mannering</i> , 112 Wn.App. 268, 48 P.3d 367 (2002)	4
<i>State v. McKinsey</i> , 116 Wn.2d 911, 810 P.2d 907 (1991)	14
<i>State v. Palomo</i> , 113 Wn.2d 789, 783 P.2d 575 (1989)	11
<i>State v. Peterson</i> , 133 Wn.2d 885, 948 P.2d 381 (1997)	7
<i>State v. Robinson</i> , 24 Wn.2d 909, 167 P.2d 986 (1946)	14
<i>State v. Robinson</i> , 44 Wn.App. 611, 722 P.2d 1379 (1986)	11
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005)	7
<i>State v. Warden</i> , 133 Wn.2d 559, 947 P.2d 708 (1997)	8
<i>State v. Williamson</i> , 100 Wn.App. 248, 996 P.2d 1097 (2000)	11, 12
<i>State v. Willis</i> , 67 Wn.2d 681, 409 P.2d 669 (1966)	5
<i>State v. Wilson</i> , 125 Wn.2d 212, 883 P.2d 320 (1994)	5
<i>State v. Young</i> , 160 Wn.2d 799, 161 P.3d 967 (2007)	10, 14
STATUTES	
RCW 9A.08.010	5, 8
RCW 9A.16.030	5
RCW 9A.32.050	4
RCW 9A.32.060	8
RCW 9A.32.070	8

RULES

ER 801 9
ER 802 9
ER 803 9

TREATISES

E. Cleary, *McCormick on Evidence* (2d ed. 1972)..... 11
J. Wigmore, *Evidence* (1976) 10

A. ASSIGNMENTS OF ERROR

1. The jury's verdict of second degree intentional murder was not supported by substantial evidence.

2. The trial court's exclusion of Mr. Martinez's statements to the first responding firefighters was an abuse of discretion.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The due process clauses of the Fourteenth Amendment to the United States Constitution as well as art. I, § 3 of the Washington Constitution require the State prove every element of an offense beyond a reasonable doubt. Where the resulting guilty verdict is not supported by substantial evidence, the verdict must be reversed. Second degree murder required the State prove Mr. Martinez intended to kill Ms. Dixon. Was Mr. Martinez's conviction supported by substantial evidence where the evidence established the gun went off accidentally when Mr. Martinez placed the gun against Ms. Dixon's bare flesh in order for her to see how cold the gun was, she swatted at it, his finger slipped onto the trigger causing the gun to fire?

2. A statement may be admitted as an excited utterance where the proponent of the statement establishes the occurrence of a startling event, the statement was made while under the stress of

the startling event, and the statement relates to the startling event. The trial court excluded Mr. Martinez's statement made to the initial responding emergency workers that he was playing with the gun when it went off made 30 minutes after the shooting. Did the trial court abuse its discretion when it excluded this statement?

C. STATEMENT OF THE CASE

Victor Martinez and Desandra Dixon met in approximately 2002 and shortly thereafter moved in together. RP 540-41. Together the two had seven children living with them, the oldest Teaire Bell was 17 years old. RP 15-16, 541.

On the evening of April 2, 2006, Ms. Dixon and Mr. Martinez went out for drinks so that Mr. Martinez could tell Ms. Dixon that he was moving out of the residence. RP 545. The two returned to the residence at approximately 1 a.m. on April 3, 2006, and immediately began to argue about Mr. Martinez's leaving. RP 546. As Mr. Martinez was putting his possessions together in preparation of leaving, he retrieved his gun and put it into his pocket. RP 546-49.

The argument had calmed when Mr. Martinez noted the gun was extremely cold and wanted Ms. Dixon to feel how cold the gun was. RP 550. Although he knew the gun was loaded, he believed

there was no round in the chamber. RP 552. Mr. Martinez placed the gun against Ms. Dixon's bare chest but she swatted it away. RP 550. When he again tried to place the gun against Ms. Dixon's chest and she again swatted it away, Mr. Martinez's finger slipped onto the trigger and the gun went off. RP 550, 592. Ms. Dixon died from a single gunshot wound to the chest. RP 471.

Out of fear, when the first emergency workers arrived, Mr. Martinez told them that somebody else shot Ms. Dixon and had fled with the gun. RP 621. After he was arrested, Mr. Martinez admitted to the police that he was playing with the gun when it went off. RP 625.

Mr. Martinez was charged with and convicted of two counts of second degree murder; count one intentional murder, and count two felony murder based upon the commission of an assault. CP 4-5, 76-77. The trial court unconditionally vacated the second degree felony murder count as violative of double jeopardy prior to sentencing. CP 87-88.

D. ARGUMENT

1. THE JURY'S VERDICT OF SECOND DEGREE INTENTIONAL MURDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

a. A conviction for second degree murder as charged required an intent to kill. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221.

Second degree murder is defined as the killing of one person by another without premeditation but with the intent to kill. RCW 9A.32.050(1)(a); *State v. Mannering*, 112 Wn.App. 268, 273, 48 P.3d 367 (2002). Intent is defined as acting with the “objective or

purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(a). Intent must be the logical probability from all the facts and circumstances. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Intent can be proven through circumstantial evidence. *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983).

The evidence at trial established that Mr. Martinez did not intend to kill Ms. Dixon but that her death was the result of a terrible accident or, at worst, Mr. Martinez’s reckless or negligent actions with his firearm.

b. Mr. Martinez’s shooting constituted excusable homicide as it was the result of an accident. Mr. Martinez contended the shooting of Ms. Dixon was an accident, the gun going off when she pushed it away while he was pressing it to her chest demonstrating how cold the barrel was.

“Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.” RCW 9A.16.030. An accident is an event that takes place without foresight or expectation. *State v. Willis*, 67 Wn.2d 681, 683, 409 P.2d 669 (1966).

Here, Mr. Martinez and Ms. Dixon had quarreled over Mr. Martinez's decision to move out of the house they shared in order to take a break from the relationship. RP 546-51. Mr. Martinez had earlier gathered his gun in anticipation of his leaving. RP 551. Mr. Martinez noted the gun was cold and approached Ms. Dixon to demonstrate to her how cold the gun was. RP 552. Mr. Martinez tried to place the gun on Ms. Dixon's chest when she pushed it away causing his finger to slip onto the trigger. RP 552, 590-92. The gun went off striking Ms. Dixon in the chest and killing her. RP 471, 552-54.

This evidence established that Mr. Martinez's act of shooting Ms. Dixon was a terrible accident, not an intentional killing. Mr. Martinez had no intention of harming Ms. Dixon, let alone killing her, when he tried to place the gun on Ms. Dixon's chest. The jury's verdict that Mr. Martinez possessed the intent to kill Ms. Dixon was not supported by substantial evidence. This Court must reverse Mr. Martinez's conviction with instructions to dismiss.

c. Alternatively, Mr. Martinez was guilty of manslaughter as the evidence showed he acted recklessly or negligently. A defendant may generally be convicted of only those crimes charged in the information. *State v. Peterson*, 133 Wn.2d

885, 889, 948 P.2d 381 (1997); *State v. DeRosia*, 124 Wn.App. 138, 150, 100 P.3d 331 (2004). The two recognized exceptions to this rule are lesser included offenses and crimes of an inferior degree. *In re the Personal Restraint of Thompson*, 141 Wn.2d 712, 722, 10 P.3d 380 (2000); *DeRosia*, 124 Wn.App. at 151.

A successful challenge to the sufficiency of the evidence generally warrants a reversal of the criminal conviction with an order to dismiss the prosecution. *State v. Smith*, 155 Wn.2d 496, 504-05, 120 P.3d 559 (2005). However, under certain circumstances, the court may remand the case with instructions to sentence a defendant for a lesser included offense or an inferior degree offense where “the jury necessarily found each element of the lesser included [or inferior degree] offense beyond a reasonable doubt in reaching its verdict on the crime charged.” *State v. Hughes*, 118 Wn.App. 713, 731, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039, 95 P.3d 758 (2004), *quoting State v. Gamble*, 118 Wn.App. 332, 336, 72 P.3d 1139 (2003), *aff'd in part, rev'd in part on other grounds*, 154 Wn.2d 457, 114 P.3d 646 (2005).

Manslaughter is a lesser included offense of intent-to-kill second degree murder. *State v. Warden*, 133 Wn.2d 559, 563, 947

P.2d 708 (1997). A person is guilty of manslaughter in the first degree when he or she recklessly causes the death of another person. RCW 9A.32.060(1)(a). Alternatively, a person is guilty of manslaughter in the second degree “when, with criminal negligence, he causes the death of another person.” RCW 9A.32.070(1). A person acts with criminal negligence “when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.” RCW 9A.08.010(1)(d).

Although the evidence established Ms. Dixon’s death was excusable as a terrible mistake, alternatively, the evidence established that Mr. Martinez’s conduct in playing with a loaded gun was either reckless or negligent. The jury was instructed on both first and second degree manslaughter as lesser included offenses of second degree murder. CP 61-68. Thus, given the fact the jury was instructed on these lesser included offenses, this Court must reverse Mr. Martinez’s conviction for second degree murder and may remand for entry of a conviction for second or first degree manslaughter.

2. THE COURT'S EXCLUSION OF MR. MARTINEZ'S STATEMENTS TO THE RESPONDING FIREFIGHTERS VIOLATED HIS RIGHT TO DUE PROCESS AS THEY WERE ADMISSIBLE AS EXCITED UTTERANCES

During the testimony of David Carlisle, a Tacoma Firefighter who was one of the first responders to Mr. Martinez's 911 telephone call, Mr. Martinez moved to admit his spontaneous statement to the firefighters that he was playing with a gun and it went off hitting Ms. Dixon, under the theory the statement qualified as an excited utterance. RP 73. The court disagreed and refused to admit the statement. RP 84.

a. Hearsay statements are generally inadmissible as substantive evidence. Generally, out-of-court statements admitted to prove the truth of the matter asserted are not admissible. ER 801, 802. An exception to this hearsay rule exists where the statement is an excited utterance. ER 803(a)(2). To qualify as an excited utterance the proponent of the statement must establish by a preponderance of the evidence that (1) a startling event occurred, (2) the declarant made the statement while under the stress of the startling event, and (3) the statement related to the startling event.

State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007); *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The underpinning of the excited utterance rule is the idea that while under the influence of a sufficiently startling event, the declarant will lack the reflective capacity to fabricate, and thus a degree of reliability attaches to the statement. *Chapin*, 118 Wn.2d at 686. See also 6 J. Wigmore, *Evidence* § 1747, at 195 (1976) (The excited utterance exception is based on the idea that “under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.”).

b. Mr. Martinez’s hearsay statement was made while he was still under the stress of the shooting of Ms. Dixon. There can be no argument regarding two of the three requirements for admission of the statement as an excited utterance: the shooting of Ms. Dixon constituted a startling event and Mr. Martinez’s statement that the gun went off while he was playing with it related directly to the startling event of the shooting. Thus, the only issue was whether Mr. Martinez was still under the stress of this startling event when he made the statement to initial responding firefighters.

In assessing whether a statement qualifies as an excited utterance, spontaneity is the key to the requirement that the statement was made while under the stress of excitement caused by the startling event. *Chapin*, 118 Wn.2d at 688, see also *State v. Williamson*, 100 Wn.App. 248, 258, 996 P.2d 1097 (2000) (“Spontaneity is crucial.”). Appellate courts may also consider the declarant's emotional state in determining whether the statement was made while under the stress of the startling event. *Id.* Statements are generally not considered to be spontaneous when the declarant had the opportunity to reflect on the event and fabricate a story about it. *Id.*

While the statements must be made while the declarant is under the influence of the event, an excited utterance need not be contemporaneous to the event. *State v. Robinson*, 44 Wn.App. 611, 615-16, 722 P.2d 1379 (1986). Ideally, the utterance should be made contemporaneously with or soon after the startling event giving rise to it. *E.g.*, *State v. Palomo*, 113 Wn.2d 789, 791, 783 P.2d 575 (1989) (statement of victim of attempted rape made immediately after a policeman pulled the defendant off of her), *cert. denied*, 112 L. Ed. 2d 53 (1990); see generally E. Cleary, *McCormick on Evidence* § 297, at 706 (2d ed. 1972). This is

because as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases. The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought. *Chapin*, 118 Wn.2d at 688.

The firefighters arrived in response to Mr. Martinez's 911 call no more than 30 minutes after Ms. Dixon was shot.¹ This certainly qualified as being spontaneous. See *State v. Anderson*, 44 Wn.App. 644, 649-50, 723 P.2d 464 (1986) (statements by the defendant's wife to the police, indicating that the defendant had held a knife to her chest and had threatened to kill her, about 30 minutes after the incident, were admissible as excited utterances). While Mr. Martinez presented himself to the emergency workers as calm and quiet, this fact does not automatically disqualify his statement as an excited utterance. Since his statement was spontaneous and there was no evidence that Mr. Martinez fabricated his statement, the statement was still admissible as an excited utterance. *Williamson*, 100 Wn.App. at 258 ("[s]pontaneity is crucial.").

¹ While there was a dispute about precisely how long after the shooting the emergency workers arrived, for the sake of this argument Mr. Martinez will use the State's estimate of 30 minutes after the shooting.

In *State v. Brown*, the Supreme Court reviewed the admission of a 911 call as an excited utterance, where the victim testified that she had decided, before making the 911 call, to lie about being abducted when in fact she willingly went to the defendant's apartment. 127 Wn.2d 749, 753, 757-59, 903 P.2d 459 (1995). Because of the evidence of fabrication, the Supreme Court held it was error to admit the 911 call as an excited utterance as it was not made while still under the stress of the startling event. *Brown*, 127 Wn.2d at 759.

By contrast, here there was no evidence that Mr. Martinez fabricated any part of his statement. Although he appeared calm and quiet when he met the firefighters at the door less than one half hour after the incident, the record supported a finding that Mr. Martinez was still under the stress of the event when he made his statement. *Anderson*, 44 Wn.App. at 649-50. The trial court erred in concluding the statement did not qualify as an excited utterance and excluding it.

c. The error in excluding Mr. Martinez's statement was not harmless. An error is not harmless unless it was an "error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in

no way affected the final outcome of the case.” *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947). The error thus requires reversal where there is a reasonable probability the error affected the verdict. *State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991); *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

The evidence in this case was largely circumstantial. The only issue for the jury in light of Mr. Martinez’s spontaneous statements that he had accidentally shot Ms. Dixon was whether the State had proven beyond a reasonable doubt that Mr. Martinez intended to kill Ms. Dixon. Mr. Martinez’s hearsay statement to the first emergency workers who arrived at the residence served as further corroboration of his theory that Ms. Dixon’s death was not the result of an intent to kill but rather a tragic mistake. Since this case turned on the credibility of Mr. Martinez’s claim the incident was an accident, the additional piece of evidence which supported the accident theory was crucial.

“[I]t is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors.” *Young*, 160 Wn.2d at 825 (Sanders, J., dissenting), *quoting State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). The jury could well have

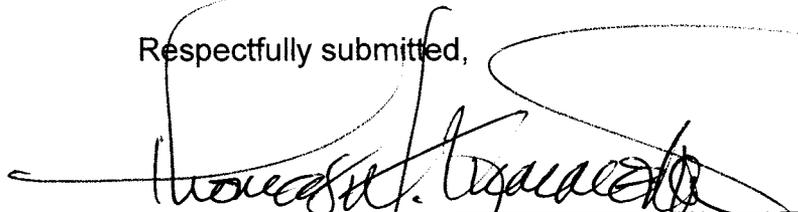
given Mr. Martinez's spontaneous hearsay statement to the firefighters great weight and the outcome of the trial could have been very different. The error in excluding that statement affected the verdict and cannot be found to be harmless. This Court must reverse Mr. Martinez's conviction.

E. CONCLUSION

For the reasons stated Mr. Martinez submits his conviction for second degree murder must be reversed and remanded with instructions to dismiss, with instructions to enter a conviction for manslaughter, or for a new trial.

DATED this 25th day of October 2007.

Respectfully submitted,



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DIVISION II**

STATE OF WASHINGTON,)
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RESPONDENT,)
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v.)
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VICTOR ELROY MARTINEZ,)
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APPELLANT.)

NO. 35844-1-II

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CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 26TH DAY OF OCTOBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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