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DIVISION II
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STATE OF WASHINGTON
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NO. 39235-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TRISTAN F. BRIGHT, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in permitting into evidence the 911 call of Lakesha Edwards.
2. The trial court erred by convicting Tristan Bright of unlawful imprisonment without evidence sufficient to convince a fair-minded fact-finder that all the elements had been proved beyond a reasonable doubt.
3. The trial court erred by convicting Tristan Bright of fourth degree assault without evidence sufficient to convince a fair-minded fact-finder that all the elements had been proved beyond a reasonable doubt.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED BY ALLOWING THE 911 CALL INTO EVIDENCE UNDER THE “EXCITED UTTERANCE” HEARSAY EXCEPTION WHERE THERE WAS NO EVIDENCE OTHER THAN THE STATEMENT ITSELF TO ESTABLISH THAT A “STARTLING EVENT OCCURRED.”
2. THE TRIAL COURT ERRED BY CONVICTING MR. BRIGHT OF UNLAWFUL IMPRISONMENT WITHOUT SUFFICIENT EVIDENCE.
 - A. THE SOLE EVIDENCE, THE 911 CALL, DID NOT PROVIDE FACTS SUFFICIENT TO SUPPORT A CONVICTION FOR UNLAWFUL IMPRISONMENT.

B. THE UNCORROBORATED HEARSAY STATEMENT OF AN ALLEGED VICTIM WHO DOES NOT TESTIFY SHOULD BE HELD INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION BECAUSE THE TRIER OF FACT HAS NO WAY TO EVALUATE THE CREDIBILITY OF THE DECLARANT.

III. STATEMENT OF THE CASE

On August 18, 2008, in the middle of the night, Tristan Bright and his girlfriend, Lakesha Edwards were engaged in an argument. RP2 68, 8-89. Ms. Edwards and Mr. Bright lived together in a house Ms. Edwards rented, along with Ms. Edwards' two children. RP2 87-88, 93. The couple yelled loudly at each other in their downstairs bedroom, but Ms. Edwards' children remained undisturbed asleep upstairs. RP2 89, 91. The couple was arguing over whether Mr. Bright could bring his child to their house for a visit. RP2 88-89. Mr. Bright said this argument was heated, but not physical. RP2 91-92.

At some point during this argument, Ms. Edwards told Mr. Bright she was going to the bathroom, but instead took her car keys and phone and went outside the house and got in her car. RP2 92, 96. She called 911 from the car. Supp. CP, Exh. 1. The State was permitted to play the 911 tape for the court, under the excited utterance exception to hearsay, over defense objection. RP2 15, 24-27, 29-30; RP2 115. The sole evidence of

the crimes charged in this case came from this uncorroborated hearsay statement of Lakesha Edwards, who did not testify at trial.

There is no transcript of the 911 tape in evidence. What follows is counsel's recitation of the substance of that tape:

LE: I need you to come to my house . . . my kids are in the car."

911: "What is your address?"

LE: "6918 E. "I" Street."

911: "What's going on that you need the police?"

LE: "My kids are in the house. He has a knife [unintelligible]."

"He's beating me—he kept me in the house."

911: "Who's beating you?"

LE: "Tristan Bright."

911: "Does anyone have any weapons?"

LE: "He has a knife in his hand."

...

911: "What is your name?"

LE: "Lakesha Edwards."

...

LE: "Please send someone because I don't know what he's gonna do with those knives."

...

911: "He hit you, wouldn't let you out?"

LE: "Yes, he wouldn't let me out—I had to run—I had to run and get my keys. I'm outside in the car."

911: "He hit you, you said?"

LE: "Yes."

911: "Do you need the paramedics?"

LE: "No."

...

911: "How did you get out—through a door or did you crawl through a window?"

LE: "I went to the bathroom and I snuck my keys and I ran . . . I ran and broke my front door."

911: "You broke your front door when you ran out?"

LE: "My screen door."

LE: "That's my mom calling me on the other line."

911: "I need you to stay on the line with me."

LE: "I need my kids, please."

911: "I understand."

911: "Did he make any threats or anything?"

LE: "Yes, he's sayin' he's not scared of no police or anything. Tristan Bright, he's out on bail."

911: "What's he on bail for?"

LE: "I don't know."

911: "You don't know what kind of crime?"

LE: "No. I need my kids."

...

LE: [yelling out] Tristan!

LE: [to 911] "The kids are asleep."

LE: [to Tristan] "I want you to settle down and go back in and go to sleep."

911: "Who are you talking to? Are you talking to Tristan?"

LE: "Yeah."

911: "Does he still have the knife?"

LE: [to Tristan] "No, it's not."

911: "Does he still have the knife?"

LE: "No."

911: "Do you know where it's at?"

LE: "Uh uh."

LE: [to Tristan] "I want you to . . . I'm going to turn off the car. I don't want you hitting me. I will come in if you don't hit me."

LE: [to Tristan] "Well, Tristan, you're scaring me. I don't want it to end up like on my birthday. I don't want . . . If you calm down, I'll go in and you let me go to sleep for two hours. . . . You need to stop . . . I said you need to calm down."

LE: [to 911] "He just ran in the house."

...

LE: “Oh, God, here he is, I hope he doesn’t do anything to my kids. . . . I see the officers right now.”

LE: [to officers] “Please don’t kill him. Please don’t kill him.”

Supp. CP, Exh. 1.

Mr. Bright denied having a knife, denied hitting Ms. Edwards, and denied doing anything to prevent her from leaving the house. RP2 92, 93, 95, 97.

The responding officer had no independent memory of the incident. RP2 70. Over defense objection, he was permitted to read his report into the record, which stated:

Officers arrived on the scene prior to us and detained the subject, who supposedly had the knife. That subject was Tristan Bright. He was unarmed at the time. I located the victim in a vehicle across the street from the location. She was crying hysterically and trying to talk. It took me several minutes to calm her down.

RP2 75. No knife was found. RP2 79. He did not see any injuries on Ms. Edwards—no medical treatment was sought. RP2 80.

Following a bench trial on the above evidence, the trial judge stated:

I am convinced beyond a reasonable doubt that you restrained—Mr. Bright—that you restrained Lakesha against her will on or about the 18th of August, and you accomplished that by physical force and/or the display of a knife, and you did not have any legal right to do that. It occurred in Pierce County, Washington.

...

It also revealed, meaning the tape, that Mr. Bright hit Lakesha Edwards, which would be fourth degree assault. Mr. Bright, in his own testimony, indicated that they had been living together as boyfriend and girlfriend, so it's a domestic issue.

The hitting did not rise to the necessity for paramedics, which, when offered, Lakesha Edwards refused. And she actually said on the tape that she will come in if you don't hit me; you're scaring me; you need to calm down.

So, I am convinced beyond a reasonable doubt that Count I, the unlawful imprisonment, elements have been proven and that the Assault in the Fourth Degree have also been proven.

RP2 117-18. Mr. Bright was convicted of unlawful imprisonment and fourth degree assault and sentenced within the standard range. CP 21-25, 9-20. The notice of appeal was timely filed. CP 5.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY ALLOWING THE 911 CALL INTO EVIDENCE UNDER THE "EXCITED UTTERANCE" HEARSAY EXCEPTION WHERE THERE WAS NO EVIDENCE OTHER THAN THE STATEMENT ITSELF TO ESTABLISH THAT A "STARTLING EVENT OCCURRED."

The State moved for the admission of Lakesha Edwards' 911 call under the hearsay exception for an "excited utterance." RP2 15. The defense opposed the admission of this hearsay evidence, arguing that it did not fall into the excited utterance exception and that its admission violated the confrontation clause because Ms. Edwards was not available to testify. RP2 24-27. The trial court ruled that the statement was not testimonial

and would be permitted into evidence as an “excited utterance.” RP2 29-30.

Hearsay is not admissible at trial unless it falls within one of several exceptions. ER 802; ER 803; ER 804. A trial court’s decision to admit hearsay statements is reviewed for abuse of discretion. *State v. Young*, 160 Wn.2d 799, 805, 161 P.3d 967 (2007); *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999).

Under ER 803(a)(2), a statement is not excluded as hearsay if it is an excited utterance “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” The 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.” *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 *John H. Wigmore, Evidence* § 1747, at 195 (1976)). The crucial question is whether the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. *State v. Sellers*, 39 Wn. App. 799, 804, 695 P.2d 1014 (1985) (citing *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

The proponent of excited utterance evidence, in this case the State, must satisfy three “closely connected requirements” that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement from the startling event or condition, and (3) the statement related to the startling event or condition. *Young*, 160 Wn.2d at 806 (quoting *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001); citing *Chapin*, 118 Wn.2d at 686).

Words alone, the content of the declarant’s statement, can establish only the third element of the excited utterance test—that the utterance relates to the event causing the declarant’s excitement. The first and second elements (that a startling event or condition occurred and that the declarant made the statement while under the stress thereof) must therefore be established by evidence extrinsic to the declarant’s bare words. Extrinsic evidence can include circumstantial evidence, such as the declarant’s behavior, appearance, and condition, appraisals of the declarant by others, and the circumstances under which the statement is made.

Young, 160 Wn.2d at 809-10 (emphasis added).

Spontaneity is the key to the requirement that the statements be made while under the stress of excitement caused by the startling event. *State v. Briscoeray*, 95 Wn. App. 167, 173, 974 P.2d 912 (1999) (citing *Chapin*, 118 Wn.2d at 688). In determining spontaneity, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an

opportunity to reflect on the event and fabricate a story about it.

Briscoeray, 95 Wn. App. at 173-74 (citing *Chapin*, 118 Wn.2d at 688).

In this case, there was no corroborating evidence of the “startling event.” The only evidence that Ms. Edwards had a startling event was her own hearsay statement, which is insufficient. *Young*, 160 Wn.2d at 809-10. If, as Mr. Bright testified, Ms. Edwards and Mr. Bright had only had a verbal argument, then this would not support admission under the hearsay exception because being mad at someone is hardly a “startling event” and it certainly does not preclude lying.

Without corroborating evidence of a “startling event,” Ms. Edwards’ statement lacks the necessary indicia of reliability. Therefore, the trial court abused its discretion by permitting the 911 call into evidence as an excited utterance. This was the sole evidence against Mr. Bright and therefore this error requires the reversal of the convictions against him.

ISSUE 2: THE TRIAL COURT ERRED BY CONVICTING MR. BRIGHT OF UNLAWFUL IMPRISONMENT WITHOUT SUFFICIENT EVIDENCE.

1. The sole evidence, the 911 call, did not provide facts sufficient to support a conviction for unlawful imprisonment.

A person commits unlawful imprisonment if “he knowingly restrains another person.” RCW 9A.40.040(1). To restrain someone is to restrict their movements “without consent and without legal authority in a manner which interferes substantially with [her] liberty.” RCW

9A.40.010(1). A substantial interference is a “‘real’ or ‘material’ interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict.” *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff’d*, 92 Wn.2d 357, 597 P.2d 892 (1979). The presence of a means of escape may help to defeat a prosecution for unlawful imprisonment unless “the known means of escape . . . present[s] a danger or more than a mere inconvenience.” *State v. Kinchen*, 92 Wn. App. 442, 452 n. 16, 963 P.2d 928 (1998).

In this case, the sole evidence was the tape of Lakesha Edwards’ 911 call. Assuming for purposes of this argument that this tape was properly admitted into evidence, Ms. Edwards’ statements do not provide facts sufficient to convict Mr. Bright of unlawful imprisonment. In the 911 call, Ms. Edwards’ only relevant statements are:

...

[LE] “My kids are in the house. He has a knife [unintelligible].”

“He’s beating me—he kept me in the house.”

911: “Who’s beating you?”

LE: “Tristan Bright.”

911: “Does anyone have any weapons?”

LE: “He has a knife in his hand.”

...

911: "He hit you, wouldn't let you out?"

LE: "Yes, he wouldn't let me out—I had to run—I had to run and get my keys. I'm outside in the car."

911: "He hit you, you said?"

LE: "Yes."

911: "Do you need the paramedics?"

LE: "No."

...

911: "How did you get out—through a door or did you crawl through a window?"

LE: "I went to the bathroom and I snuck my keys and I ran . . . I ran and broke my front door."

911: "You broke your front door when you ran out?"

LE: "My screen door."

...

911: "Did he make any threats or anything?"

LE: "Yes, he's sayin' he's not scared of no police or anything. Tristan Bright, he's out on bail."

...

LE: [to Tristan] "I want you to . . . I'm going to turn off the car. I don't want you hitting me. I will come in if you don't hit me."

LE: [to Tristan] "Well, Tristan, you're scaring me. I don't want it to end up like on my birthday. I don't want . . . If you calm down, I'll go in and you let me go to sleep for two hours. . . . You need to stop . . . I said you need to calm down."

In essence, the facts that can be gleaned from Ms. Edwards are vague in regards to the unlawful imprisonment charge. On one hand, she says, “he kept me in the house” and “he wouldn’t let me out.” But, then she says that she was able to get her keys, and, apparently, her cell phone, and exit her house through the front door. She never says how Mr. Bright prevented her from leaving—it is possible he simply asked her not to leave in the middle of their argument—and there are no details. Although Ms. Edwards says Mr. Bright had a knife at some point, she never says that he threatened her with it or used it to prevent her from leaving, or even that she saw the knife that night. When asked if Mr. Bright threatened her, Ms. Edwards only says, “He’s sayin’ he’s not scared of no police or anything.” She never relates any threats against her. This is simply insufficient evidence to support a conviction for unlawful imprisonment.

In *State v. Washington*, 135 Wn. App. 42, 143 P.3d 606 (2006), the court found the evidence sufficient to support an unlawful imprisonment charge where witnesses observed the argument between the victim and the defendant, reported the incident to the victim’s mother, who called the police. 135 Wn. App. at 46. When police arrived, they found the victim standing outside a disabled vehicle in the driveway, visibly upset, and with visible injury. 135 Wn. App. at 46. The victim told police that the defendant had ordered her into his car, and, when she attempted to get out,

“grabbed her clothing, pulled her into the vehicle, and punched her in the stomach, causing her to buckle over in pain and eventually vomit.” 135 Wn. App. at 46. The defendant then closed the door, got on top of the victim, and squeezed her neck—marks were observed on her neck. 135 Wn. App. at 46. The defendant then told the victim he would “really fuck her up” because she had “disrespected” him—and hit her in the face. 135 Wn. App. at 46. At this point, the victim’s friends called the police. 135 Wn. App. at 46. According to the court, “Police also obtained several eyewitness statements generally consistent with [the victim’s] account.” 135 Wn. App. at 47. The court found that this evidence was sufficient to show that the victim had no means of escape and was therefore restrained and that the restraint was separate from and not incidental to the assault. 135 Wn. App. at 50-51.

By contrast to *Washington*, in this case there are no facts from which the court could conclude that Ms. Edwards had no means of escape—in fact Ms. Edwards did escape without any outside assistance. Furthermore, there are no facts from which a court could conclude that Ms. Edwards was actually “restrained” within the meaning of the statute because the statement made to 911 contains no actual description of what happened. Although Ms. Edwards says that Mr. Bright “has a knife,” this might be a reference to a pocket knife she knows he carries—there is no

detail from which a court could find that Mr. Bright was even armed at the time of the alleged crime, much less that he used it to restrain her.

Furthermore, unlike in *Washington*, in this case there is no testimony from the victim, no corroborating witness statements, no corroborating evidence of any kind.

It was the State's burden to prove unlawful imprisonment and this hearsay statement does not provide proof sufficient to convince a fair-minded fact finder that the elements are proved beyond a reasonable doubt. Therefore, Mr. Bright's conviction must be reversed.

2. The uncorroborated hearsay statement of an alleged victim who does not testify should be held insufficient as a matter of law to sustain a conviction because the trier of fact has no way to evaluate the credibility of the declarant.

Mr. Bright testified in his own defense that he and Ms. Edwards had an argument, but that he never hit her, threatened her or restrained her. RP2 88-89, 92, 93, 95, 97. The only evidence against him was Ms. Edwards' uncorroborated hearsay statement to the 911 operator.

No knife was found. Ms. Edwards did not have any visible injury and was not treated for injury. There is absolutely no testimony corroborating the details of Ms. Edwards' statement—even to say if the screen door was damaged, as she said.

This case is unique in that the sole evidence is the uncorroborated hearsay statement of the alleged victim. The defendant disputed her account and that puts her credibility at issue. Yet the court had no way to evaluate Ms. Edwards' credibility. In such a circumstance, the hearsay statement should be held to be insufficient as a matter of law to support the conviction without some corroboration.

An uncorroborated hearsay statement is insufficient to support a conviction if that statement is the defendant's confession. *State v. Bean*, 89 Wn.2d 467, 474, 572 P.2d 1102 (1978); *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). A conviction may not rest on the uncorroborated testimony of a co-defendant without a limiting instruction to the jury that it is less reliable.¹ *State v. Claassen*, 131 Wn. 598, 230 P. 825 (1924); *State v. Carothers*, 84 Wn.2d 256, 525 P.2d 731 (1974). An uncorroborated hearsay statement is insufficient to support a conviction if that statement is a child victim's statement. *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). An uncorroborated hearsay statement is insufficient to support a conviction here as well. Therefore, Mr. Bright's two convictions should be reversed.

¹ Of course, an uncorroborated co-defendant's hearsay statement could not be admitted at all where the declarant was unavailable because they have been held to be inherently unreliable and a violation of the confrontation clause. *State v. Ng*, 104 Wn.2d 763, 772, 713 P.2d 63 (1985).

V. CONCLUSION

Mr. Bright's convictions for unlawful imprisonment and fourth degree assault must be reversed because the uncorroborated hearsay statement on which they are based was erroneously admitted and is insufficient, in and of itself, to support the convictions.

DATED: November 20, 2009

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