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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it ruled that a woman's statements contained on a recording of a 911 call were admissible as excited utterances.
2. The trial court erred when it ruled that a man's statements contained on a recording of a 911 call recording were admissible as statement against interest, and that a woman's statements on that same recording were admissible as res gestae.
3. The trial court erred when it admitted the tape recording of a 911 call without any evidence authenticating or identifying the voices on the recording.
4. The imposition of a deadly weapon sentence enhancement on Appellant's second degree assault conviction violates double jeopardy.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the record does not corroborate the timing of the alleged startling event, did the trial court err when it found that the 911 call recording contained excited utterances?  
(Assignment of Error 1)
2. Did the record establish that the woman declarant heard on

the 911 call recording was under the stress and excitement of a startling event? (Assignment of Error 1)

3. Did the record establish that the man's statements contained on the 911 call recording were statement against interest? (Assignment of Error 2)
4. Did the trial court improperly admit the 911 call recording when there was no evidence or testimony that authenticated or identified the voices heard on the recording? (Assignment of Error 3)
5. Do double jeopardy protections and the post-Blakely line of cases apply to deadly weapon sentence enhancements? (Assignment of Error 4)
6. Where the crime of assault is elevated to second degree due to the use of a knife, does the imposition of a deadly weapon sentence enhancement based on the use of the same knife violate double jeopardy? (Assignment of Error 4)

### **III. STATEMENT OF THE CASE**

Around 3:00AM on the morning of November 1, 2008, 911 dispatch received a call, which was traced to 5110 Chicago Avenue, Apartment 34, in Lakewood. (RP 67, 69, 103) The caller did not speak directly to the dispatch operator, but the voices of an

unidentified man and woman could be heard on the line. (Exh. 1) The woman referred to the man as Frederick, and was heard saying things like: “stop hitting me in the head;” and “please don’t stab me.” (Exh. 1) The man referred to the woman as Lora, and could be heard saying things like: “I love you too much to let you go.” (Exh. 1) But there were no other sounds of a struggle or a physical altercation. (Exh. 1)

Lakewood Police Officers Brian Wurts and Ryan Moody responded to the address. (RP 69, 104) They saw a man and woman standing outside of the apartment door. (RP 70, 105) Officer Wurts took the woman aside, and she identified herself as Lora Foster. (RP 71-72) As they talked, Wurts noticed swelling above Lora’s right temple, redness on her neck, and a laceration on her leg.<sup>1</sup> (RP 73) Wurts testified that Lora was initially calm and quiet, but later became upset and started crying. (RP 75)

Wurts and Lora went into the apartment so that Lora could sit down. (RP 73-74) While he was inside, Wurts noticed that Lora was wearing only one earring, and he saw the matching earring lying on the floor. (RP 74) When Officer Moody entered the

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<sup>1</sup> To avoid confusion, Lora Foster and Frederick Foster will be referred to by their first names in this brief.

apartment, he noticed signs of a struggle and found a knife on the bedroom floor. (RP 105) The officers did not find any other people present at the apartment. (RP 105) Moody arrested the man, later identified as Frederick Steven Foster. (RP 113-14)

The State charged Frederick with one count of second degree assault with a deadly weapon (a knife) (RCW 9A.36.021(1)(c)), and one count of fourth degree assault (RCW 9A.36.041). (CP 14-15) The State also alleged that Frederick was armed with a deadly weapon (the knife) when he committed the second degree assault, and that the fourth degree assault was a domestic violence incident. (CP 14-15)

Before trial, Frederick objected to the admissibility of the recording of the 911 call. (RP 11-14, 43) The trial court ruled that the recording was admissible under the excited utterance and statement against interest exceptions to the hearsay rule. (RP 26-27) Lora did not testify at trial because she had left the country. (RP 8)

The jury convicted Frederick on both assault counts, found that he was armed with a deadly weapon when he committed the second degree assault, and that the fourth degree assault was a domestic violence offense. (CP 53-56; RP 157-58) The trial court

sentenced Frederick within his standard range to three months of confinement, followed by 12 months for the deadly weapon sentence enhancement. (CP 60, 63, 71-75; RP 168) This appeal timely follows. (CP 76)

#### IV. ARGUMENT & AUTHORITIES

A. The trial court abused its discretion when it admitted the recording of the 911 call.

1 *The record does not support the application of the excited utterance or statement against interest hearsay exceptions in this case.*

Hearsay is not admissible at trial unless it falls within one of several exceptions. ER 802; ER 803; ER 804. Over defense objection in this case, the trial court admitted the recording of the 911 call under two exceptions to the hearsay rule, finding that: (1) the woman's statements on the recording were excited utterances; and (2) the man's statements were against interest, and the woman's statements were res gestae of the event that would help the jury understand the man's statements.<sup>2</sup> (RP 11-14, 26-27, 43)

A trial court's decision to admit hearsay statements is

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<sup>2</sup> Defense counsel conceded that the recording did not contain testimonial statements, and therefore did not implicate the confrontation clause and Crawford v. Washington, 124 S. Ct. 1354, 1359, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). (RP 10, 18) Counsel also stipulated to the recording's foundational requirements. (RP 43)

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). The trial court abused its discretion in this case when it admitted the recording under either exception because the underlying facts required for admission are not in the record.

First, 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 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).

The key to the requirement that the statements be made while under the stress of excitement caused by the startling event is spontaneity. 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, the State's evidence consisted of the officers' testimony that they saw bruising and swelling on Lora's face and a laceration on her leg, and that they saw a kitchen knife on the floor of the bedroom. (RP 73, 105, 106) This evidence may be sufficient to corroborate that the startling event occurred (for the purposes of admission), but it does not establish **when** the event occurred in relation to the utterances.

The State presented no extrinsic evidence showing that the event was actually occurring at the time the 911 call recording was made. There was no medical testimony establishing the approximate age of Lora's injuries, no additional eye- or ear-witnesses who could establish a timeline, and there were no corroborating sounds of a struggle or altercation on the recording. (Exh. 1; RP 12) Without any independent evidence establishing that the event was actually occurring at the time the statements were made, it is impossible to determine whether the statements were in fact spontaneous or whether the declarant was speaking while under the stress of the event.

Second, ER 804(b)(3), provides that in a criminal case a statement against the declarant's interest is "not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." For purposes of ER 804(b)(3), courts assess the adequacy of corroborating circumstances by evaluating nine factors. McDonald, 138 Wn.2d at 694. Five factors focus on the declarant (apparent motive to lie, character, personal knowledge of other crime participants, likelihood of faulty recollection, and likelihood of misrepresentation). Three factors focus on the context of the statement (spontaneity, timing, and relationship between declarant and witness, and presence of more than one witness). Young, 160 Wn.2d at 811.

The State made no effort to establish any of the nine factors in this case, and the trial court did not refer to any of the factors when it ruled that the recording was admissible under this exception. (RP 26-27) And a review of the record shows that there are simply no "corroborating circumstances" that "clearly indicate the trustworthiness" of the man's recorded statements. The statements should not have been admitted under this exception.

But even if the man's statements were admissible under the statement against interest exception, the woman's statements

should not have been admitted as res gestae. Res gestae is the “same transaction” exception to ER 404(b), in which evidence of other crimes, wrongs or bad acts committed by a person is admissible “[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.” State v. Powell, 126 Wash.2d 244, 263, 893 P.2d 615 (1995) (quoting State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980)). The woman’s statements are not other crimes, wrongs or acts that would have normally been excluded under ER 404(b), but rather verbal out-of-court statements that are subject to the hearsay rules.<sup>3</sup> The res gestae rule simply does not apply to the woman’s statements on the 911 call recording, and they should not have been admitted under this ER 404(b) exception.

*2 The trial court abused its discretion when it admitted the 911 call recording without any evidence authenticating or identifying the voices on the recording.*

Frederick also argued below that the State had not presented any evidence to authenticate that the voices on the 911

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<sup>3</sup> ER 404(b) states: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

recording were actually Lora and Frederick. (RP 13-14)

Authentication is a threshold requirement designed to assure that evidence is what it purports to be. State v. Williams, 136 Wn. App. 486, 499-500, 150 P.3d 111 (2007) (citing 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 900.2, at 175; § 901.2, at 181-82 (4th ed.1999)). The State satisfies ER 901, which requires that documents be authenticated or identified, if it introduces sufficient proof to permit a reasonable juror to find in favor of authenticity or identification. State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984).

ER 901 applies to sound recordings. ER 901(a), (b)(5). Accordingly, if the proffered evidence “records human voices, a foundational witness (or someone else with the requisite knowledge) usually must identify those voices.” State v. Jackson, 113 Wn. App. 762, 767, 54 P.3 739 (2002); see also ER 901(b)(5). In this case, the State failed to call a single witness to identify that the voices on the tape were those of Lora and Frederick.

A party can also authenticate a voice recording by presenting other evidence sufficient to support basic findings of identification and authentication. Jackson, 113 Wn. App. at 769. For example, in Williams, the trial court admitted a recording of

victim Makeba Otis' 911 call following a break-in at her home. 136 Wn. App. at 491. On appeal, Williams argued that the recording was not properly authenticated because the State did not offer the testimony of anyone who participated in the call. 136 Wn. App. at 499. The appellate court disagreed, noting:

Here, the trial court had both spoken to Otis in court and listened to the recording of the 911 call before it made the ruling on the recording's authenticity. The trial court was, therefore, in the best position to determine if Otis' voice matched that on the recording and to require any additional necessary authenticating evidence. Other factors, including the recital of Otis' address by the 911 caller, the fact that Otis admitted calling 911 when questioned by the court, and the fact that the events recounted by the caller were consistent with those testified to by [second victim Leslie] Johnson, all support the trial court's decision as to authenticity.

136 Wn. App. at 501.

Unlike Williams, there is no evidence in this case that the trial court ever heard Lora's voice and therefore the court could not compare it to the woman's voice on the 911 recording. The trial court never indicated that it believed the man's voice matched Frederick's voice. Unlike Williams, there was no evidence that Lora admitted to calling 911. And unlike Williams, there were no other witnesses to corroborate the events articulated by the woman on the 911 call recording.

Because there was neither direct testimony authenticating the voices on the tape, nor any other evidence sufficient to support a basic finding of identification, the recording was not properly authenticated, and should not have been admitted.

3. *The erroneous admission of the 911 call recording was not harmless.*

The trial court's error in admitting the 911 call recording was not harmless, because it was the only evidence presented by the State to indicate that Lora's injuries were caused by an assault perpetrated by Frederick. In fact, the State informed the trial court that it could not proceed with prosecution without the recording as evidence. (RP 4) Accordingly, Frederick's convictions must be reversed.

B. The imposition of a deadly weapon enhancement for second degree assault with a deadly weapon violated the constitutional prohibition on double jeopardy.

1. *Double jeopardy analysis, and the post-Blakely line of cases, also apply to deadly weapon sentence enhancements.*

Frederick was convicted of and sentenced for second degree assault with a deadly weapon, the knife, and received a deadly weapon sentence enhancement under RCW 9.94A.602, for the use of that same knife. (RP 157-58, 168; CP 63) In the past,

Washington courts have rejected double jeopardy challenges to convictions of both a substantive crime that have the use of a deadly weapon as an element, as well as a deadly weapon enhancement for the same weapon.<sup>4</sup> Those challenges, however, have always been rejected on the ground that the underlying, substantive statute was considered a crime containing the element of unlawful use of a weapon, while the deadly weapon sentence enhancement was not an element of a crime, but merely a fact that enhanced an offender's sentence.<sup>5</sup>

That logic does not survive Apprendi, Blakely, and Recuenco.<sup>6</sup> In those cases, the courts ruled that any fact that increases the maximum penalty that may be imposed upon a criminal defendant is akin to an element of the crime, and must be proved to a jury beyond a reasonable doubt. Because the deadly weapon enhancement is considered the "functional equivalent" of an element, it is now clear that RCW 9.94A.602 (codifying the enhancement) increases the maximum sentence over the statutory

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<sup>4</sup> *E.g.*, State v. Caldwell, 47 Wn. App. 317, 320, 734 P.2d 542 (1987) (robbery); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605 (1986) (rape).

<sup>5</sup> *E.g.*, State v. Claborn, 95 Wn.2d 629, 628 P.2d 467 (1981); State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003).

<sup>6</sup> Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); State v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

maximum.<sup>7</sup> Prior decisions holding that there is no double jeopardy violation because there is no duplication of elements between the underlying crime and the weapon enhancement must be reconsidered.<sup>8</sup>

Moreover, in Frederick's case, the fact underlying the sentence enhancement is not just the functional equivalent of an element of a crime. It is an actual, separately described, statutorily defined criminal act, that has always been submitted to a jury under RCW 9.94A.602, even pre-Blakely. Both the assault statute, RCW 9A.36.021, and the deadly weapon statute penalize the use of what in Frederick's case was exactly the same thing—the kitchen knife.

The deadly weapon enhancement is defined in its own statute, just like the crime of assault itself. The deadly weapon enhancement is submitted to the jury at the time of trial, just like the crime of assault itself, and the deadly weapon enhancement must be imposed at sentencing, just like punishment for the crime of

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<sup>7</sup> See State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004) (citing with approval portions of Appendi and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), containing this “functional equivalent” language and analysis).

<sup>8</sup> A similar argument was rejected by Division 1 in State v. Nguyen, 134 Wn. App. 863, 142 P.3d 1117 (2006), and by this Court in the unpublished case of State v. Aguirre, 146 Wn. App. 1048, 2008 WL 4062820 (2008). However, our State Supreme Court accepted review of this issue in Aguirre, although it has not issued its opinion as of the writing of this brief. State v. Aguirre, 165 Wn.2d 1036, 205 P.3d 131 (2009).

assault itself. In other words, the deadly weapon enhancement is not the same sort of enhancement that has been exempted from double jeopardy enhancements in prior Washington cases.

In sum, the fact of the use of a deadly weapon in this case is the functional equivalent of an element of a separate and additional crime, and is treated like an element of a separate and additional crime. Therefore, a double jeopardy analysis should be applied.

*2. The imposition of punishment for both assault with a deadly weapon and use of a deadly weapon violates double jeopardy.*

The double jeopardy clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

Washington’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Wash. Const. art. 1, § 9. This Court gives Article 1, section 9 the same interpretation as the United States Supreme Court gives to the Fifth Amendment. State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

The double jeopardy clause protects against (1) a second

prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

To determine if separate prosecutions violate double jeopardy prohibitions, the courts utilize the Blockburger, or “same elements” test. United States v. Dixon, 509 U.S. 688, 697, 113 S. Ct. 2349, 125 L. Ed. 2d 556 (1993).

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Two offenses are the same offense for purposes of double jeopardy analysis when one offense is necessarily included within the other and, in the prosecution for the greater offense, the defendant could have been convicted of the lesser. State v. Roybal, 82 Wn.2d 577, 582, 512 P.2d 718 (1973). Thus, conviction or acquittal on a lesser included offense bars the government from prosecuting the defendant for the greater offense. Green v. U.S., 355 U.S. 184, 190-91, 78 S. Ct. 221, 2 L. Ed. 2d 199

(1957). Likewise, while the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. State v. Freeman, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

Here, in count one, Frederick was convicted of second degree assault while armed with a deadly weapon. (CP 1, 54; RP 157-58) By special verdict, the jury again found Frederick was “armed with a deadly weapon” when he committed the assault. (CP 54; RP 157-58). The deadly weapon in both charges was the same—the kitchen knife.

RCW 9.94A.533, the “Hard Time for Armed Crime” initiative, shows the voters’ intent to create exemptions for crimes where possessing or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm. RCW 9.94A.510(3)(f). However, it appears that the voters were unaware of the similar problem of redundant punishment created when a deadly weapon enhancement is added to a crime where the punishment has already been increased due to the necessary element of use of a deadly weapon. There is no language showing an intent to punish twice crimes committed with a deadly weapon

by adding a deadly weapon sentence enhancement. This is a change from prior law, where the legislative intent to attach two punishments was clear in the language itself. See State v. Adlington-Kelly, 95 Wn.2d 917, 924, 631 P.2d 954 (1981).

The “Hard Time for Armed Crime” initiative was passed long before Apprendi and Blakely reshaped the sentencing landscape. Thus, state law did not view additional findings triggering an increased sentence as implicating the rights to a jury trial, due process of law, or double jeopardy. *Cf.*, Former RCW 9.94A.535.

Because under Blakely and Apprendi factual findings that support sentencing enhancements constitute elements of a crime, they also constitute a new, greater offense for purposes of double jeopardy. There is no principled reason to distinguish between the statutory elements of the crime—which in this case included possession of a deadly weapon—and the statutory deadly weapon enhancement—which again punishes for the same finding. See Sattazahn v. Pennsylvania, 537 U.S. 101, 111-12, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) (“The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence not only delimits the boundaries of . . . important constitutional rights, like the Sixth Amendment right to trial by jury,

but also provides the foundation for our entire double jeopardy jurisprudence.”)

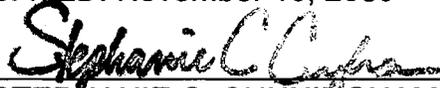
Frederick’s assault charge was elevated to a higher degree by the element of being armed with a deadly weapon while committing the crime. RCW 9A.36.021(1)(c). Therefore, again elevating the crime for the same underlying act—use of the same deadly weapon—violates double jeopardy. This court should reverse and remand with the direction that the deadly weapon enhancement be vacated. See State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007).

#### **V. CONCLUSION**

The trial court abused its discretion when it admitted the recording of the 911 call because there was no independent evidence that established when the stressful event occurred, or that the declarant made the statements while under the stress of the event; no evidence in the record to establish that the statements met the requirements of a statement against interest; and no evidence to authenticate or identify the voices on the recording as belonging to Lora and Frederick. The trial court should not have admitted the 911 call recording, and Frederick’s conviction should be reversed. Additionally, the imposition of punishment for both

assault with a deadly weapon and the use of that same deadly weapon violates Frederick's double jeopardy protection, and the deadly weapon sentence enhancement should be stricken.

DATED: November 16, 2009



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I certify that on 11/16/2009, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Frederick S. Foster #331561, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.



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