

78238-5

NO. 32112-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES OHLSON,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
MID-52  
STATE OF WASHINGTON  
BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 04-1-00628-5

BRIEF OF RESPONDENT

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## I. COUNTERSTATEMENT OF THE ISSUES

1. Was admission under the excited utterance exception of D.L.'s statements to Officer Gray at the scene of the crime an abuse of discretion where:

a. Ohlson's driving towards D.L. at a high rate of speed was startling event;

b. The statements were made while D.L. was still upset and "shaken up;" and

c. No prejudice resulted from the admission of these statements?

2. Was Ohlson's Sixth Amendment right to confrontation violated by the admission of D.L.'s statements to Officer Gray where

a. No objection was made on confrontation clause grounds;

b. The statements were non-testimonial; and

c. Error, if any, was harmless?

3. Was there sufficient evidence that Ohlson put D.L. in reasonable apprehension of bodily harm and that Ohlson intended to cause that apprehension where:

a. D.L. said "look out" and jumped out of the way of

Ohlson's speeding car; and

b. Ohlson admitted his intention was to "scare" L.F. and D.L.?

4. Was Ohlson's Sixth Amendment right to a fair and impartial trial violated by reference to the fact that he was in jail at the time of trial?

5. Did the prosecutor engage in misconduct by asking a single question which referenced the fact that Ohlson was in jail at the time of trial?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

James Ohlson was charged by amended information filed in Kitsap County Superior Court with one count of malicious harassment and two counts of assault in the second degree. CP 1-3.

After trial, the jury unanimously found Ohlson guilty of two counts of assault in the second degree. CP 23. The jury acquitted Ohlson of malicious harassment. CP 23.

### **B. FACTS**

On April 16, 2004, L.F. and D.F., both age 17, were waiting to be picked up by their mothers near Lions Field in a residential area on Lebo Boulevard. RP 62-63, 65, 96. As they were waiting Ohlson drove by and yelled "'F you, niggers'" and "flipp[ed] off" L.F. and D.L. RP 63-64. After

passing L.F. and D.F., Ohlson turned around and sped past L.F. and D.L. again, continuing to yell “F you, niggers.” RP 65. Ohlson did this about four times and came within about five feet of L.F. and D.L. RP 84-85. He then left the area. RP 66.

After several minutes, Ohlson returned and tried to run over L.F. and D.L. with his car. RP 66. L.F. and D.L. were on the sidewalk, D.L. with his back against a pole. RP 66, 68. As Ohlson got near, he “cut” across a wide shoulder and up onto the sidewalk at about 45 miles per hour. RP 67, 113-114. L.F. and D.L. had to jump out of the way to avoid being hit by Ohlson’s car. RP 66. Ohlson then drove his car off the sidewalk. RP 66. Had Ohlson continued on the sidewalk he would have hit the telephone pole D.L. was leaning on. RP 66, 68.

As Ohlson approached this last time, L.F. was facing the opposite direction, and D.L. was the first to see Ohlson. RP 68. D.L. said “look out” to L.F. RP 68. L.F. then turned and saw Ohlson’s car very close to them. RP 68. This caused L.F. to be scared because she believed Ohlson was trying to run her over with his car. RP 68-69. L.F. called 911. RP 69.

Bremerton Police Officer Crystal Gray responded to the 911 call and was at the scene within five minutes of the call. RP 90. Officer Gray contacted L.F. and D.L. and noted that “[t]hey were pretty upset. . . . [L.F.]

was shaking . . . they were pretty shaken up.” RP 91. L.F. and D.L. told Officer Gray that they felt Ohlson had tried to hit them with his car and that they had to jump out of the way to avoid being hit. RP 92.

Bremerton police officers Daniel Fatt and Mike Davis contacted Ohlson at his home after the incident. RP 80-81. Ohlson told Officer Davis that he had had a problem with two people earlier in the day in the area where L.F. and D.L. were. RP 83. Ohlson admitted that he called D.L. “a nigger” several times. RP 84. Additionally, he admitted he was driving “[k]ind of recklessly to scare them.” RP 84. After driving past L.F. and D.L. the first several times, Ohlson left the area. RP 85. Ohlson told Officer Davis that when he returned to the area where L.F. and D.L. were, he began the reckless driving again. RP 85-86. He told Officer Davis that his intention was “to scare them.” RP 86.

As Ohlson was being taken to jail, he asked Officer Daniel Fatt if he was being arrested for “a felony?” RP 77. When Officer Fatt told him he was, Ohlson responded, “[s]o I got in trouble for what I said?” RP 77. Officer Fatt told Ohlson that was correct. RP 77. Ohlson then said “[w]ell, I should have made it worth my while. I should have beat them up.” RP 77. After Ohlson was taken out of the police car he reiterated “I should have beat them up.” RP 77.

### III. ARGUMENT

#### A. D.L.'S STATEMENTS TO OFFICER GRAY AT THE SCENE OF THE CRIME WITHIN MINUTES OF NEARLY BEING HIT BY OHLSON'S CAR WERE EXCITED UTTERANCES AND PROPERLY ADMITTED.

Ohlson argues that there is no evidence demonstrating that D.L. perceived a startling event or that he was under the influence of the startling event at the time he made statements to Officer Gray. This claim is without merit because the statements were made within minutes of nearly being hit by a car and while D.L. was still “shook up.”

The trial court's decision to admit a statement as an excited utterance is reviewed for an abuse of discretion.<sup>1</sup> Thus, the ruling of the trial court will not be disturbed unless a reviewing court believes that no reasonable judge would have ruled in the same manner.<sup>2</sup> Prior to the admission of an excited utterance, the trial court must find by a preponderance of the evidence that the statement was made while the declarant was still under the influence of the startling event.<sup>3</sup>

Errors in admitting evidence will only be reversed where prejudice to

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<sup>1</sup> *State v. Davis*, 141 Wn.2d 798, 841, 10 P.3d 977 (2000).

<sup>2</sup> *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004).

<sup>3</sup> *State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000).

the defendant results.<sup>4</sup> “Where the error is from violation of an evidentiary rule rather than a constitutional mandate, . . . [courts] apply ‘the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’”<sup>5</sup>

Hearsay is not admissible unless permitted by evidentiary rule, court rule or statute.<sup>6</sup> “Hearsay” is an out of court statement offered for the truth of the matter asserted.<sup>7</sup> “Excited utterances,” while hearsay, are admissible.<sup>8</sup> Unavailability of the declarant is not a prerequisite to admission of an excited utterance.<sup>9</sup>

An excited utterance is a “spontaneous statement[] made while under the influence of external physical shock before the declarant has time to calm down enough to make a calculated statement based on self interest.”<sup>10</sup> For a statement to qualify as an excited utterance, the following must be shown: “(1) a startling event or condition occurred, (2) the statement was made while

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<sup>4</sup> *Thomas*, 150 Wn.2d at 871.

<sup>5</sup> *Thomas*, 150 Wn.2d at 871 *quoting State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

<sup>6</sup> ER 802.

<sup>7</sup> ER 801(c).

<sup>8</sup> ER 803(a)(2).

<sup>9</sup> ER 803(a)(2).

<sup>10</sup> *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

the declarant was under the stress of excitement caused by the event or condition, and (3) the statement relates to the event or condition.”<sup>11</sup> This is a factual determination.<sup>12</sup>

When evaluating the first requirement, the focus is on the effect the event had upon the declarant.<sup>13</sup> The “relates” requirement is met by “[a]ny utterance that may reasonably be viewed as having been about, connected with, or elicited by the startling event.”<sup>14</sup>

“The key to the second element is spontaneity.”<sup>15</sup> Washington courts have repeatedly held that “[t]he crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.”<sup>16</sup> While spontaneity is critical, “[t]he statement need not be completely spontaneous and may be in response to a question.”<sup>17</sup>

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<sup>11</sup> *Davis*, 141 Wn.2d at 843.

<sup>12</sup> *State v. Williamson*, 100 Wn. App. at 258.

<sup>13</sup> *State v. Chapin*, 118 Wn.2d 681, 687, 826 P.2d 194 (1992).

<sup>14</sup> *Chapin*, 118 Wn.2d at 688.

<sup>15</sup> *Chapin*, 118 Wn.2d at 688.

<sup>16</sup> *State v. Downey*, 27 Wn. App. 857, 861, 620 P.2d 539 (1980) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 405, 457 P.2d 194 (1969)); see also *State v. Palomo*, 113 Wn.2d 789, 796, 783 P.2d 575 (1989); *State v. Majors*, 82 Wn. App. 843, 848, 919 P.2d 1258 (1996); *State v. Davis*, 141 Wn.2d 798, 843, 10 P.3d 977 (2000); *State v. Ramirez*, 109 Wn. App. 749, 758, 37 P.3d 343 (2002); *State v. Davis*, 116 Wn. App. 81, 86, 64 P.3d 661 (2003); and *State v. Thomas*, 150 Wn.2d 821, 853-54, 83 P.3d 970 (2004).

<sup>17</sup> *State v. Williamson*, 100 Wn. App. 248, 258; accord, *State v. Downey*, 27 Wn. App. 857,

The ability to provide a detailed statement about the event weighs in favor of a finding that the statement is the result of reflection, not spontaneity.<sup>18</sup> Courts will also consider the time period between the startling event and the statement.<sup>19</sup> “The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought.”<sup>20</sup> Additionally, a court may consider other factors surrounding the event and statement.<sup>21</sup>

Even if a statement is admissible as an excited utterance, it must also meet the constitutional requirements of the Confrontation Clause.<sup>22</sup>

In the case at bar there is no dispute that the statements made relate to Ohlson’s driving of his car onto the curb towards L.F. and D.L. Thus, the third requirement is met. The issues are whether this act was a startling event to D.L. and whether the statements were made while L.F. and D.L. were still under the stress of excitement caused by this event.

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861, 620 P.2d 539 (1980).

<sup>18</sup> *State v. Ramires*, 109 Wn. App. 749, 758, 37 P.3d 343 (2002).

<sup>19</sup> *Ramires*, 109 Wn. App. at 759.

<sup>20</sup> *Chapin*, 118 Wn.2d at 688.

<sup>21</sup> *Davis*, 141 Wn.2d at 844.

<sup>22</sup> *State v. Palomo*, 113 Wn.2d 789, 794, 783 P.2d 575 (1989); see Point B, *infra*.

***1. Ohlson's driving onto the sidewalk at a high rate of speed towards L.F. and D.L. was a startling event.***

Ohlson concedes that his driving was startling to L.F.<sup>23</sup> However, he contends that “no testimony was provided directly from D.L. to indicate that a startling event occurred from his perspective.”<sup>24</sup> This argument fails to consider that the availability of the declarant is immaterial.<sup>25</sup> Circumstantial evidence that the event was startling to D.L. will suffice.

The facts of this case indicate that a startling event occurred. D.L. was standing on the side of Lebo Boulevard when a person he did not know began yelling racial slurs and making obscene gestures at him while speeding back and forth in a car. Ohlson drove back and forth four times and then left. When Ohlson returned he resumed the activity, but this time cut across the shoulder onto the sidewalk and directly towards D.L. L.F. testified that D.L. was facing the direction from which Ohlson drove, and told her to “look out.” D.L. then jumped out of the way. Moreover, when Officer Gray spoke to D.L. she observed that D.L. was “pretty upset” and “pretty shaken up.”

All of these facts demonstrate that this event was startling to D.L.

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<sup>23</sup> Brief at 7.

<sup>24</sup> Brief at 7.

<sup>25</sup> ER 803(a).

***2. The statements of L.F. and D.L. were made while still under the stress of the exciting event.***

Officer Gray was at the scene within five minutes after L.F. called 911. When Officer Gray spoke with L.F. and D.L. she noted they were “pretty upset” and “pretty shaken up.” Additionally, L.F. was still physically shaking. Finally, the statements the two gave to Officer Gray were not a detailed account of what occurred.

The demeanor of L.F. and D.L., the length of time that had passed, and the lack of a detailed account of what happened all indicate that neither L.F. or D.L. had sufficient time to reflect on the events and make self-serving statements. It cannot be said that no reasonable judge would have found that L.F. and D.L. were still under the stress of nearly being hit by a speeding car.

***3. Admission of the statements, even if improper, did not cause Ohlson prejudice requiring reversal.***

There was ample evidence produced at trial in addition to this testimony by Officer Gray that Ohlson intentionally drove his car at L.F. and D.L. and that they were placed in reasonable apprehension of harm. The evidence showed that Ohlson repeatedly drove back and forth in front of L.F. and D.L. in a dangerous manner. He then cut up onto the sidewalk where both L.F. and D.L. were standing forcing them to jump out of the way or be hit by his car. Even if the statements were improperly admitted, the outcome of the trial was not materially affected because other evidence provided the

basis for the jury's verdict of guilty.

**B. OHLSON'S SIXTH AMENDMENT RIGHT TO CONFRONTATION WAS NOT VIOLATED BY THE ADMISSION OF D.L.'S OUT OF COURT STATEMENTS.**

Ohlson next claims that the statements made by D.L. are testimonial and therefore his Sixth Amendment right of confrontation was violated because D.L. did not testify. This claim is without merit because the statements made were not testimonial because they were not given in response to a police interrogation or with the expectation that they would be used in the prosecution of Ohlson.

*1. Ohlson did not object on the basis of the Confrontation Clause at trial, and therefore may not now assign error to admission of testimony on this basis.*

Appellate courts will generally not consider an issue on appeal that was not raised in the trial court.<sup>26</sup> However, it is within the discretion of the appellate court whether to reach the merits of an issue raised for the first time on appeal.<sup>27</sup>

To preserve an issue for appeal a party must state the specific ground for the objection.<sup>28</sup> Furthermore, “[a] party may only assign error in the

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<sup>26</sup> *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a).

<sup>27</sup> *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

<sup>28</sup> *State v. Walker*, 75 Wn. App. 101, 109, 879 P.2d 957 (1994); *see also State v. Guloy*, 104

appellate court on the specific ground of the evidentiary objection made at trial.”<sup>29</sup> A specific objection is required in order to provide the other party ““an opportunity to remedy the claimed defect””<sup>30</sup> and to give the trial court the ability to “rule on such contentions, consider such theories, and thus avoid committing error.”<sup>31</sup>

An error not objected to at trial may be raised on appeal where the error alleged is a “manifest error affecting a constitutional right.”<sup>32</sup> Not all issues raised for the first time on appeal alleging constitutional error will be heard.<sup>33</sup> This exception is to be construed “narrowly by requiring the asserted error to be (1) manifest and (2) ‘truly of constitutional magnitude.’”<sup>34</sup>

In *State v. Lynn*<sup>35</sup> the Court set forth the following framework to be used when evaluating an alleged constitutional error raised for the first time on appeal:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional

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Wn.2d 412, 422, 705 P.2d 1182 (1985).

<sup>29</sup> *State v. Quigg*, 72 Wn. App. 828, 836, 866 P.2d 655 (1994).

<sup>30</sup> *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976) (quoting *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 675, 374 P.2d 939, 942 (1962)).

<sup>31</sup> *Quigg*, 72 Wn. App. at 836.

<sup>32</sup> RAP 2.5(a)(3).

<sup>33</sup> *State v. Jones*, 117 Wn. App. 221, 232, 70 P.3d 171 (2003).

<sup>34</sup> *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

<sup>35</sup> *State v. Lynn*, 67 Wn. App. 339, 835 P.2d 251 (1992).

issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.

Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.<sup>[36]</sup>

An error is “manifest” only when a defendant can demonstrate *actual prejudice*.<sup>37</sup> Thus, to prevail on a claim of manifest error, the appellant “must show that the outcome likely would have been different, but for the error.”<sup>38</sup> If the record before the appellate court does not contain the facts necessary to evaluate the alleged error, no actual prejudice exists and therefore any error is not manifest.<sup>39</sup>

The State concedes that the error claimed by Ohlson raises a constitutional issue. However, Ohlson fails to show either that error occurred, or even if it did, that actual prejudice resulted and therefore this court should not hear this claim.

***2. Officer Gray’s testimony about the statements made by D.L. did not violate Ohlson’s right to confrontation because the statements were non-testimonial.***

Under the recent Supreme Court decision in *Crawford v. Washington*

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<sup>36</sup> *Lynn*, 67 Wn. App. at 345.

<sup>37</sup> *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

<sup>38</sup> *Jones*, 117 Wn. App. at 232.

a testimonial statement is inadmissible in a criminal trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.<sup>40</sup> While the Court set forth a bright-line rule as to when out-of-court testimonial statements are admissible, the Court expressly chose not to define what is a testimonial statement.<sup>41</sup> However, the Court did provide some examples of what it considered to be testimonial:

Various formulations of this core class of “testimonial” statements exist: *ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]<sup>[42]</sup>

The State concedes that if the statements made by D.L. and testified to by Officer Gray are found to have been made in response to police interrogation or with a reasonable belief that his statements would be used to prosecute Ohlson, the statements would be testimonial and thus Ohlson’s right to confrontation would have been violated.

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<sup>39</sup> *McFarland*, 127 Wn.2d at 333.

<sup>40</sup> *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 1374 (2004).

<sup>41</sup> *Crawford*, 124 S. Ct. at 1374.

<sup>42</sup> *Crawford*, 124 S. Ct. at 1364 (internal quotation marks and citations omitted) (ellipsis in original).

**a. D.L.’s statements to Officer Gray were not testimonial because the statements were not made in response to structured police questioning.**

After an extensive discussion of the historical background of the Sixth Amendment,<sup>43</sup> the Court observed that the civil law mode of criminal procedure “condone[d] examination in private by judicial officers” and allowed examinations conducted by justices of the peace before trial to be “read in court in lieu of live testimony.”<sup>44</sup> Thus, “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”<sup>45</sup> In light of this history and conclusion, the *Crawford* Court held that “[s]tatements taken by police officers in the course of *interrogations* are also testimonial in nature under even a narrow standard.”<sup>46</sup>

The Court stated that it was using “‘interrogation’ in its colloquial, rather than any technical legal, sense.”<sup>47</sup> Black’s Law Dictionary defines interrogation as: “[t]he formal or systematic questioning of a person; esp. intensive questioning by the police, usu. of a person arrested for or suspected

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<sup>43</sup> See *Crawford*, 124 S. Ct. at 1359-64.

<sup>44</sup> *Crawford*, 124 S. Ct. at 1359.

<sup>45</sup> *Crawford*, 124 S. Ct. at 1363.

<sup>46</sup> *Crawford*, 124 S. Ct. at 1364 (emphasis added).

<sup>47</sup> *Crawford*, 124 S. Ct. at 1365 n.4.

of committing a crime.”<sup>48</sup> Additionally, the Court noted that the statement at issue in *Crawford* “qualifie[d] under any conceivable definition” because it was “*knowingly* given in response to *structured* police questioning.”<sup>49</sup>

That the *Crawford* Court chose to limit its holding to police “interrogation” instead of police “questioning” should be noted.<sup>50</sup> This “clearly indicates that police ‘interrogation’ is not the same as, and is much narrower than, police ‘questioning.’”<sup>51</sup> Such a reading of the Court’s use of the term “interrogation” is consistent with its colloquial definition.

Furthermore, such a distinction is consistent with the analogy the Court drew between the pretrial examination practices of English justices of the peace and modern police investigations. Several courts have recognized that this analogy “indicates that, under *Crawford*, a police interrogation requires a relatively formal investigation where a trial is contemplated.”<sup>52</sup> Implicit in this requirement of a “relatively formal investigation” is that there is structure to the questioning and the setting in which the questioning takes

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<sup>48</sup> Black’s Law Dictionary 825 (7<sup>th</sup> ed. 1999).

<sup>49</sup> *Crawford*, 124 S. Ct. at 1365 n.4 (emphasis added).

<sup>50</sup> *Hammon v. State*, 809 N.E.2d 945, 952 (Ind. Ct. App. 2004).

<sup>51</sup> *Hammon*, 809 N.E.2d at 952.

<sup>52</sup> *People v. Corella*, 18 Cal.Rptr.3d 770, 776 (Cal. Ct. App. 2004). *Accord In re T.T.*, 351 Ill.App.3d 976, 988, 815 N.E.2d 789, 287 Ill.Dec. 145 (2004) (“*Crawford* indicates that governmental involvement in some fashion in the creation of a formal statement is necessary to render the statement testimonial in nature.”).

place.<sup>53</sup> This degree of formality and structure is absent from police questioning of witnesses at the scene of a crime.

Washington courts have yet to address what qualifies as an “interrogation” for the purposes of *Crawford*. However, numerous other courts have addressed this issue, and have focused on the formalities of both the questioning and the statement given.<sup>54</sup>

*People v. Corella* and *Hammon v. State* are illustrative of this point and are similar to the case at bar. In *Corella*, police responded to a motel where the defendant and the victim were living.<sup>55</sup> On arrival the police officer saw the victim in the parking lot crying, distraught and appearing to be in pain.<sup>56</sup> She told the officer that the defendant had punched her several times and explained the circumstances.<sup>57</sup> At trial, her statements were admitted under the California spontaneous statements exception to the hearsay rule<sup>58</sup> that is substantially similar to ER 803(a)(2).<sup>59</sup> The defendant

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<sup>53</sup> See *Crawford*, 124 S. Ct. at 1365 n.4.

<sup>54</sup> *State v. Barnes*, 854 A.2d 208, 211-212 (Me. 2004); *People v. Corella*, 18 Cal. Rptr. 3d 770, 776 (Cal. Ct. App. 2004); *State v. Forrest*, 596 S.E.2d 22, 27-28 (N.C. Ct. App. 2004); *Hammon*, 809 N.E.2d 945, 953-954; *In re Rolandis*, 817 N.E.2d 183, 187-188 (Ill. App. Ct. 2004); *Samarron v. State*, 150 S.W.3d 701, 706-707 (Tx. Ct. App. 2004); *Wilson v. State*, 151 S.W.3d 694, 698 (Tx. Ct. App. 2004).

<sup>55</sup> *Corella*, 18 Cal. Rptr. 3d at 773.

<sup>56</sup> *Corella*, 18 Cal. Rptr. 3d at 773.

<sup>57</sup> *Corella*, 18 Cal. Rptr. 3d at 773.

<sup>58</sup> See *Corella*, 18 Cal. Rptr. 3d at 774.

<sup>59</sup> Compare Cal. Evid. Code § 1240 with ER 803(a)(2).

appealed the admission of the victim's statements, arguing that the statements did not qualify as spontaneous statements and were testimonial.<sup>60</sup>

The *Corella* court held that the victim's statements explaining her perception of the events were admissible as spontaneous statements,<sup>61</sup> but recognized the need for analyzing the statements to determine if they were testimonial under *Crawford*.<sup>62</sup> In finding that the statements were not testimonial the court noted the following:

The section 1240 spontaneous statements made by [the victim] to the 911 telephone call and Officer Diaz, however, were not given in a police interrogation because they were not "knowingly given in response to structured police questioning," and bear no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford*.

...

In addition, when Officer Diaz arrived at the scene in response to [the] 911 call, [the victim's] spontaneous statements describing what had just happened did not become part of a police interrogation merely because Officer Diaz was an officer and obtained information from [her]. *Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an "interrogation."* *Such an unstructured interaction between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police interrogation as that term is used in Crawford.*<sup>[63]</sup>

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<sup>60</sup> *Corella*, 18 Cal. Rptr. 3d at 774.

<sup>61</sup> *Corella*, 18 Cal. Rptr. 3d at 774.

<sup>62</sup> *Corella*, 18 Cal. Rptr. 3d at 775.

<sup>63</sup> *Corella*, 18 Cal. Rptr. 3d at 776 (emphasis added).

In *Hammon v. State* a police officer was sent to a residence where he contacted A.H.<sup>64</sup> A.H. responded no when asked by the officer if “there ‘was a problem and if anything was going on.’”<sup>65</sup> After being separated from the defendant, A.H. told the officer she had been attacked by the defendant and indicated she was in pain.<sup>66</sup> At trial, the officer testified to the statements A.H. had made, but A.H. did not testify.<sup>67</sup> The defendant appealed arguing that A.H.’s statements did not qualify as excited utterances.<sup>68</sup>

The court in *Hammon* found the statements to be excited utterances, under Ind. Evid. R. 803(2), which is identical to ER 803(a)(2). The court nevertheless recognized the need to analyze the statements in the light of *Crawford*.<sup>69</sup> In finding that the declarant’s statement was not testimonial the court stated:

We thus hold that when police arrive at the scene of an incident in response to a request for assistance and begin informally questioning those nearby immediately thereafter in order to determine what has happened, statements given in response thereto are not “testimonial.” *Whatever else police “interrogation” might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred.* Such interaction with

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<sup>64</sup> *Hammon*, 809 N.E.2d at 947.

<sup>65</sup> *Hammon*, 809 N.E.2d at 947.

<sup>66</sup> *Hammon*, 809 N.E.2d at 947.

<sup>67</sup> *Hammon*, 809 N.E.2d at 948.

<sup>68</sup> *Hammon*, 809 N.E.2d at 948.

<sup>69</sup> *Hammon*, 809 N.E.2d at 950.

witnesses on the scene does not fit within a lay conception of police “interrogation,” bolstered by television, as encompassing an “interview” in a room at the stationhouse. It also does not bear the hallmarks of an improper “inquisitorial practice.”<sup>70</sup>

In the case at bar, L.F. called 911 to seek the assistance of the police. She and D.L. had just been nearly run over by Ohlson. Ohlson had left once, returned and was still in the area when L.F. was on the phone with 911. When Officer Gray arrived on the scene and talked with L.F. and D.L., she was attempting to determine what had happened. Officer Gray was not conducting a formal investigation at this time. Assuming that Officer Gray asked questions of D.L., the record does not indicate any formality or structure in the questioning. The only questioning in this case that would likely rise to the level of interrogation was the questioning of Ohlson at his home by Officer Davis. Just as in *Hammon* and *Corella*, any questioning by Officer Gray was not the type of inquisitorial interrogation that the Confrontation Clause was intended to curtail.

**b. Because D.L.’s statements were excited utterances, by definition they were not given with a reasonable expectation that the statements would be used to prosecute Ohlson and therefore are not testimonial.**

In the examples of the “core class of ‘testimonial’ statements”<sup>71</sup> given by the *Crawford* Court it included “pretrial statements that declarants would

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<sup>70</sup> *Hammon*, 809 N.E.2d at 952 (emphasis added) (citation omitted).

reasonably expect to be used prosecutorially[.]”<sup>72</sup> An excited utterance by definition cannot be made with a reasonable expectation that it will be used for prosecution.

Washington courts have repeatedly recognized that the theory on which the admissibility of excited utterances is premised is that “the stress of the event suppresses the reflective faculties of the declarant[.]”<sup>73</sup> It is critical that the declarant of an excited utterance not have had time to reflect on the exciting event such that they are able to make a statement based upon self-interest.<sup>74</sup> It flows from this that the declarant of an excited utterance, being “incapable of reflection” is unable to form the expectation that his or her statement will be used in a prosecution. As the *Rogers* court recognized: “[a]n unrehearsed statement made without time for reflection or deliberation, as required to be an ‘excited utterance,’ is not ‘testimonial’ in that such a statement, by definition, has not been made in contemplation of its use in a future trial.”<sup>75</sup> Several other courts have reached this same conclusion.<sup>76</sup>

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<sup>71</sup> *Crawford*, 124 S. Ct. at 1364.

<sup>72</sup> *Crawford*, 124 S. Ct. at 1364 (quotation marks omitted).

<sup>73</sup> *State v. Palomo*, 113 Wn.2d 789, 796, 783 P.2d 575 (1989). See also *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997); *State v. Davis*, 141 Wn.2d 798, 843, 10 P.3d 977 (2000); and *State v. Ramires*, 109 Wn. App. 749, 757, 37 P.3d 343 (2002).

<sup>74</sup> *State v. Downey*, 27 Wn. App. at 861

<sup>75</sup> *Rogers v. State*, 814 N.E.2d 695, 701 (Ind. Ct. App. 2004).

<sup>76</sup> See *Hammon*, 809 N.E.2d at 952-53; *Corella*, 122 18 Cal. Rptr. 3d at 776; *Forrest*, 164 N.C.App. at 280. But see *Lopez v. State*, 888 So.2d 693, 699-700 (Fla. Dist. Ct. App. 2004).

Ohlson points to this Court's decision in *State v. Powers*<sup>77</sup> in support of his claim that D.L.'s statements to Officer Gray were testimonial. In that case, the victim called 911 to report that the defendant "had been in her home in violation of a no-contact order."<sup>78</sup> On appeal, the defendant argued that the victim's statement to the 911 operators was the type of statement that would reasonably be expected to be used prosecutorially.<sup>79</sup> At the time the victim made the call, the defendant had already left her house.<sup>80</sup> This Court held that the taped 911 phone call was testimonial because it "was not part of the criminal incident itself or a request for help."<sup>81</sup>

Like the defendant in *Powers*, Ohlson argues that D.L.'s statement to Officer Gray was made with an expectation of future use in prosecution. This is erroneous and *Powers* can be distinguished.

In this case the statement at issue is not contained in a recorded statement with a question and answer format. The record did not explicitly reveal whether Officer Gray asked D.L. and L.F. any questions. Officer Gray stated that she "spoke with both of them, and they told me what happened."<sup>82</sup>

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<sup>77</sup> *State v. Powers*, 124 Wn. App. 92, 99 P.3d 1262.

<sup>78</sup> *Powers*, 124 Wn. App. at 94

<sup>79</sup> *Powers*, 124 Wn. App. at 97.

<sup>80</sup> *See Powers*, 124 Wn. App. at 94.

<sup>81</sup> *Powers*, 124 Wn. App. at 101 (internal quotation marks omitted).

<sup>82</sup> RP 91.

The record is unclear as to what questions, if any, were posed by Officer Gray and what information was sought. This is in stark contrast to a recorded 911 call that clearly reveals what questions were asked and whether the victim was reporting a crime or calling for assistance.

As previously discussed, D.L.'s statements were excited utterances.<sup>83</sup> By definition these statements could not have been made with a reasonable expectation that would be used to prosecute Ohlson. Therefore, the statements were not testimonial and their admission did not violate Ohlson's Sixth Amendment confrontation rights.

**c. Admission of D.L.'s statements, if error, was harmless because the untainted evidence leads only to a finding of guilt.**

Ohlson claims that admission of D.L.'s statements to Officer Gray violated his right to confrontation. Assuming that the statements of D.L. were testimonial and admission violated Ohlson's confrontation rights, the error was harmless because the remaining evidence led only to a finding that Ohlson intended to put both L.F. and D.L. in reasonable apprehension of bodily harm.

A violation of the confrontation clause is subject to harmless error

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<sup>83</sup> See Point A, *supra*.

analysis.<sup>84</sup> If a court finds a manifest constitutional error was committed, in determining if the error was harmless, the “overwhelming untainted evidence” test will be used.<sup>85</sup> Under this test, the evidence untainted by the error is examined to determine if the evidence is “so overwhelming that it leads necessarily to a finding of guilty.”<sup>86</sup> If so, then the error is harmless.<sup>87</sup>

In this case, the evidence clearly led to a finding of guilt. The evidence showed that Ohlson repeatedly drove back and forth in front of L.F. and D.L. in a dangerous manner. As Ohlson was doing this he was yelling racial slurs and profanities. An eyewitness described Ohlson’s driving as a “cut” up onto the sidewalk. This “cut” by Ohlson forced L.F. and D.L. to jump out of the way or be hit by Ohlson’s car. Ohlson himself admitted that he was trying to “scare” L.F. and D.L. All of this untainted evidence, leads only to one conclusion: that Ohlson intended to put both L.F. and D.L. in reasonable apprehension of bodily harm. Thus any error in the admission of D.L.’s statements to Officer Gray was harmless error.

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<sup>84</sup> *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

<sup>85</sup> *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004).

<sup>86</sup> *Barr*, 123 Wn. App. at 384.

<sup>87</sup> See *State v. Palomo*, 113 Wn.2d 789, 798-799, 796, 783 P.2d 575 (1989).

**C. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT OF GUILTY OF ASSAULT IN THE SECOND DEGREE.**

Ohlson next claims that no evidence was introduced demonstrating that D.L. was in fear of bodily harm. He also claims that there was insufficient evidence to demonstrate he acted with the requisite intent towards either L.F. or D.L. These claims are without merit because circumstantial evidence showed that D.L. was in reasonable apprehension of bodily harm and that Ohlson intended to cause the apprehension of bodily harm.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt.<sup>88</sup> The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant.<sup>89</sup> "[A]ll reasonable inferences from the evidence must be drawn in favor of the State."<sup>90</sup> Circumstantial evidence is no less reliable than direct evidence.<sup>91</sup>

It is a basic principle of law that the finder of fact at trial is the sole

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<sup>88</sup> See *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980).

<sup>89</sup> *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980).

<sup>90</sup> *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>91</sup> *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld.<sup>92</sup> The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently.<sup>93</sup> The appellate courts must defer to the trier of fact on issues involving “conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.”<sup>94</sup>

An assault may be “committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.”<sup>95</sup> When the assault is alleged to have been committed by causing another to be in apprehension of bodily harm, the State must prove that the defendant had the specific intent to place the victim in apprehension.<sup>96</sup> “Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances.”<sup>97</sup> Additionally, the State must prove that the victim was in apprehension of harm.<sup>98</sup> Like the

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<sup>92</sup> *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969).

<sup>93</sup> *Basford*, 76 Wn.2d at 530-31.

<sup>94</sup> *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

<sup>95</sup> *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995) (quoting *State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972)) (internal quotation marks omitted).

<sup>96</sup> *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996).

<sup>97</sup> *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

<sup>98</sup> *Eastmond*, 129 Wn.2d at 503-04.

intent element, reasonable apprehension of harm by the victim may be demonstrated by circumstantial evidence.<sup>99</sup>

As discussed above, D.L.'s out-of-court statements were properly admissible and further support the jury verdict. However, because substantial competent evidence supported the verdict even without the disputed evidence, the following discussion will disregard D.L.'s statements to Officer Gray.

***1. Circumstantial evidence demonstrated that D.L. was in apprehension of bodily harm.***

The evidence presented at trial, when interpreted most strongly against Ohlson, revealed through circumstantial evidence that D.L. was in reasonable apprehension of bodily harm. The fact that D.L. himself did not testify is irrelevant.

Despite no provocation by L.F. or D.L., Ohlson began speeding back and forth in front of D.L. and L.F. while making an obscene gesture and yelling racial slurs. The undisputed evidence showed Ohlson was driving in a very unsafe manner; he himself admitted he was driving "recklessly." Ohlson then left the area. This activity alone likely caused D.L. to be in apprehension of what actions Ohlson might take.

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<sup>99</sup> See *State v. Smith*, 124 Wn. App. 417, 428, 102 P.3d 158 (2004).

After a few minutes Ohlson returned and resumed these same actions. This time, however, he cut across the shoulder and up onto the sidewalk, speeding towards D.L. and L.F. D.L. saw this and exclaimed “look out.” He then jumped out of the way as Ohlson sped past before cutting back onto the street before hitting the telephone pole D.L. was leaning against.

It is common knowledge that a person struck by a speeding car can sustain substantial bodily injury, if not death. Ohlson himself testified to this fact.<sup>100</sup> Common experience indicates that a person afraid of being hit by a car fears substantial bodily injury.

The totality of the circumstances coupled with D.L.’s own words to L.F. and actions clearly indicate he was in apprehension of bodily harm. The jury’s finding that this apprehension existed and was reasonable was supported by substantial competent evidence.

***2. The statement’s of Ohlson to Officer Fatt while he was being taken to jail coupled with Ohlson’s actions demonstrated that Ohlson intended to put D.L. and L.F. in apprehension of bodily harm.***

Ohlson admitted to Officer Davis that he was driving in a “reckless” manner to “scare” both L.F. and D.L.<sup>101</sup> Ohlson said he was driving back and forth “close to” L.F. and D.L. and admitted to getting within five feet of

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<sup>100</sup> RP 147.

<sup>101</sup> RP 84.

them.<sup>102</sup> When describing his actions after returning to the area, Ohlson told Davis that he resumed the driving back and forth, “using the sidewalks to turn around, and yelling racial slurs.”<sup>103</sup> Ohlson said that his reason for doing this was to scare L.F. and D.L.<sup>104</sup>

An eyewitness, Robert Klose, also described Ohlson’s conduct:

[He] took a pretty good swipe at them. It was a cut. He just cut. You know what I mean? He had to cut off – the shoulder is as wide as a car. He had to come off the shoulder of the road and then onto the sidewalk and back out.<sup>105</sup>

The State does not dispute that the jury was presented with conflicting evidence on the issue of intent. The verdict of guilty, however, demonstrates that the jury found the State’s evidence to be more credible and persuasive. When viewing the evidence in the light most favorable to the State, substantial competent evidence clearly exists for the jury’s conclusion that Ohlson intended to cause both L.F. and D.L. to be fearful of being hit by his car, *i.e.* to be in apprehension of substantial bodily injury.

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<sup>102</sup> RP 84-85.

<sup>103</sup> RP 85-86.

<sup>104</sup> RP 86.

<sup>105</sup> RP 113-14.

**D. OHLSON'S SIXTH AMENDMENT RIGHT WAS NOT VIOLATED BY REFERENCES TO HIS BEING IN JAIL BECAUSE THERE IS AN EXPECTATION THAT A PERSON FACING CRIMINAL CHARGES WILL REMAIN IN JAIL IF NO BOND OR BAIL IS POSTED.**

Ohlson next claims that his right to a fair trial and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution was violated by references to his being in jail during the pendency of the trial. This claim is without merit because Ohlson himself first mentioned that he was in jail, trial counsel did not object or request a curative instruction, and he can show no resulting prejudice. Furthermore, even if the passing references to his in-custody status were found to be error, the error would be harmless.

The Sixth Amendment of the United States Constitution guarantees a defendant's right to fair and impartial trial. This guarantee is made applicable to state proceedings by the Fourteenth Amendment to the United States Constitution. This guarantee includes an accused right to a presumption of innocence.<sup>106</sup>

"It is common knowledge that a person charged with an offense is detained in jail during the pendency of a trial, unless he has been released on

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<sup>106</sup> *State v. Mullin-Coston*, 115 Wn. App. 679, 692, 64 P.3d 40 (2003). The *Mullin-Coston* opinion and Ohlson's brief refer to the Fourth Amendment when discussing the right to a fair and impartial trial. As the Fourth Amendment governs searches and seizures, presumably

bond or on his personal recognizance. The ordinary juror would not relate detention in jail with guilt or innocence.”<sup>107</sup> Comments revealing that a defendant is incarcerated during his trial have the potential to be prejudicial.<sup>108</sup> However, being held in jail pending the resolution of criminal charges “does not carry the same inherent prejudice as the sight of a defendant in shackles.”<sup>109</sup>

***1. Ohlson cannot now raise this issue because he invited the comments by first raising the issue and failed to object to the question of the prosecutor or comment of the trial court.***

As previously discussed, a party cannot raise an issue on appeal where no objection was made at the trial court.<sup>110</sup> Additionally, the “invited error” doctrine precludes a party from setting up an error and then complaining on appeal.<sup>111</sup>

In support of Ohlson’s claim that he was denied a fair trial, he points to caselaw discussing situations where defendants were shackled during trial.

*Mullin-Costin* rejected a similar argument as unpersuasive:

But, although references to custody can certainly carry some

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this is a typographical error by both the Court and counsel.

<sup>107</sup> *State v. Boggs*, 57 Wn.2d 484, 498, 358 P.2d 124 (1961).

<sup>108</sup> *State v. Condon*, 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993).

<sup>109</sup> *Mullin-Coston*, 115 Wn. App. at 692.

<sup>110</sup> See *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a).

<sup>111</sup> *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial. Jurors must be expected to know that a person awaiting trial will often do so in custody. . . . In contrast, shackling a defendant during trial sends the message to the jury that the judge, corrections officers, and security personnel present fear the defendant or think he might leap from his chair at any point and cause harm to someone in the courtroom. That is a much stronger prejudice than a reference to the fact that a defendant was in jail on the same charge for which he is being tried. *Accordingly, [the defendant's] analogy to physical restraint cases is misplaced, and cases from other states that have drawn the same analogy are not persuasive.*<sup>112]</sup>

The thrust of Ohlson's argument is based upon the fact that the prosecutor did not provide the trial court with an opportunity to weigh the probative value of Ohlson's custody status versus its prejudice. This argument ignores the fact that in response to a question posed by his own counsel Ohlson first revealed the fact that he was in jail.<sup>113</sup>

On direct examination, Ohlson's counsel asked "Are you still struggling with stopping to use – trying to stop using drugs?"<sup>114</sup> Ohlson responded with "[w]ell, not since I have been in jail, no."<sup>115</sup>

On cross examination, the prosecutor questioned Ohlson as follows:

Q. Back on this day, this is what a lot of events stemmed from. How is your recollection of this day?

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<sup>112</sup> *Mullin-Costin*, 115 Wn. App. at 693-94 (emphasis added).

<sup>113</sup> RP 127.

<sup>114</sup> RP 127.

<sup>115</sup> RP 127.

A. Uhm, pretty clear I think.

Q. So when you have been, I guess, probably sitting around from that point in time on, what are the types of things that you think about? Has this been on your mind a lot?

A. It's been weighing pretty heavy, yeah.

Q. It's been kind of dominating your thoughts while you are in custody?

A. Yeah.

Q. Okay. And you have probably regone [sic] over these or gone over these events in your mind many times; is that correct?

A. That's correct.

Q. Are you comfortable drawing a little diagram of that area of Lebo Boulevard on the chart there?

A. I guess.<sup>116]</sup>

Ohlson's assertion that "the only purpose to that line of questioning was to emphasize to the jury Mr. Ohlson's custodial status" is unfounded.<sup>117</sup> When viewed in context, a much more reasonable assumption is that the purpose of the questioning was to establish the Ohlson had sufficient memory of the event to draw a diagram of the scene.

The evidence presented at trial was overwhelming. In light of this evidence, it cannot be said that the outcome of the trial would have been different had the jury not be aware that Ohlson was in jail. This is particularly true in light of the presumption that jurors know a defendant is in

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<sup>116</sup> RP 132-33.

<sup>117</sup> Brief 17.

jail pending trial unless bail or bond has been posted.

***2. Juries are presumed to follow the instructions, thus if the trial court's comment on Ohlson's in custody status is viewed as a comment on the evidence, it was ignored by the jury.***

Juries are presumed to follow the instructions they receive from the trial court.<sup>118</sup> "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement."<sup>119</sup>

After the case had gone to the jury, the jury requested to be permitted to continue deliberations for another 30 minutes before adjourning for the day.<sup>120</sup> In light of this, the court stated:

There's one provisional problem -- I'm going to allow you to keep deliberating -- but here's the issue we're trying to resolve right now, as I deal with other people and other institutions, the jail. We're trying to make sure that if you reach a verdict, so you don't have to come back tomorrow, we can have the defendant, since you heard in testimony he is in custody, whether or not he can be brought over after 4:30. And we're trying to determine that.

So you can make that decision, whether you want to go ahead and do the work now, under the proviso that if we can't get him back, we still may have to have you come back tomorrow to render your verdict if you reach a verdict in 30 minutes.

So you can decide that now, go in private there in the jury room and decide and come back and let us know. That's up to

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<sup>118</sup> *State v. Copeland*, 130 Wn.2d 244, 285, 922 P.2d 1304 (1996).

<sup>119</sup> *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

<sup>120</sup> RP 208.

you.<sup>121j</sup>

Ohlson is essentially arguing that his being in jail is evidence that he is guilty, and that this evidence was bolstered by the trial court's comment. He makes this claim despite the fact that Ohlson himself first brought this fact to the attention of the jury. Any error resulting from the trial court's comment was prevented by the jury instructions. The jury was instructed that any comment by the judge that may appear to be a comment on the evidence should be disregarded.<sup>122</sup> As juries are presumed to follow instructions, presumably the jury did not give any weight to this comment by the trial court.

Therefore the trial court's comment regarding the fact that the defendant was in jail did not infringe on Ohlson's right to a fair and impartial trial.

**E. THE PROSECUTOR'S SINGLE QUESTION THAT INCLUDED A REFERENCE TO OHLSON BEING IN JAIL AS HE WAITED FOR TRIAL WAS NOT MISCONDUCT.**

Ohlson next claims that prosecutorial misconduct occurred by a single question asked by the prosecutor referencing the fact that Ohlson was in jail. This argument is wholly without merit because Ohlson himself first informed

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<sup>121</sup> RP 210-11.

<sup>122</sup> CP 10.

the jury that he was in jail.

To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that there was improper conduct by the prosecutor that had a prejudicial effect on the jury's verdict.<sup>123</sup> Prejudicial error results where there is a substantial likelihood that the verdict was affected by the misconduct.<sup>124</sup> When such a claim is made, the defendant bears the burden of demonstrating both the impropriety of the conduct as well as prejudicial effect.<sup>125</sup>

Improper conduct that affects a verdict deprives a defendant of his right to a fair trial.<sup>126</sup> Whether a prosecutor's comment is improper is determined in light of the "the prosecutor's entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury."<sup>127</sup>

A claim of prosecutorial misconduct is waived where no objection and request for a curative instruction was made in the trial court.<sup>128</sup> However, where the conduct "is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an

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<sup>123</sup> *State v. Davis*, 141 Wn.2d 798, 840, 10 P.3d 977 (2000).

<sup>124</sup> *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

<sup>125</sup> *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

<sup>126</sup> *State v. Jungers*, 106 P.3d 827, 829, 2005 WL 351930 (Wn. App. Div. 2) (2005).

<sup>127</sup> *Jungers*, 106 P.3d at 830.

<sup>128</sup> *Gentry*, 125 Wn.2d at 596.

admonition to the jury” there is no waiver even in the absence of an objection.<sup>129</sup> The failure to object at the trial court “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.”<sup>130</sup> Furthermore, “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”<sup>131</sup>

First, this issue was waived because Ohlson’s trial counsel did not object to the question of the prosecutor. Waiver is appropriate because any harm that may have resulted could have been cured by an instruction. As previously noted, Ohlson claims the intent of the prosecutor in asking his question was to highlight the fact that Ohlson was in jail. Even were this so, which the State does *not* concede, any prejudice could have been remedied by an admonition by the trial court that the jury should not consider Ohlson’s being in jail as evidence of guilt.

Additionally, in light of the overwhelming evidence of guilt,<sup>132</sup> this single question of the prosecutor over the course of a two day trial cannot be

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<sup>129</sup> *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

<sup>130</sup> *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

<sup>131</sup> *Swan*, 114 Wn.2d at 661 (quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

<sup>132</sup> See Point C, *supra*.

said to have affected the verdict.

#### IV. CONCLUSION

For the foregoing reasons, Ohlson's conviction and sentence should be affirmed.

DATED April 8, 2005.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to be "CHAD M. NICHOLSON", written in a cursive style.

CHAD M. NICHOLSON  
WSBA No. 35058  
Deputy Prosecuting Attorney

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