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NO. 61941-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES ARTIS CASON,

Appellant.

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DIVISION I
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE PRESENTED

1. The recent Supreme Court decision in State v. Pugh establishes that the State Confrontation Clause is not violated by admission of statements that would fall within the historical res gestae doctrine, regardless of the availability of the declarant. The victim in this case was assaulted minutes before the police contact, by a man who may still have been inside the apartment building from which the victim emerged with fresh injuries that appeared to be life threatening. She briefly described the assault and told the officer who had assaulted her. Did those statements fall within the historical res gestae exception to the hearsay rule?

B. SUPPLEMENTAL ARGUMENT

1. THE STATE CONFRONTATION CLAUSE WAS NOT VIOLATED BY ADMISSION OF HEARSAY STATEMENTS THAT FALL WITHIN THE RES GESTAE DOCTRINE.

The Supreme Court in State v. Pugh, 167 Wn.2d 825, ___ P.2d ___ (2009), held that the Confrontation Clause of the Washington Constitution, article I, section 22, is not violated by the admission of statements to a police officer that fall within the historical res gestae doctrine. Pugh, 167 Wn.2d at 834-46. The

Court rejected the State Constitutional arguments that have been made by this defendant in his opening brief. The Court rejected the argument that admission of any accusatory statement made to a police officer would violate the confrontation clause unless the defendant had a prior opportunity to cross-examine the witness. Id. at 844. The Court rejected the argument that admission of any hearsay statement violates the confrontation clause unless the State has proven the unavailability of the declarant. Id. at 844-45.

The Court held that statements made in response to questions may fall within the res gestae rule. Pugh, 167 Wn.2d at 841. It cited with approval a case in which a statement was found to be res gestae although the statement was made by the declarant 15 to 20 minutes after the event, in response to a question. Id. (citing State v. Labbee, 134 Wash. 55, 58, 234 P. 1049 (1925)).

The analytical framework in Pugh establishes that the admission of the challenged statements in the case, which were made by the injured victim minutes after she was assaulted, fall within the traditional res gestae exception to the hearsay rule and did not violate the State Confrontation Clause. The circumstances of this case are very similar to the facts in Pugh, in which the

Supreme Court held that the admission of that victim's statements were part of the res gestae and did not violate the State Confrontation Clause. Case law of the era on which the Supreme Court in Pugh relied to approve the res gestae exception also supports the conclusion that the statements at bar fall well within the res gestae doctrine as it existed at that time.

The Supreme Court in Pugh described the two main inquiries under the res gestae doctrine: "whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." Pugh, 167 Wn.2d at 838 (quoting Simon Greenleaf, A Treatise on the Law of Evidence § 108, at 144-45 (14th ed. 1883)). The Court set out the requirements of the doctrine as summarized by the Court in 1939:

(1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need

not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

Pugh, 167 Wn.2d at 839 (quoting Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939)).

In Pugh, a woman was assaulted by her husband and called the police after he left the house and was out of her sight.¹ Pugh, 167 Wn.2d at 829-30. Her statements during the 911 call were admitted at trial although she did not testify. Id. at 830-31. The Supreme Court concluded that her statements fell within the historical res gestae doctrine, applying the factors recognized in Beck v. Dye, supra. Pugh, 167 Wn.2d at 843. The circumstances surrounding the statements there are very similar to the facts at bar--an injured victim of an assault briefly described the assault in the minutes after it occurred.

¹ Although at one point during the 911 call the victim apparently said "He's beating me up," she immediately clarified that Pugh was outside the house and that she could not see him. Pugh, 167 Wn.2d at 829-30. The Court's discussion of the facts make it clear that it premised its decision on the understanding that Pugh was outside of the house and out of the victim's sight when the call was made. Id. at 833.

There is no debate that three of the Beck factors are satisfied in this case. As to the first factor, the statements related to the main event, and explain or characterize it. As to the third factor, they are statements of fact, not opinion. As to the sixth, the statements were made by a person who witnessed the event about which the statement was made. The defendant makes no claim that these factors are lacking as to the victim's statements here.

The remaining three Beck factors relate to the connection between the statements themselves and the event described, indicating that the statements were evoked by the event itself and were not the product of deliberation. For the second factor, the statement must grow out of the event, as opposed to being a mere narrative of a completed event; for the fourth, it must be a spontaneous or instinctive utterance, dominated or evoked by the event, and not the product of reflection or design; and for the fifth factor, the statement need not be contemporaneous with the event, but must be made at a time and under circumstances excluding the presumption that it is the result of deliberation. Beck, 200 Wash. at 9-10. The statements at issue here were not made during the assault itself, but they did grow out of the event, were evoked by

the event, and the circumstances indicate that they were not the product of reflection or deliberation.

The Court in Pugh explained that the statements need not be exactly contemporaneous with the event to fall within the res gestae exception. Pugh, 167 Wn.2d at 840-41. It cited with approval a case in which statements made nearly two hours after a train wreck had been found to fall within the res gestae exception. Id. at 840 (citing Walters v. Spokane International Ry. Co., 58 Wash. 293, 297-98, 108 P. 593 (1910)).

The statements in this case were made immediately after the assault, less than four minutes after the bleeding victim stumbled out of the apartment building where she was assaulted and collapsed to the ground. 3RP 69-71, 73, 106-09.² The time elapsed after the victim came out of the building was captured on the video in the police car of the officer first on the scene. Ex. 25. These statements were made as the victim effected her escape.

The defendant's claim that at least 12 minutes passed between the assault and the statements uses a start time from a video that shows a man leaving the victim's apartment with a time

² As cited in Respondent's Brief, 2RP = VRP of 5/6/08; 3RP = VRP of 5/7/08.

stamp of 3:40 a.m., but the time on the video is usually off by a few minutes. 3RP 48. He uses an end time of 3:52 a.m. based on the time stamp on the police car video, but the accuracy of that measure was not established. Further, the victim had called 911 repeatedly before the assault, asking for help getting the defendant out of her apartment. Ex. 28. The last call was disconnected at 3:48 a.m., presumably by the defendant, as the police found the phone pulled out of the wall and there is no reason the victim would have done that. Ex. 28; 2RP 12; 3RP 72, 111. Assuming the relative accuracy of the 911 recording and the police car video, the time lapse between that 911 disconnect by the defendant inside the victim's apartment and the victim's statements outside the building was just four minutes and the assault may have occurred even after the defendant pulled the phone out of the wall.

Further, as in Pugh, because the victim (and the police) did not know where the assailant was and the victim was in need of medical aid, for purposes of the victim's state of mind, the event itself was still in progress. Pugh, 167 Wn.2d at 833, 843.³ The

³ The Court in Pugh also concluded that the statements were not testimonial for purposes of Sixth Amendment analysis, supporting the State's argument that the victim's statements in this case were not testimonial. U.S. Const. amend. VI; Pugh, 167 Wn.2d at 834.

victim did not think her assailant, Cason, was still in her apartment, but she did not know where he was and did not know if he was still in or around the apartment building. 3RP 84-85, 107-09. The responding police officer was unwilling to leave her alone outside but as soon as other officers arrived they went inside and then around the outside of the building to search for Cason. 3RP 70-72, 109, 118, 135. The police did not search other rooms in the building and there is no evidence as to where Cason was at the time the statements were made. 3RP 72, 118.

In any event, a person bleeding from wounds of an assault, who has just gotten out of the building where it occurred, in search of help and safety, has not had the opportunity to carefully reflect and deliberate. As some passage of time does not preclude application of the res gestae doctrine, the minimal time that passed here cannot in itself disqualify the statements.

A review of cases before 1939, the year of the decision on which the Court in Pugh relied to establish the historical res gestae standard, establishes that the circumstances in this case are of the same type consistently found to fall within the res gestae exception. For example, the Supreme Court found the following to fall within the res gestae doctrine: statements made nearly two hours after a

train wreck, after the declarant went to get help and returned, Walters v. Spokane International Ry. Co., 58 Wash. at 297-98 (1910); statements made 15 minutes after an explosion, by an injured victim, State v. Goodwin, 119 Wash. 135, 138-39, 204 P. 769 (1922); a driver's statements made 15 to 45 minutes after his car struck a pedestrian, after he had taken the victim's body to a home and then to the hospital, Lucchesi v. Reynolds, 125 Wash. 352, 353-55, 216 P. 12 (1923); statements made 10 to 15 minutes after a shooting, after the victim had been carried to a different place, State v. Labbee, 134 Wash. 55, 58-59, 234 P. 1049 (1925); and statements made to police, some minutes after the victim was shot, and after the victim had identified the shooters to his wife, State v. Kwan, 174 Wash. 528, 535, 25 P.2d 104 (1933).

The analysis by the Court in Lucchesi, supra, is telling, as the Court concluded that as long as 45 minutes after a collision, the event was not terminated when the police asked questions of the driver at the hospital where the victim's body was laid out.

125 Wash. at 354-55. The act that causes an injury does not define the parameters of the event for purposes of res gestae analysis. The event has not terminated at the point when the act that causes the injury ends and the injured victim's attempt to

escape and obtain help was part of an ongoing event that included the assault that caused the injury.

The statements of the bleeding victim within minutes of this assault fall within the historical res gestae doctrine.

C. CONCLUSION

The Supreme Court's opinion in Pugh sets out the State Confrontation Clause analysis applicable to this case. The statements in this case fall within the historical res gestae doctrine and under the Pugh analysis admission of the statements did not violate the State Confrontation Clause or the Sixth Amendment. For this reason and those previously argued, the conviction should be affirmed.

DATED this 12TH day of March, 2010.

Respectfully submitted,

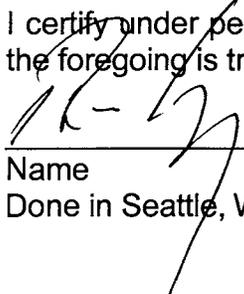
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to MAUREEN M. CYR, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent, in STATE V. JAMES ARTIS CASON, Cause No. 61941-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

03/12/10

Date