

NO. 63883-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

S.L.S.
(D.O.B. 2/17/1992),

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Police officer Victor McKissack found himself in a chaotic situation when he intervened in a fight but the person he was trying to aid struggled against him. A large crowd gathered, including friends of the boy the officer struggled to subdue. McKissack felt himself being pushed, pulled, and hit from all sides, and the person he was trying to arrest reached toward his police firearm, when a teenage boy kicked McKissack in the head.

S.L.S. was arrested several blocks away, and while he was handcuffed in the police car, McKissack identified him as the person who kicked him. No other witnesses identified S.L.S. as the perpetrator. Before his trial, S.L.S. asked the court to order a lineup, but the court refused. Because identification was the critical issue in the case, there were many witnesses who never identified S.L.S., and the only identification procedure was an inherently suggestive show up, the court's refusal to order any lineups denied S.L.S. his right to present a defense and receive due process of law.

Further error occurred in the court's admission of three recorded 911 calls when the declarants did not testify at trial and

they were not admissible under hearsay rules. S.L.S. is entitled to a new trial.

B. ASSIGNMENTS OF ERROR.

1. The court's denial of S.L.S.'s request for a lineup violated his rights to due process of law and to present a defense.

2. The court improperly admitted out-of-court declarations that did not meet any exception to the rules barring hearsay.

3. The cumulative error denied S.L.S. a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The rights to due process of law and to present a defense require the State to give an accused person access to the necessary tools to investigate material issues in a case. The allegations against S.L.S. rested on whether he was the person who assaulted a police officer. Many people saw the incident but the State did not ask any eyewitnesses whether S.L.S. was the perpetrator other than conducting a single show-up held under suggestive circumstances involving an extremely agitated victim. Did the court's refusal to order a lineup deny S.L.S. his ability to investigate the case and present a defense, and thus violate his right to due process of law?

2. The rules of evidence bar the admission of hearsay statements unless the court finds an exception applies. The court disregarded the evidentiary requirements for present sense impressions and admitted statements that were not spontaneous utterances as the rule requires. The court ignored the excited utterance requirements by admitting statements without finding that the declarants, who observed an incident from afar, were operating under the stress of the incident. Where the court misapplied the legal requirements for present sense impressions and excited utterances, has it abused its discretion?

D. STATEMENT OF THE CASE.

Police officer Victor McKissack responded to a disturbance and saw two men fighting. 5/12/09RP 47.¹ As he watched, Harry Castillo lifted Deonte Randolph in the air, slammed him to the ground, and beat him. 5/12/09RP 63-64. McKissack immediately intervened. 5/12/09RP 67. He pushed Castillo to the side and sat on top of Randolph, who had landed on his head and back in a ditch. 5/12/09RP 64.

While McKissack had intervened to “save Randolph,” Randolph struggled with McKissack. 5/12/09RP 67. He interpreted

Randolph's struggle as a "fight" that he needed to win. 5/12/09RP 71-75; 5/13/09RP 72. Randolph's continued resistance brought a large crowd, including Randolph's then-girlfriend Auni'quia Rutledge. 5/12/09RP 122-23. Others watched from inside their homes. Ex. 17 (nine 911 calls from neighbors). McKissack felt hands all over him, pushing, pulling, and hitting him. 5/12/09RP 78, 82. He tried to gain control of Randolph by a variety of tactics, including biting Randolph in the shoulder, squeezing his legs, punching him, and "forearm shivers" which disorient a person by hitting him in the head with the front of the arm. 5/12/09RP 74, 76; 5/13/09RP 74-76. Some people in the crowd yelled for McKissack to stop hurting Randolph. 5/7/09RP 130-31. Rutledge grabbed McKissack, and in response, McKissack punched her in the face. 5/12/09RP 80.

Because Randolph was lying in a ditch, and McKissack was sitting on top of him, McKissack's upper body was close to ground level. 5/7/09RP 27. A teenage boy kicked McKissack in the face and ran away. 5/13/09RP 81.

When back-up officers responded, McKissack directed them to search for the boy who kicked him in the face. 5/12/09RP 89.

¹ The verbatim report of proceedings is referred to herein by the date of

The kick made McKissack dizzy and disoriented, and ultimately caused some brain injuries. 5/12/09RP 106; 127.

A responding officer Ralieg Evans saw someone walking nearby who partially fit the description of the perpetrator. 5/5/09P 101. Evans did not stop the boy at first. Later, after receiving some additional descriptive information, Evans stopped S.L.S. as he walked down the street. Id. S.L.S. was talking to his mother on his cell phone as Evans approached him. 5/6/09RP 42. Evans noted that S.L.S. was sweating, which S.L.S. said was from playing basketball. 5/5/09RP 86. He handcuffed S.L.S. and put him in the backseat of his police car. 5/6/09RP 43.

McKissack drove to where S.L.S. was detained, knowing that the police has arrested a suspect and while he was very upset over the incident. 5/6/09RP 28-29. Upon seeing S.L.S. handcuffed in the back seat of the police car, McKissack slammed the door four times to vent his anger. 5/6/09RP 34, 47. An officer told Seals, he "ought to let [McKissack] kick your ass." 5/6/09RP 49. McKissack identified S.L.S. as the person who kicked him. 5/6/09RP 31.

the proceeding followed by the page number.

S.L.S. was charged with third degree assault and jointly tried alongside Randolph and Rutledge.² Several months before trial, S.L.S. asked the court to order a lineup, explaining that the case hinged on whether the State's witnesses would identify him as the person who kicked McKissack and none of the State's witnesses other than McKissack had identified him. CP 7-11. The prosecution refused to cooperate with the lineup request and the court found there was no reason to order one. CP 16; 1/27/09RP 20.

At a fact-finding trial before Judge Chris Washington, several witnesses testified who had observed the incident but none identified S.L.S. as the perpetrator. A K-9 officer explained how a dog followed one or more scents on a track that led to S.L.S after the incident, although the dog was tracking a person who left the scene and not the person who kicked McKissack. 5/11/09RP 109, 111. Additionally, the prosecution relied on three recorded telephone calls to 911 from people who lived nearby, admitted over defense objection.

² Randolph and Rutledge are not part of this appeal. Both were found guilty of obstruction of a law enforcement officer. 5/21/09RP 43-44. Randolph was acquitted of third degree assault and attempting to disarm a police officer. Id.

The juvenile court convicted S.L.S. of third degree assault and imposed disposition of local sanctions. 5/21/09RP 43; CP 174. Additional facts are addressed in further detail in the pertinent argument sections below.

E. ARGUMENT.

1. THE COURT'S REFUSAL TO ORDER A LINEUP DENIED S.L.S. HIS RIGHT TO PRESENT A DEFENSE AND RECEIVE A FAIR TRIAL

Before trial, S.L.S. asked the court to order a lineup so he could probe the State's inability to offer witnesses who could identify S.L.S. as the perpetrator and minimize the harm that would follow from an impermissibly suggestive in-court identification when the witness had not had a fair opportunity to see whether he or she could identify S.L.S. outside of the courtroom. The prosecution objected to the request and refused to cooperate. The court ruled that there was no reason to order a lineup and denied the defense request. Because the evidence against S.L.S. rested on a suggestive show-up identification, the court's refusal to order a lineup denied S.L.S. his right to present a defense and receive a fair trial.

a. The right to present a defense is meaningless unless the defense is given tools critical to investigating the primary issues in the case. A person accused of a crime has “the right to a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, _ Wn.2d _, 2010 WL 1492583, *2 (2010); U.S. Const. amend. 6; Wash. Const. art. I, § 22. As the Supreme Court said recently in Jones, “We must remember that ‘the integrity of the truthfinding process and [a] defendant’s right to a fair trial’ are important considerations” when deciding questions relating to access to and admissibility of evidence. 2010 WL 1492583, *3 (quoting State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)). When evidence is highly probative, no state interest can be compelling enough to bar its introduction. Id.

The right to assistance of counsel also includes the right to an attorney who reasonably and competently investigates the allegations and prepares for trial. State v. A.N.J., 168 Wn.2d 91, 110-111, 225 P.3d 956 (2010); see Ake v. Oklahoma, 470 U.S. 68, 72, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The defense must have the opportunity to meaningfully confront and cross-examine

witnesses. Crawford v. Washington, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

“It is well established that ‘due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate.’” People v. Fernandez, 219 Cal.App.3^d 1379, 1384 (Cal. App. 1990) (quoting Evans v. Superior Court, 11 Cal.3d 617, 625, 522 P.2d 681, 686 (1974)). In Evans, the California Supreme Court ruled that the prosecution must accede to a defense request for a lineup when identification is material to the case, timely sought, and not overly burdensome to the State, drawing a parallel between the requested identification procedure and the State’s obligation to provide material evidence to the accused under Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evans, 522 P.2d at 686.

The Evans Court further explained,

We do note parenthetically that the accused himself has neither the facilities nor the experience to conduct an impartial lineup. The burden on the police is a nominal one, as the facilities, resources and other individuals who may be used in conducting a lineup are generally available. The procedure is one which uniquely falls within police expertise and routine practices.

Id. at 686-87.

Under CrR 4.7(b)(2)(i), the court, on motion from the prosecuting attorney or the defendant, may require or allow the defendant to appear in a lineup, subject to constitutional limitations. The criminal court rules governing discovery are a “two way street,” requiring the prosecution to give reciprocal discovery access to the accused person. Wardius v. Oregon, 412 U.S. 470, 475-76, 93 S.Ct. 2208, 37 L.Ed.2d. 82 (1973); State v. Boot, 40 Wn.App. 215, 219, 697 P.2d 1034 (1985) (holding that court rule permitting lineup at defense request satisfies due process). The prosecution violates the right to due process of law when holds the tools and information critical to the investigation without allowing reciprocal access to the defense. Wardius, 412 U.S. at 475-76. The prosecution’s refusal to conduct any lineups and the court’s refusal to order them denied S.L.S. access to potentially exculpatory and material information necessary for his defense.

S.L.S. asked for a lineup because the only evidence identifying S.L.S. as the suspect who kicked McKissack came from McKissack’s show-up identification, and there were numerous people who witnessed the incident. CP 7, 11-12. His motion was predicated on the circumstances of the incident. McKissack’s

identification bore all the markings of a potentially flawed procedure by its suggestive fashion and there was no other corroborating evidence to support the identification. Id.

The prosecution objected to the lineup on the grounds that it was not constitutionally obligated to conduct one. CP 17. It claimed the CrR 4.7 did not require the witnesses to attend the lineup, and argued S.L.S. had no right to confront witnesses against him before the trial. CP 18. The State did not explain if or how a lineup would be overly burdensome and never claimed that the passage of time would affect the fairness of a lineup. CP 17-19; 1/27/09RP 10. The court found “no reason” to hold a lineup. 1/27/09RP 20-21. The fact-finding adjudication bore out S.L.S.’s claim that identification was a critical lapse in the State’s case but because the State obstructed S.L.S.’s lineup request, he was denied an opportunity to effectively demonstrate the weakness of the State’s case.

b. The State’s case rested on a single suggestive identification. A show-up process is inherently suggestive because the eyewitness views only one individual “and, generally, that person is in police custody,” as the New Jersey Supreme Court explained in State v. Herrera, 902 A.2d 177, 183 (N.J. 2006). See

also Patrick M. Wall, Eye-Witness Identification in Criminal Cases 27-40 (Charles C. Thomas 1965) (explaining that courts and experts are in agreement that show-ups are “grossly suggestive”).

The U.S. Department of Justice (DOJ) has recognized the inherent suggestiveness of a show-up. U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement at 27 (1999) (instructing law enforcement to employ procedures that avoid prejudicing the witness). Among other procedural safeguards, DOJ instructs law enforcement that when multiple witnesses are involved and a positive identification is obtained from one witness, other identification procedures (e.g., lineup, photo array) should be considered for remaining witnesses. Id.

The prosecution made no effort to obtain additional identifications. The police did not use *any* identification procedures for the other witnesses at the scene or close in time to the incident. No other witnesses participated in the show-up and the police did not use a lineup or photo array to corroborate McKissack’s identification. The police relied solely on McKissack’s show-up identification to claim S.L.S. was the suspect who kicked McKissack, even though there were a number of people involved in the incident and many bystanders who witnessed it. CP 12.

S.L.S. was handcuffed in the backseat of a patrol vehicle when McKissack, after receiving a significant head trauma and following a chaotic struggle, came for the purpose of identifying an arrested suspect. 5/6/09RP 47. Before he arrived at the show-up scene, the arresting officers Raleigh Evans and Andrew Peloquin told McKissack they had a possible suspect. 5/6/09RP 28. McKissack spoke with these officers before he viewed S.L.S., and he came to “to identify the person,” knowing his fellow officers had a suspect. 5/12/09RP 95-96.

McKissack was very upset after being assaulted and his anger “grew and grew” afterward. 5/6/09RP 29; 5/12/09RP 97. When he came to the show-up, Evans described McKissack as “agitated and obviously upset.” 5/5/09RP 114. His emotional and mental state may have affected his ability to accurately identify the person who kicked him. See David B. Fishman & Elizabeth F. Loftus, *Expert Psychological Testimony on Eyewitness Identification*, 4 Law & Psychol. Rev. 87, 92 (1978) (reviewing research and concluding that “in general, extreme stress in an identification situation results in less reliable testimony”). Because of the suggestive nature of the circumstances surrounding this identification and the inherent suggestiveness of show-up

identifications generally, the trial court should have granted S.L.S.'s motion for a lineup.

c. Lineup identifications are substantially more reliable than a show-up of a person who is handcuffed and detained in a police car. Show-ups are inferior to lineups because of the increased chances for mistaken identification. Note, *No Exigency, No Consent, Protecting Innocent Suspects from the Consequences of Non-exigent Show-Ups*, 36 Colum. Human Rights L. Rev. 755, 759 (2005) (citing Gary L. Wells, *Police Lineups: Data, Theory, and Policy*, 7 Psychol. Pub. Pol'y & L. 791 (2001) (discussing current eyewitness identification research and the ways in which research can impact practice); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Show-ups: Eyewitness Identification Decisions of Adults and Children*, Law & Hum. Behav. 391, 393-402 (1997) (finding that the show-up is a "dangerous procedure" that increased rates of false identifications). The increased chances for mistaken identification are due to a lack of procedural safeguards in the show-up process:

Show-up misidentifications are likely more prevalent than misidentifications made pursuant to lineups or photographic arrays because many safeguards that exist with other methods of identification, such as lineups and photographic arrays, do not exist for

show-ups. The most important safeguard that exists with lineups and photographic arrays, but that does not exist for show-ups, is the presentation of more than one person from whom to choose.

Amy Luria, *Show-up Identifications: A Comprehensive Overview of the Problems and a Discussion of Necessary Changes*, 86 Neb. L. Rev. 515, 551 (2008) (internal citations omitted) (emphasis added).

Another important safeguard that exists for many lineups, but for virtually no show-ups, is the right to have counsel present. See United States v. Wade, 388 U.S. 218, 236-37, 87 S.Ct. 926, 18 L.Ed.2d 1149 (1967) (holding that the post-indictment lineup was a critical stage of the proceedings, so respondent was entitled to have his attorney present). The presence of counsel at an identification is an important safeguard against eyewitness misidentification because counsel is more likely to be “alert for conditions prejudicial to the suspect” than the suspect himself. Id. at 230-31; see also Moore v. Illinois, 434 U.S. 220, 225, 98 S. Ct. 458, 54 L. Ed. 2d 424 (1977) (“if an accused’s counsel is present at [a] pretrial identification, he can serve both his client’s and the prosecution’s interests by objecting to suggestive features of a procedure before they influence a witness’ identification.”). Moreover, it is likely that police officers conducting an identification

procedure in the presence of defense counsel will refrain from suggestive or improper behaviors.

The absence of an attorney at the show-up scene is particularly relevant here, where S.L.S. was a minor and where McKissack opened the backdoor several times in a threatening manner and another officer threatened to let McKissack beat up S.L.S. 5/6/09RP 47, 49 (S.L.S. testifying that McKissack opened and slammed the backseat door at least four times and that another officer told him that he “ought to let [Officer McKissack] kick your ass”). The show-up occurred during a time of very high emotions, increasing the potential for a false identification. See Bernal v. People, 44 P.3d 184, 190 (Colo. 2002) (discussing increased potential for misidentification by emotional victim when “victim's understandable outrage may excite a vengeful or spiteful motive” to identify a suspect). McKissack admitted his outrage over the incident, which may have influenced his desire to identify the person sitting handcuffed in a police car. Many more neutral witnesses who saw the incident were not asked to take part in any identification procedures.

d. A lineup would be far more reliable and less suggestive than a show-up. In Manson v. Brathwaite, the United

States Supreme Court held that due process permits the admission of confrontation evidence such as a show-up identification if, “despite the suggestive aspect, the out-of-court identification possesses certain features of reliability.” Manson v. Brathwaite, 432 U.S. 98, 110, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). Thus, a court must examine the totality of the circumstances such that “if the challenged identification is reliable [regardless of whether the procedures used were unnecessarily suggestive], then testimony as to it and any identification in its wake is admissible.” Id. at 110 n.10. The Brathwaite test is twofold: first, a court must determine whether the identification procedure was unnecessarily suggestive. If so, the court must then determine whether, despite the use of unnecessarily suggestive procedures, the identification was nevertheless reliable. To determine reliability the Brathwaite Court set out the following factors:

the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of [the witness’s] prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 114.

McKissack was struggling to subdue Deonte Randolph, ensure Randolph did not grab his gun, and fend off advances by a number of other people crowding him at the scene, when he was kicked in the face. 5/12/09RP 74, 76, 86. His opportunity to view the suspect who kicked him was impaired due to the on-going struggle with Randolph while simultaneously guarding against the increasingly hostile crowd that was yelling at him to stop hurting Randolph and pushing at McKissack.

McKissack's limited opportunity to observe the perpetrator is demonstrated by his inability to describe the person's clothing. McKissack did not see the person's clothes. 5/12/09RP 88. One person described the perpetrator was wearing a red jacket, while another said he wore a white t-shirt. 5/5/09RP 79, 81. Although Evans and his partner saw S.L.S. after they received the initial description, they did not stop him because they did not believe he matched the description. Id. at 101. Evans stopped S.L.S. only after another description came from a witness other than McKissack. Id. at 82-83.

McKissack claimed he was certain S.L.S. was the person who kicked him. Studies show that an eyewitness' certainty is not necessarily related to accuracy. See Christian A. Meissner & John

C. Brigham, *Special Theme* "The Other-Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making, 7 Psych. Pub. Pol. and L. 3, 25 (2001) (citing Bothwell, Deffenbacher, & Brigham (1987); Penrod & Cutler (1995); Sporer, Penrod, Read, & Cutle (1995)) (explaining that expressed confidence or certainty about an identification is not a strong indicator of accuracy). His certainty does not substitute for an accurate procedure or give excuse to the court's denial of S.L.S's efforts to obtain further identification evidence.

e. The lineup could account for cross-racial identification issues. Cross-racial identification is particularly problematic because an individual is less likely to accurately recognize the face of a different race. See John C. Brigham et al., *The Influence of Race on Eyewitness Memory*, in 2 Handbook of Eyewitness Psychology: Memory for People, 257, 257-58 (Rod C. L. Lindsay et al. eds., 2006) ("The cross-race effect (CRE), also known as the own-race bias or other-race-effect, refers to the consistent finding that adults are able to recognize individuals of their own race better than faces of another, less familiar race."); see generally Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984) (reviewing

laboratory findings that white subjects consistently displayed a significantly impaired other-race recognition ability).³

Cross-racial identification is relevant here. McKissack is Caucasian, while S.L.S. is African-American.⁴ McKissack observed an African-American man kick him in the face while simultaneously struggling to subdue Randolph and fend off other individuals. McKissack's identification of S.L.S. was not corroborated by any of the other witnesses who were at the scene of the incident. The police could have easily included other witnesses in the show-up or another identification procedure so that other witnesses--who shared his race--could corroborate McKissack's identification.

f. The court's refusal to allow S.L.S. to gather the only reasonably available persuasive evidence countering the State's case denied him the right to present a defense. The court relied on McKissack's inherently suggestive show-up identification of S.L.S. to conclude he was the perpetrator. The State bolstered McKissack's suggestive identification by offering him an in-court

³ New Jersey requires instructions on the dangers of cross-racial identification. See State v. Cromedy, 158 N.J. 112, 727 A.2d 457 (1999), and has developed standard instructions "in all eyewitness identification cases that eyewitness identification testimony requires close scrutiny and should not be accepted uncritically", instructing the jury it "must critically analyze such testimony," and that "a witness' level of confidence standing alone may not be an indication of the reliability of the identification." New Jersey v. Romero, 191 N.J. 59, 76, 922 A.2d 693, 703 (2007).

photograph of S.L.S. to identify, despite defense objection. 5/12/09RP 92-94; see Manson, 432 U.S. at 116 (single photograph identification viewed with “suspicion”). The court also noted McKissack conceded his extreme anger after the incident, which increases the potential for his emotions overriding his judgment during the show-up.

Most significantly, other credible witnesses did not identify S.L.S. The court explicitly found Sasha Simpson to be a credible witness in its ruling. 5/21/09RP 42. Simpson knew both Rutledge and Randolph. 5/14/09RP 114-15. She was with Rutledge, Randolph, and other friends before the incident. Id. She was close by as Randolph struggled with the officer. 5/14/09RP 118, 133.

Simpson saw someone kick the officer in the head. 5/14/09RP 137, 160. But she did not know S.L.S. and did not identify him as being present at the scene. Id. at 139, 165. Simpson’s testimony defeats the State’s theory that S.L.S. was Randolph’s friend who was seen with him before the incident, because Simpson was part of this group and she did not know S.L.S. or see him before the incident. 5/7/09RP 8.

⁴ See Ex. 56 (photograph of McKissack); Ex. 39 (photograph of S.L.S.).

The court also found Melinda Jones's testimony credible. 5/21/09RP 42. Jones lived in the neighborhood and was walking by as the incident unfolded. 5/19/09RP 24-40. She identified Rutledge and Randolph as participants in the incident, but did not identify S.L.S. 5/19/09RP 72-73. Rutledge also testified that S.L.S. was not present during the incident. 5/19/09RP 122.

In sum, because there was no other corroborating evidence identifying S.L.S. as the suspect who kicked McKissack, the trial court should have granted S.L.S.' motion for a lineup. The court's unreasonable denial of a lineup where it relied on an inherently suggestive show-up identification procedure denied S.L.S. his only meaningful ability to contest the allegations and present a defense.

2. THE COURT IMPROPERLY ADMITTED 911 CALLS WHEN THE ELICITED STATEMENTS WERE NOT PRESENT SENSE IMPRESSIONS OR OTHERWISE ADMISSIBLE HEARSAY

a. The 911 calls were not admissible as "present sense impressions." Over defense objection, the court admitted three 911 calls, two from non-testifying witnesses, on the grounds that they constituted present sense impressions. Statements of present sense impression must be made "while" the declarant is perceiving the event or "immediately thereafter." ER 803(a)(1).

They must be a “spontaneous or instinctive utterance of thought,” evoked by the occurrence itself, unembellished by premeditation, reflection, or design. Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939).

As S.L.S. argued when he objected to this evidence at trial, “[a]n answer to a question may not be a present sense impression.” State v. Martinez, 105 Wn.App. 775, 782, 20 P.3d 1062 (2001), overruled on other grounds, State v. Rangel-Reyes, 119 Wn.App. 494, 81 P.3d 157 (2003) (citing State v. Hieb, 39 Wn.App. 273, 278, 693 P.2d 145 (1984)). S.L.S. explained that the witnesses’ conversations with 911 operators could not be a present sense impression when the witness was answering the operators questions, deliberately eliciting information for the purpose of the police investigation. 5/7/09RP 39; 5/13/09RP 149-50. The court refused to apply this legal standard to define a present sense impression, and without citing any authority, the court claimed that it would define present sense impression more expansively to include any descriptive information notwithstanding the claim that the exception is more narrowly defined. 5/7/09RP 43.

In what was referred to as call 5,⁵ the caller's first several statements did not directly responding to questions and they may be present sense impressions. Ex. 59, p. 1 (Ex. 17, track 5). The caller told the operator, without significant prompting, that someone must help because a police officer is being beat up. Ex. 59, p. 1. But after this initial assertion, the operator asked several questions. Two people jointly responded to the operator, apparently both on the line together. Ex. 59, p. 2. The operator interrupted the callers to say, "I need the information." Ex. 59, p. 2. The operator asked how many people are involved, the race of the person who ran away, and the clothing description of the person who fled. Ex. 59, p. 3-4. This information should have been redacted as it was not a present sense impression.

Similarly, call 4 contains numerous questions asked by the operator and the caller's responses to those particular questions. Ex. 18 (transcript); Ex. 17 (track 4).⁶ While some of the responses are descriptions of presently occurring events given without prompting, many of the responses reflect the operator's calculated efforts to obtain information about who the police should treat as

⁵ Ex. 17 contains audio recordings of all calls, identified by a track number. Call 5 is track 5 on Ex. 17. Ex. 59 is a transcript of call 5 and is referred to here for convenience.

suspects. The operator asked for the race of the people involved, the clothes each wears, the extent of the damage they may have caused, height and weight, facial hair and hairstyle, in an effort to “make sure what was going on.” Ex. 18, p. 2-8.

Call 6 is a short conversation in which the operator asks several questions. Ex. 60 (transcript); Ex. 17 (track 6). Similarly to the other calls, the operator’s efforts to elicit details of the incident should be not classified as present sense impressions.

At the least, the court was required to substantially redact all three 911 calls, to excise portions that were not present sense impressions and thus were inadmissible. The court’s failure to do so constitutes an abuse of discretion.

b. The calls were not excited utterances. ER

803(a)(2) permits a court to admit excited utterances, defined as statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” A court must first make the preliminary finding that the declarant was under the influence of an event at the time the statements were made before it may admit evidence as an excited

⁶ Ex. 18 is the transcript for call 4, track 4 of Ex. 17.

utterance. State v. Bache, 146 Wn.App. 897, 904, 193 P.3d 198 (2008).

As a secondary rationale, the court indicated that calls 5 and 6 could be admitted as excited utterances.⁷ This rationale was mentioned only in passing and the court never articulated how the calls met the requirements for excited utterances.

The court found that Ex. 59, track 5, was also an excited utterance. 5/13/09RP 152. It offered no explanation as to how it found the caller was operating under the influence of the event.

The two callers who spoke to the 911 operator did not sound excited. Ex. 17 (track 5). The female voice was initially breathing slightly harder than might be normal, but the male voice was calm throughout and the female voice calmed quickly during the call. Id. The woman's initial breathing is just as likely to be the result to rushing to the telephone, or anxiety in talking to a 911 operator, as it is any reflection of stress over the event. While a judgment about the excited nature of the declarant is left to the court's discretion, here the court provided no basis for its ruling. The prosecution offered the excited utterance rationale only on the ground that it

was “close enough in time,” but this timing is more apt for the present sense impression exception and was targeted toward defeating the confrontation clause objection. 5/13/09RP 148. The prosecution did not claim the declarants in call 5 were operating under the stress and excitement of the event which they were viewing from afar. 5/13/09RP 148. The only purported excitement the prosecution alleged was the caller’s expression of “relief” when the police arrived. Id. at 149. The tones of the voices were not excited, do not display clear signs of stress, and absent a court finding that the callers were affected by the stress of the event, it simply cannot be inferred.

The court similarly did not engage in specific analysis about the excited nature of the declarant in call 6. Ex. 60. The caller’s voice is relatively calm in the course of the 911 call. Ex. 17 (track 6). The prosecution claimed that the mere fact she was reporting an emergency necessarily renders her call an excited utterance, but that argument inappropriately conflates the confrontation clause analysis with the hearsay rules. 5/13/09RP 156. Even if she was reporting what she saw as a presently occurring emergency, she

⁷ The only rationale offered for call 4 was the present sense impression. 5/7/09RP 37-38, 43. This caller’s voice is particularly calm throughout his conversation with the 911 operator and it would be far-fetched to argue that it

was not necessarily operating under the stress of the excitement when she was safely ensconced in her home and faced no personal threat. Like the calls in tracks 4 and 5, this latter call was neither an excited utterance nor a present sense impression and should not have been admitted.

A court necessarily abuses its discretion when it does not apply the proper legal standard. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The court admitted these 911 calls without applying the necessary framework for deciding whether they met the criteria for excited utterances. Moreover, the declarants sound calm and collected in the calls. Thus the court's failure to engage in the necessary analysis may not be ignored and this exception to the hearsay rules may not justify the admission of these 911 calls.

c. The improperly admitted 911 calls bolstered the weak case against S.L.S. and denied him a fair trial. The cumulative error doctrine requires reversal when the combined effects of the errors denied the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The court's improper admission of several 911 calls, two from witnesses who did not

could be viewed as an excited utterance. Ex. 17 (track 4).

testify at trial,⁸ in addition to its refusal to allow S.L.S. to gather critical identification evidence, denied him a fair trial.

The 911 calls were inflammatory, because they showed homeowners' grave concern over the well-being of the officer. Welch's call, contained in track 4, reflects complete disdain for the juveniles at the scene. He denigrates their clothing in addition to their behavior. The joint callers in track 5 offer little insight other than emphasizing community concern for the officer. The caller in track 6, reflected in Ex. 60, claimed the people at the scene were going to "maul" a female security officer even though there was no evidence that anyone at the scene showed any aggression toward her.

Only one of these three callers testified at trial, but all set the scene of a community seriously concerned over the actions of some juveniles toward a police officer. None of the witnesses identified S.L.S. and their testimony should not have been used to obtain a conviction.

⁸ The court found that the non-testifying declarants in calls 5 and 6 were offering information for the purpose of police assistance for an on-going incident. 5/13/09RP 148. S.L.S. does not challenge this characterization on appeal, but notes that he was denied any ability to challenge their descriptions by confronting them.

This improperly admitted evidence cemented McKissack's version of events. By bolstering McKissack's credibility, they enhanced his identification of S.L.S. as the perpetrator in the face of an otherwise sparse record of evidence against him. Because S.L.S.'s trial was tainted by these improprieties and the outcome who have been different had the court not made these errors, S.L.S is entitled to a new trial.

F. CONCLUSION.

For the reasons stated above, S.L.S. respectfully asks this Court to reverse his conviction and remand the case for a new trial. He also asks that no costs be awarded in the event that has does not substantially prevail on appeal.

DATED this 4th day of June 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63883-1-I
v.)	
)	
S.L.S.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF JUNE, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> S.L.S. 2300 21 ST AVE. S SEATTLE, WA 98122	(X) () ()	U.S. MAIL HAND DELIVERY _____

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COURT OF APPEALS
DIVISION ONE
FILED
MARI ARRANZA RILEY

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF JUNE, 2009.

X _____ 

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