

63883-1

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NO. 63883-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SEAN L. SEALS,

Appellant.

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FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PHILIP HUBBARD
THE HONORABLE CHRISTOPHER WASHINGTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court abused its discretion in denying Seals' motion to appear in a lineup when seven months had passed since the crime occurred, Seals' appearance had changed substantially, and Seals was identified by the victim in a proper show-up procedure very shortly after the crime occurred.

2. Whether the trial court properly admitted several 911 calls because the statements made during the calls were admissible under the hearsay rules.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged juvenile respondent Sean Seals and his two juvenile co-respondents, Deonte Randolph and Ani'quia Rutledge, with assault in the third degree and obstruction for their participation in a melee on June 17, 2008 that resulted in multiple assaults upon Seattle Police Officer Jason McKissack. The information charging Seals with these crimes was filed within 72 hours of his arrest. CP 1-4.

Seven months after the crime occurred, Seals made a motion under CrR 4.7 to compel the State to arrange for Seals to

appear in a lineup for all of "the State's principal witnesses" to view prior to trial. CP 15. The State opposed the motion. CP 16-19. After considering arguments from both parties, the Honorable Philip Hubbard denied Seals' motion to compel a lineup. RP (1/27/09) 2-21; CP 20-21.

A fact-finding hearing for all three juvenile respondents took place in May 2009 before the Honorable Christopher Washington. After hearing all of the evidence and the arguments of the parties, the trial court found that Seals had committed assault in the third degree, but not obstructing.¹ RP (5/21/09) 26-44; CP 138. Although the State requested a manifest injustice disposition above the standard range, the trial court imposed a standard-range disposition. RP (6/19/09) 73-82, 102-06; CP 123-29. Seals now appeals. CP 130-37.

2. SUBSTANTIVE FACTS

Seals' co-respondents Rutledge and Randolph had an on-again/off-again girlfriend/boyfriend relationship. RP (5/19/09) 84-85. On June 17, 2008, they had an argument, and Randolph

¹ Juvenile co-respondents Randolph and Rutledge were each found to have committed obstructing, but not assault in the third degree. RP (5/21/09) 26-44.

assaulted Rutledge by yanking on her arm and choking her with her scarf. RP (5/15/09) 144-45, 150. The assault was bad enough that Rutledge's friends intervened by striking Randolph. RP (5/14/09) 146. Rutledge's friend Sasha Simpson told Rutledge to run home. RP (5/14/09) 150.

After Rutledge had gone inside her house, which was located in the Highpoint neighborhood in West Seattle, Randolph and two other juvenile males, one of whom was Seals, appeared on Rutledge's front porch. RP (5/7/09) 8-10. Randolph began pounding on the door and the front window with his fists, while shouting in a "very loud and boisterous" manner. RP (5/7/09) 9-10. Randolph picked up a plastic chair and appeared ready to throw it through the window. At this point, neighbor Anthony Welch called 911 to report what he was witnessing. RP (5/7/09) 11-12; Ex. 17, 18. Randolph then threw the plastic chair against a vehicle parked nearby. RP (5/7/09) 12.

At that point, Rutledge's stepfather Harry Castillo came outside to confront Randolph. RP (5/7/09) 13; RP (5/14/09) 32-34. At about the same time, private security guard Dorian Parker and Seattle Police Officer Jason McKissack both arrived in response to calls about the incident. RP (5/7/09) 116-20, 123; RP (5/12/09)

58-59, 62. In view of several witnesses, Castillo picked up Randolph, slammed Randolph to the ground in a ditch, and began punching him. RP (5/7/09) 14; RP (5/12/09) 63, 66; RP (5/14/09) 115.

Officer McKissack believed that Randolph was about to be seriously injured, or even killed, so he made the decision to assist Randolph without the benefit of having backup officers present. RP (5/12/09) 67-68. McKissack got between Castillo and Randolph in order to stop the assault; Castillo quickly recognized that McKissack was a police officer, and he backed off. RP (5/12/09) 68-70. Randolph, on the other hand, turned around and punched McKissack three times in the face. McKissack lost his balance and started falling backwards. RP (5/12/09) 71. Randolph then attacked McKissack more aggressively, and punched McKissack two more times in the face. RP (5/12/09) 72. McKissack heard someone yell, "He is a cop. Don't hit him." RP (5/12/09) 73. Randolph ignored this bystander and continued his assault. RP (5/12/09) 74.

McKissack was able to get Randolph on his back, and McKissack got on top of him. McKissack struck Randolph 3 or 4 times with a closed fist while straddling Randolph's torso.

RP (5/12/09) 76. Nonetheless, Randolph continued to struggle. As McKissack continued to try to gain control of Randolph, Seals approached and punched McKissack twice in the side of the head. RP (5/12/09) 77. At that point, Rutledge also approached and grabbed Officer McKissack in an effort to pull him off of Randolph. RP (5/12/09) 79. McKissack punched Rutledge once, and she backed away. RP (5/12/09) 80-81. As the melee continued, a hostile crowd was gathering around McKissack. RP (5/7/09) 130. Dorian Parker was trying to keep people back, but with little success. RP (5/7/09) 24, 132-33.

Officer McKissack obviously realized that he was in dire need of backup at this point, but he had lost his radio and shoulder microphone at some point in the melee. As McKissack looked around for his radio while still on top of Randolph, Seals punched him in the head again. RP (5/12/09) 81-82. McKissack then spotted his radio in some nearby bushes; somehow, he grabbed the radio without losing complete control of Randolph, and radioed for "fast backup." RP (5/12/09) 82.

At this point, again in view of several witnesses, Seals stepped forward and kicked Officer McKissack in the face. RP (5/7/09) 27, 134-35; RP (5/12/09) 84. After the first kick, Seals

stepped back, took "a boxing type" stance, and kicked McKissack again. RP (5/7/09) 27. McKissack felt dazed and knew he was injured; he was very concerned about being knocked unconscious and having his gun taken away if he were to be kicked again, so he looked around the immediate area to determine if he could shoot Seals without injuring anyone else. RP (5/12/09) 84-85. McKissack then focused on Seals' face; Seals gave McKissack a "shitty little smile,"² and ran away. RP (5/12/09) 87-88. At that point, other officers began arriving and helped to get the situation under control. RP (5/11/09) 53, 59.

Anthony Welch was on the phone with 911 throughout the incident. Ex. 17, 18. In addition to describing events as they occurred, Welch provided the 911 operator with a description of Seals and a detailed description of the direction in which Seals had fled. Ex. 17, 18; RP (5/7/09) 28.

One of the officers who responded to the scene was K-9 Officer Kevin Heffernan. Officer Heffernan performed a track with his K-9 partner Luke in an effort to locate Seals. RP (5/11/08)

² McKissack actually described Seals' facial expression as an "evil, shitty little smile." RP (5/12/09) 87. In response to Seals' objection, the trial court struck the word "evil," but allowed the remainder of McKissack's description to stand. RP (5/12/09) 88.

98-100. Meanwhile, Officer Raleigh Evans and his human partner were setting up containment for the K-9 track when Seals, who fit the suspect description that had been broadcast, approached their patrol car from behind. RP (5/12/09) 9-13. Officer Evans got out of the patrol car and told Seals to stop. Evans noted that Seals was talking on a cell phone, and that his eyes were darting back and forth nervously. RP (5/12/09) 14-15. Evans held Seals by the arm so that he would not flee; Evans noted that Seals was sweating so profusely that he had sweated through both t-shirts he was wearing. RP (5/12/09) 15. Evans then asked Officer McKissack to come to his location so that he could view Seals in a show-up procedure. RP (5/12/09) 16.

McKissack arrived shortly thereafter, and positively identified Seals as the person who had struck him repeatedly and kicked him in the head. RP (5/12/09) 18, 97. McKissack was very angry, and he slammed the door of the patrol car after viewing Seals in the back seat. In fact, McKissack was so angry at Seals that he opened the car door a second time and slammed it even harder. RP (5/12/09) 97-98. Other officers tried to calm him down, and McKissack walked away. Shortly thereafter, some gang unit officers transported him to Harborview. RP (5/12/09) 98.

After Officer McKissack identified Seals and then left for the hospital, Officer Heffernan and K-9 dog Luke arrived at the location where Officer Evans still had Seals detained in the back seat of his parked patrol car. RP (5/12/09) 20. When K-9 dog Luke reached the patrol car, he jumped up on the car to indicate that he had found the suspect that he had been tracking from the crime scene. RP (5/11/09) 103.

As of the time of trial in this case, Officer McKissack had not yet been able to return to active duty as a result of the injuries he suffered during the attack. RP (5/12/09) 105-09.

Additional facts of this case will be discussed further below as necessary for argument.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED SOUND DISCRETION IN DENYING SEALS' MOTION FOR A LINEUP SEVEN MONTHS AFTER THE CRIME OCCURRED.

Seals first claims that Judge Hubbard violated his constitutional right to present a defense and receive a fair trial by denying his motion to compel the State to arrange for him to appear in a lineup. Appellant's Opening Brief, at 7-22. This claim should be rejected. This Court has previously held that denying a

defendant's request for a lineup does not implicate the defendant's constitutional rights, and that the question of whether to order a lineup under CrR 4.7 is addressed to the discretion of the trial court. There was no abuse of discretion here, particularly given the amount of time that had passed between the date of the crime and the date of Seals' motion for a lineup. Accordingly, this Court should affirm.

Under CrR 4.7, the procedural court rule governing discovery in criminal cases, the trial court may order the defendant to appear in a lineup in response to a motion made by either the prosecution or the defense. CrR 4.7(2)(i). As a preliminary matter, Seals frames his claim regarding the request for a lineup as an issue of constitutional magnitude. However, this Court has previously held that a defendant does not have a constitutional right to a lineup upon request. Rather, the decision whether to grant a defendant's request for a lineup under CrR 4.7 is a matter addressed to the sound discretion of the trial court. State v. Dukes, 56 Wn. App. 660, 662-64, 784 P.2d 584 (1990). A trial court abuses its discretion only when its decision is manifestly unreasonable or rests on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). A reviewing court

will find an abuse of discretion only if it concludes that no reasonable person would have ruled as the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

This Court is not alone in the view that this is not a constitutional issue. To the contrary, this Court's holding in Dukes that a defendant does not have a constitutional right to a lineup and that ordering a lineup is a matter of discretion for the trial court represents the majority view among state and federal courts that have considered this issue. See, e.g., United States v. Ravich, 421 F.2d 1196, 1203 (2d Cir. 1970) (a lineup is not "so essential to the presentation of a proper defense concerning identification that refusal to arrange one on a defendant's request is a denial of due process"); State v. Boettcher, 338 So.2d 1356, 1361 (La. 1976) (holding "[i]n accord with the national jurisprudence" that there is "no constitutional right to order a lineup," and the trial court "has broad discretion to order one or not"); State v. Ferguson, 120 Ariz. 345, 348, 586 P.2d 190 (1978) (noting that courts "have uniformly decided that there is no constitutional right" to a lineup, citing numerous cases); United States v. Robertson, 606 F.2d 853, 857 (9th Cir. 1979) (there is "no absolute or constitutional right to a lineup," and "[t]he decision to conduct a lineup is solely within the

discretion of the trial judge"); State v. Watson, 164 W. Va. 642, 647, 264 S.E.2d 628 (1980) (noting "general agreement" among courts that granting a defendant's request for a lineup "lies within the discretion of the trial judge," citing numerous cases).

This Court should adhere to its holding in Dukes, which is in accordance with the majority rule, that Seals' claim is not of constitutional dimension and the only remaining inquiry is whether there was at least one tenable basis for the trial court to deny Seals' motion for a lineup.

The issue of what factors a trial court should take into account when considering a defendant's request for a lineup was addressed in United States v. Ravich, *supra*. In Ravich, while holding that there is no constitutional right to a lineup, the court also recognized that "a *prompt* line-up might be of value both to an innocent accused and to law enforcement officers." Ravich, 421 F.2d at 1203 (emphasis supplied). Accordingly, the court concluded that "[a] pretrial request by a defendant for a line-up is thus addressed to the sound discretion of the [trial] court and should be carefully considered." Id. The court then provided guidance for the exercise of that discretion by identifying factors

relevant to deciding whether to grant or deny a defendant's request for a lineup:

Without any attempt at being exhaustive, we think some relevant factors are the length of time between the crime or arrest and the request, the possibility that the defendant may have altered his appearance (as was at least attempted here), the extent of inconvenience to prosecution witnesses, the possibility that revealing the identity of the prosecution witnesses will subject them to intimidation, the propriety of other identification procedures used by the prosecution, and the degree of doubt concerning the identification.

Id. Other courts have cited these factors from Ravich with favor.

See, e.g., State v. Aita, 114 Ariz. 470, 471, 561 P.2d 1242 (Ariz. Ct. App. 1976); Boettcher, 338 So.2d at 1361.

Applying the Ravich factors in this case reveals that there were sound reasons for the trial court to deny Seals' motion to compel a lineup. First, and most obviously, seven months had passed between Seals' arrest and his motion for a lineup. CP 1-4, 15, 18; RP (1/27/09). This length of time, standing alone, provides a reasonable basis for denying Seals' motion. Second, the trial record establishes that Seals had substantially changed his appearance. Specifically, Seals shaved off the distinctive long braids he was wearing on the date of the crime, and he wore glasses in court that he was not wearing on the date of the crime.

RP (5/6/09) 134-35. This change in appearance, especially when coupled with the passage of time, also supports the trial court's decision to deny the request for a lineup.

As to the third and fourth Ravich factors, the record does not reveal what the extent of inconvenience to the witnesses would have been, and it does not establish whether they would have been subject to intimidation. However, as to the fifth and sixth factors, despite Seals' arguments to the contrary, there was no impropriety in conducting a show-up identification procedure with Officer McKissack immediately after the crime occurred,³ and Officer Heffernan's K-9 partner Luke also confirmed Seals' identity as the perpetrator by tracking from the crime scene to the nearby location where Seals was detained. In sum, the Ravich factors alone provide several tenable grounds for denying Seals' motion for a lineup, and therefore, Seals cannot demonstrate a manifest abuse of discretion.

Nonetheless, Seals argues that he had a constitutional right to demand a lineup, relying primarily upon Evans v. Superior Court,

³ "Showup identifications are not per se unnecessarily suggestive, and one held shortly after the crime is committed and in the course of a prompt search for the suspect is permissible." State v. Rogers, 44 Wn. App. 510, 515, 722 P.2d 1349 (1986).

11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974), for this proposition. This Court should reject the analysis in Evans for at least two reasons. First, California appears to be the only jurisdiction whose courts have expressly held that a defendant's request for a lineup is an issue of constitutional magnitude, and in this respect, Evans conflicts with this Court's holding in Dukes and the overwhelming majority of courts that have considered the issue. Second, the holding in Evans stemmed from the fact that there was no existing authority in the California statutes or court rules providing for a lineup at the request of the defendant as part of the discovery process. Thus, the Evans court chose due process as a means for creating such a rule. Evans, 11 Cal. 3d at 621-23. In Washington, by contrast, CrR 4.7 provides express authority for a pretrial lineup at the request of either party.

In addition, a closer inspection of Evans reveals that it does not actually support Seals' position in this case. This is evident from the holding itself:

We conclude in view of the foregoing that due process requires in an appropriate case that an accused, *upon timely request therefore*, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, *only when eyewitness identification is shown to be a material issue and there exists a*

reasonable likelihood of a mistaken identification which a lineup would tend to resolve.

The questions whether eyewitness identification is a material issue and whether fundamental fairness requires a lineup in a particular case are inquiries *which necessarily rest for determination within the broad discretion of the magistrate or trial judge.*

Evans, 11 Cal. 3d at 625 (footnote omitted) (emphasis supplied).

Thus, even under Evans, the defendant's request for a lineup must be timely, the defendant must show both that eyewitness identification is a material issue *and* that there is a reasonable likelihood of misidentification, and the trial court ultimately maintains broad discretion to decide whether a lineup is necessary.

The Evans court was particularly concerned about the issue of timeliness:

The broad discretion vested in a trial judge or magistrate includes the right and responsibility on fairness considerations to deny a motion for a lineup when that motion is not made timely. *Such motion should normally be made as soon after arrest or arraignment as practicable.* We note that motions which are not made until shortly before trial should, unless good cause is clearly demonstrated, be denied in most instances by reason of such delay.

Id. at 626 (emphasis supplied). Moreover, the California Court of Appeals has previously found, based on the Evans standard, that there were no grounds to grant the defendant's request for a lineup

where the defendant had been positively identified in a show-up procedure at the scene of the crime, and thus, identification was not a sufficiently material issue. People v. Rivera, 127 Cal. App. 3d 136, 149, 179 Cal. Rptr. 384 (1982).

In other words, even if this Court were to apply the analysis from Evans, Seals still cannot demonstrate that the trial court abused its discretion in denying his motion to compel a lineup. Seals did not make a timely request "as soon after arrest or arraignment as practicable." Evans, at 626. Instead, he did not make his motion until seven months after his arrest, and less than four months prior to trial. In addition, Seals did not demonstrate that identification was a material issue or that there was a reasonable likelihood of misidentification, because he was positively identified by Officer McKissack in a show-up procedure very shortly after the crime occurred. Seals' reliance on Evans is misplaced.

Also, Seals argues at length that Officer McKissack's show-up identification procedure was impermissibly suggestive, that there should have been other identification procedures utilized, that lineups are preferable to show-ups, and (although no such argument was made in the trial court) that cross-racial identification

was an issue in this case. These arguments are presented to bolster the notion that Seals was constitutionally entitled to a lineup.

But as discussed at length above, this is not a constitutional issue; it is a matter addressed to the trial court's discretion. In addition, Seals' arguments would go to the weight of the identification evidence, which was considered by the fact finder and found to be sufficient to support Seals' identity as the perpetrator beyond a reasonable doubt.

Show-up identifications are not per se impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987). A show-up is entirely proper when conducted shortly after the crime was committed and in the course of a prompt search for the suspect. State v. Kraus, 21 Wn. App. 388, 392, 584 P.2d 946 (1978). In fact, a show-up conducted shortly after the crime to determine whether an eyewitness can identify the suspect as the perpetrator permits the witness to make the determination while the image of the perpetrator is still fresh in his or her mind, and may lead to the prompt release of an innocent suspect. United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977). Moreover, in the context of a motion to suppress an identification, if a defendant cannot make a threshold showing that an identification

was impermissibly suggestive and likely to result in irreparable misidentification, any uncertainty or inconsistency in the identification goes to weight, not admissibility. State v. Vaughn, 101 Wn.2d 604, 610, 682 P.2d 878 (1984).

In this case, the show-up procedure was conducted very shortly after the crime occurred, immediately after Seals was apprehended by Officer Evans and his partner a few blocks from the crime scene. RP (5/12/09) 14-16, 18. Officer Evans noted that Seals was sweating profusely, which was consistent with him running away from the crime scene. RP (5/12/09) 15, 41. Upon seeing Seals in the back seat of the patrol car, Officer McKissack immediately and positively identified Seals as the perpetrator. RP (5/12/09) 18, 96-97. In fact, McKissack became so angry upon seeing Seals again that he slammed the door of the patrol car twice. RP (5/12/09) 97-98. Officer Heffernan's K-9 partner Luke confirmed Seals' identity as the perpetrator by tracking directly from the crime scene to the patrol car where Seals was detained. RP (5/11/09) 99-106. Officer Evans also identified Seals from photographs taken on the day of the crime, and in court. RP (5/12/09) 21-24.

In sum, there was no showing in this case that Officer McKissack's show-up was improper, and other evidence presented at trial corroborated Seals' identity as the perpetrator. Moreover, Seals' arguments to the effect that lineups are preferable to show-ups do not establish an abuse of discretion in not ordering a lineup. Put another way, "[t]he failure to provide lineup evidence goes to the sufficiency of the identification, not its propriety." Dukes, 56 Wn. App. at 664. Seals' arguments are without merit.

Lastly, even if this Court were to find that Judge Hubbard abused his discretion in denying Seals' motion to compel a lineup, there is still no basis to reverse because any possible error is harmless. When nonconstitutional error is at issue, a new trial is not warranted unless there is a reasonable probability that the outcome of the trial would have been different absent the error. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Put another way, the error must have materially affected the trial in a manner resulting in prejudice to the defendant. State v. Grenning, 169 Wn.2d 47, 234 P.3d 169, 175 (2010).

In this case, the absence of a lineup did not result in material prejudice to Seals. To the contrary, the trial court ruled that little if any weight would be given to any in-court identifications unless a

sufficient foundation for the identification could be established.⁴ RP (5/6/09) 135. In one instance, with witness Anthony Welch, the trial court did not allow an in-court identification at all because Welch had inadvertently seen Seals' booking photograph just before testifying. RP (5/7/09) 2-6. Nonetheless, the trial court found the evidence sufficient to establish Seals' identity beyond a reasonable doubt. RP (5/21/09) 37. In short, there is no reasonable probability that a lineup would have affected the outcome of the fact-finding hearing. Therefore, even assuming that error occurred, the error was harmless and this Court should affirm.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING 911 CALLS THAT WERE ADMISSIBLE UNDER THE HEARSAY RULES.

Seals next claims that Judge Washington erred in admitting three 911 calls during the fact-finding hearing. More specifically, Seals claims that the trial court abused its discretion because the three 911 calls in question did not qualify for admission under the hearsay rules regarding present sense impressions and excited

⁴ In addition, the trial judge is presumed to disregard inadmissible evidence when sitting as the factfinder during a bench trial. State v. Read, 147 Wn.2d 238, 244-45, 53 P.3d 26 (2002).

utterances, mainly because the callers responded to questions from the 911 operators. See Brief of Appellant, at 22-30. This claim should also be rejected, because the trial court acted well within its discretion in admitting the calls, each of which contained statements describing the attack on Officer McKissack as it was occurring and in its immediate aftermath.

Evidentiary rulings are addressed to the sound discretion of the trial court. Atsbeha, 142 Wn.2d at 913-14. A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. Enstone, 137 Wn.2d at 679-80. A reviewing court will find an abuse of discretion only if it concludes that no reasonable person would have ruled as the trial judge did. Atsbeha, 142 Wn.2d at 914.

An excited utterance is a statement made while the declarant is still under the influence of a traumatic event such that the statement is not the product of reflection or deliberation. ER 803(a)(2); State v. Woods, 143 Wn.2d 561, 600, 23 P.3d 1046 (2001). Spontaneity, the passage of time, and the declarant's state of mind are factors that courts consider to determine whether a statement is an excited utterance or not, i.e., whether it is the product of reflex or instinct, or of deliberation. State v. Palomo, 113

Wn.2d 789, 791, 783 P.2d 575 (1989). Accordingly, a statement is admissible as an excited utterance if the following requirements are met: 1) a startling event occurred; 2) the statement was made while the declarant was still under the stress of the startling event; and 3) the statement relates to the startling event. State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1) This exception is interpreted "in a sufficiently restrictive manner" such that it does not apply where there are insufficient guarantees of trustworthiness. State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), *overruled on other grounds*, 107 Wn.2d 97, 727 P.2d 239 (1986). The trustworthiness of a present sense impression "is based upon the assumption that its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant." Id. Accordingly, "[t]he time limit [for present sense impressions] is considerably shorter than the time limit associated with the exception for excited utterances." 5A K. Teglund, Wash. Prac., Evidence § 803.4, at 417 (4th ed., 1999).

Based on these standards, the trial court acted well within its discretion in admitting the three 911 calls.

First, witness Anthony Welch's call (referenced in the trial record as "track 4") was admissible in its entirety as a present sense impression. As Welch described during his trial testimony, the events that he was witnessing were "going from [his] eyes to [his] mouth" during the 911 call, without "enough time to process the information[.]" RP (5/7/09) 33. Welch's description of the call is reflected in the call itself, which consists of a moment-by-moment account of what Welch was seeing. Ex. 17, 18. Indeed, a better example of a present sense impression is difficult to imagine.

Second, the call from the Strupps (referenced in the trial record as "track 5") was admissible as both a present sense impression and an excited utterance. As with Welch's call, the Strupps described the events they were seeing to the 911 operator as they occurred. Ex. 17, 59. In addition, although Welch maintained a calm demeanor during his call, the Strupps were excited and stressed during theirs. This is evident in several of their spontaneous remarks.⁵

⁵ For example, Mr. Strupp stated, "Yeah, a policeman is being beat, get, get someone over here," and then added, "Right now." Ex. 17; Ex. 59, p. 1.

Third, the call from Janis Chapman (referenced in the trial record as "track 6") was admissible as a present sense impression and an excited utterance as well. Like the other callers, Chapman was doing her best to describe what she was seeing in a contemporaneous manner. Ex. 17, 60. In addition, Chapman's tone of voice demonstrates that she was stressed and upset, and she can be heard to be crying at a couple of points during the call. Ex. 17.

In sum, the trial court properly exercised its discretion in admitting these three calls under the applicable exceptions to the hearsay rules. Accordingly, this Court should affirm.

Nonetheless, Seals argues that anything that any of these 911 callers said in response to a question from the operator cannot be a present sense impression, citing Division Three's opinion in State v. Martinez, 105 Wn. App. 775, 783, 20 P.3d 1062 (2001), *overruled on other grounds*, State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003). Martinez does indeed state that "[a]n answer to a question is not a present sense impression." Id. As support for this sweeping proposition, Martinez cites this Court's decision in Hieb, 39 Wn. App. at 278. But Hieb does not support

the conclusion stated in Martinez that answers to questions cannot be present sense impressions.

In Hieb, this Court correctly observed that a present sense impression is admissible because "its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant." Hieb, 39 Wn. App. at 278. Accordingly, this Court concluded that the statements at issue were not present sense impressions because they were made "at least several hours" after the events in question had occurred. Id.

After reaching this entirely reasonable conclusion, this Court then considered whether the statements in question were excited utterances. The Court correctly explained that the excited utterance exception to the hearsay rule is not as restrictive as the exception for present sense impressions:

The excited utterance exception is broader than that for present sense impressions. The principle elements of an excited utterance are a startling event and a spontaneous declaration caused by that event. Unlike a statement of present sense impression, an excited utterance need not be contemporaneous to the event. Nor must the statement be completely spontaneous; responses to questions may be admissible.

Hieb, 39 Wn. App. at 278 (citations omitted). Ultimately, the Court concluded that the statements in question were properly admitted as excited utterances. Id. at 278-79.

Nowhere in Hieb did this Court hold that answers to questions cannot be present sense impressions. Rather, this Court held that 1) present sense impressions must be made contemporaneously with or immediately after the event, 2) excited utterances must be made when the declarant is under the influence of a startling event, and yet, 3) excited utterances need not be completely spontaneous and may be made in response to questioning. Thus, the statement in Martinez that answers to questions cannot be present sense impressions is incorrect, and appears to be based on a less-than-careful reading of Hieb.

The fact that answers to questions can still qualify as present sense impressions is evident from the 911 calls admitted in this case. For example, Anthony Welch's call makes clear that he is describing people and events as he is contemporaneously perceiving them, whether in response to the operator's questions or not:

WIT: Like he just threw a chair at a parked car.

OPR: And what race are these teens?

WIT: Black.

OPR: Okay. All black males and when you say teens do you mean like 16; you know like 15 to 18 that kind of range?

WIT: Ahh, 18 one of; the; the one doing the most damage is ah; (inaudible)

OPR: What color clothes is he wearing?

WIT: No shirt; black . . .

OPR: No shirt what color pants?

WIT: Black shorts beige pants hanging around his ankles.

OPR: Wait; wait; is; is this the guy; the guy with no shirt what color pants or shorts is he wearing?

WIT: He has black underwear on; he has . . .

OPR: Oh it's the black underwear and beige pants.

WIT: Beige pants down around his knees.

OPR: Okay. And then baggie beige pants? Okay. Any weapons seen on them?

WIT: Ahh, no but I see police officers pulling up right now.

Ex. 18, p. 2-3. Here, the fact that the operator was asking questions to obtain suspect descriptions from Welch does not change the fact that Welch's descriptions were based on contemporaneous observations.

Another example from a different call demonstrates the same principle:

OPR: Is the officer under control now?

WIT1: Oh, now somebody's through.

OPR: Is the officer under control now?

WIT2: I think so. He's holding somebody down; here comes another cop.

WIT1: Finally.

OPR: How many kids does he have there?

WIT1: One; two; three; four.

OPR: So there's one juvenile again. . . versus the officer?

WIT2: There were; there were several; one; but the officer's under control now and so; he's okay there's another cop here.

Ex. 59, p. 1-2. As was true with Welch's call, the fact that this 911 operator asked the callers whether the situation was under control and how many people were involved does not alter the fact that the callers' responses were based on first-hand, contemporaneous observations.

In sum, the blanket statement in Martinez that a present sense impression cannot be uttered in response to a question is incorrect and unsupported by authority. As the Florida Supreme Court observed in rejecting Martinez: "Responses to questions do not necessarily diminish contemporaneousness." Deparvine v. State, 995 So.2d 351, 370 n.20 (2008). This Court should reject Martinez, and affirm.

Seals also argues that the Strupps and Janis Chapman do not sound sufficiently excited for their calls to qualify as excited utterances, and that the trial court did not make a sufficient record on this point. But both calls speak for themselves, and the stress of the event is evident in the callers' voices. Ex. 17. Accordingly, because the calls speak for themselves and were made part of the record, there was no need for the trial court to make more of a record regarding the reasons for admitting the calls. Seals' arguments are without merit.

Finally, even if this Court were to conclude that these 911 calls or any portions thereof were admitted in error, there is still no basis to reverse Seals' conviction because any possible error is

harmless. As previously stated, nonconstitutional error is harmless if there is no reasonable probability that the outcome of the trial would have been different, and there has been no material effect on the trial resulting in prejudice to the defendant. Jackson, 102 Wn.2d at 695; Grenning, 234 P.3d at 175. Moreover, trial judges are presumed to disregard inadmissible evidence during bench trials. Read, 147 Wn.2d at 244-45. In this case, there is no indication in either the trial court's oral ruling or the written findings of fact and conclusions of law that the court relied on any 911 calls in finding Seals guilty of assault in the third degree. RP (5/21/09) 26-44; Supp. CP ____ (Sub No. 92). Thus, any possible error is harmless.

D. CONCLUSION

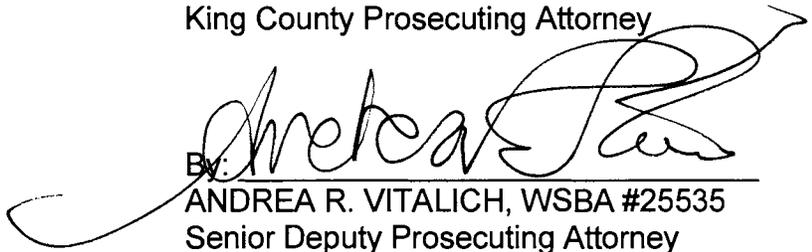
Seals had no constitutional right to compel a lineup, and the trial court exercised sound discretion in denying his motion to compel a lineup. Moreover, the trial court exercised sound discretion in admitting three 911 calls. For all of the reasons set

forth above, this Court should affirm Seals' juvenile conviction for assault in the third degree.

DATED this 17th day of August, 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 Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SEAN SEALS, Cause No. 63883-1-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.

U Brame
Name
Done in Seattle, Washington

8/17/10
Date