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King County Prosecutor
Appellate Unit

NO. 65039-4-I

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

STATE OF WASHINGTON,

Respondent,

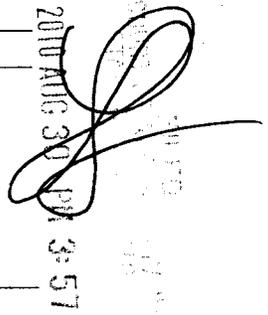
v.

ALBERT HOLDRIDGE,

Appellant.

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

The Honorable Laura Inveen, Judge

2010 AUG 30 PM 3:57


BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred when it admitted various hearsay statements and writings of the non-testifying alleged theft victim.

Issue Pertaining to Assignment of Error

A hearsay statement must meet three requirements to be admitted under the “excited utterance” hearsay exception: there must be a startling event, the declarant must make the statement while still under the stress or excitement of that event, and the statement must relate to the event.

Here there was insufficient evidence to establish *when* the alleged provoking event occurred and thus insufficient evidence that the declarant continuously remained under the stress of that event. Did the trial court err by admitting the December 2007 statements of the non-testifying alleged theft victim?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged appellant Albert Holdridge (Holdridge)² and his wife Barbara with 19 counts of first degree theft by “exert[ion of]

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 9/25/09; 2RP – 10/19/09; 3RP – 10/30/09; 4RP – 11/4/09; 5RP – 11/5/09; 6RP – 11/9/09; 7RP – 11/10/09; 8RP – 11/12/09; 9RP – 11/16/09; 10RP – 11/17/09; 11RP – 11/18/09; 12RP – 11/19/09; 13RP – 12/11/09; 14RP – 1/8/10; and 15RP – 2/12/10. Some but not all the volumes are consecutively paginated.

unauthorized control”³ occurring throughout 2007. CP 1-26. All but count 2 related to checks made out to Holdridge and signed by Barbara against a joint account shared by Barbara and her mother Tamara Adams.⁴ 10RP 508; 11RP 749; 12RP 890.

The jury convicted the Holdridges on counts 1, 3, and 10-19 but acquitted them on counts 4-9, after the State conceded in closing argument those checks represented Adams’s loans to the Holdridges. CP 44-46. The court sentenced Holdridge under the first-time offender waiver to 60 days in jail. CP 107-15; former RCW 9.94A.650(2006).

2. The background

The Holdridges own a Capitol Hill bed-and-breakfast. 10RP 618. The couple married in 2007. 11RP 673. Holdridge, a former real estate agent, met Barbara and her family in 1988 when he purchased the house next door to Barbara and her mother as an investment property. 7RP 187-88; 10RP 622; 11RP 667, 734. Barbara, a talented gardener, performed landscaping work for Holdridge. 7RP 185; 11RP 735.

² Holdridge changed his name from Ronald to Albert before trial and is referred to in the record as both Ronald and Albert. 7RP 182-83.

³ RCW 9A.56.020(1)(a) defines “theft” as “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.”

⁴ The state dismissed count 2 because Adams signed the check at issue herself.

Barbara lived with her mother until her marriage to Holdridge. For the previous 14 years, she provided Adams daily care following an aneurysm that left Adams partially incapacitated and largely a shut-in. 8RP 8-11; 9RP 329, 418-19, 431; 10RP 612; 11RP 730-33.

In 2002, Barbara's brother, Nicholas, hired Holdridge to remodel and sell the home of the siblings' recently deceased grandmother, Anna Hitsenko. 10RP 617, 624-25. Shortly thereafter, the Adams family invested in a home located near Green Lake that Holdridge purchased and planned to remodel. 8RP 15-17; 10RP 627-28. Unfortunately, the proceeds of the sale of the Green Lake home were insufficient to repay Holdridge's debt to the family. 10RP 62, 642.

Holdridge's debt was carried into the next project, the 2005 purchase of the Capitol Hill bed and breakfast. 10RP 616-17, 630-40. Holdridge planned to run the business and hoped to turn a profit within five years. 10RP 630-40. Holdridge obtained additional loans⁵ from the Hitsenko Family Trust, which was originally established by Barbara and Nicholas's grandmother and augmented by the proceeds of the sale of her home. 7RP 189-96; 8RP 22. The purpose of the trust was to provide care

⁵ Many of the loans were secured by a deed of trust on the bed and breakfast property, although it was questionable whether the value of the property would cover that debt as well as the mortgages used to purchase the property. 9RP 332-39, 356-61; 10RP 575, 621.

for Hitsenko and, later, Adams, with the remaining money to pass to Adams's children. 7RP 199-200; 8RP 12; 9RP 405; Ex. 19.

Barbara and Nicholas were the original trustees, although Nicholas's son James was substituted after Nicholas's death in 2004.⁶ 7RP 200-01; 8RP 19, 33; 9RP 375-76; 11RP 745. The terms of the trust permitted each trustee to borrow up to 25 percent of the trust assets. 7RP 191; 8RP 13-15; 9RP 408; 11RP 741, 787; Ex. 19. Although not technically a trustee, in practice Holdridge and Barbara had to seek the approval of Jill Tokarczyk-Adams (Tokarczyk) to borrow money. 7RP 230-31, 239, 254; 8RP 80; 11RP 745, 788. In addition to being James's mother, Tokarczyk managed the trust account and Adams's personal investment account at Smith Barney. 7RP 164-65, 190.

In late 2006, the Holdridges learned the bed and breakfast required additional, expensive renovations. 10RP 647-48; 8RP 69-77. After Tokarczyk informed the Holdridges she would not permit Barbara to borrow more money from the trust, they sought assistance from Adams, who agreed to loan them \$60,000. 7RP 241-43; 10RP 570-74, 599; 11RP 660. After consulting with attorneys, Adams transferred the Hitsenko trust

⁶ Barbara had urged Nicholas's widow, Jill Tokarczyk-Adams, to replace Nicholas as Barbara's co-trustee but Tokarczyk's employer prohibited it. 8RP 19.

account and her personal investment accounts from Smith Barney to Washington Mutual in early 2007. 7RP 275; 8RP 142; 10RP 537-43, 546, 564-69, 592; 11RP 676-77.

In late 2006, Adams executed an updated power of attorney⁷ naming Barbara as Adams's attorney-in-fact and Holdridge as the alternate if Barbara became unavailable. 7RP 264-25; 9RP 380-81; Ex. 214. The power of attorney enabled Barbara to transfer money from Adams's Washington Mutual investment account into Adams and Barbara's joint account at Bank of America. 9RP 461.

It became clear that without even more money to complete renovations, the Holdridges faced defaulting on the mortgage and the family's substantial loans to Holdridge. 10RP 575; 11RP 659. Barbara wrote a series of checks to Holdridge from this account, which the Holdridges used to fund improvements on the bed and breakfast and pay personal expenses while they worked full time to improve the property. 11RP 700; 12RP 851-55, 861 (testimony of defense expert forensic accountant Martha Norberg); Ex. 128. The Holdridges believed Adams was "on board" with the Holdridges' use of her money to fund the bed and

⁷ Adams originally granted Barbara and Nicholas power of attorney after Adams's husband died in 1985. 8RP 21-22; 11RP 731-33. After 1993, Adams had Barbara handle her financial matters. 11RP 733.

breakfast, as she had been with the prior investments. 11RP 668, 708, 739-40, 744, 753, 761. In addition, Barbara testified she and Holdridge used the money to ensure Adams's previous investments did not go to waste, which would have occurred if the business failed. 11RP 752; see also 8RP 78 (Tokarczyk testimony); 10RP 575 (testimony of attorney Michael Malnati). Nineteen checks written from the Bank of America account in 2007 formed the basis of the charges against Holdridge and Barbara. CP 1-9.

Adams suffered some cognitive impairment following a series of strokes and aneurysms starting in the 1990s. 7RP 178-79; 9RP 310, 329, 371; 11RP 728-33. Around January 1, 2008, she began experiencing severe hallucinations. 8RP 167-68; 9RP 354; 11RP 661; Ex. 31 (Adams's January 2008 journal entries describing fantastic visions). The Holdridges eventually took Adams to the emergency room. 8RP 167-68; 11RP 662.

In December 2007, Tokarczyk received a call from Adams (discussed below) and became concerned about Adams's welfare. She contacted the police as well as Adult Protective Services (APS). 8RP 46, 50, 52.

Catherine Baker, an APS social worker, received a referral regarding Adams and spoke with her January 7 or 8, 2008, while Seattle police detective Pamela St. John was also at Adams's home. 8RP 98, 161.

Baker gave Adams a “mini mental status exam,” a series of questions used to assess cognitive orientation. 8RP 163. The exam revealed Adams was “possibly” suffering from moderate to mild dementia. 8RP 163-64, 177. According to Baker’s report, Adams told Detective St. John she gave the Holdridges more than \$60,000, but it was a loan. 8RP 170. Contrary to St. John’s testimony, Baker observed nothing to indicate that Barbara was harassing or intimidating Adams, and Baker did not seek a protective order for Adams. 8RP 101-03, 178, 185-86.

Detective St. John interviewed Holdridge in March 2008. 8RP 115. When she asked if Adams agreed to lend Holdridge money, he only mentioned the \$60,000 loan. 8RP 122-23.

3. Pretrial hearing and ruling to admit Adams’s hearsay statements as excited utterances

Adams became the subject of a legal guardianship in mid-2008 based in part on her intermittent hallucinations. 9RP 313, 331. The defense moved to exclude the testimony of Adams, arguing she was incompetent to testify. CP 27-32; 9RP 313, 331. After arguing Adams was indeed competent, the prosecutor later decided Adams would not take the stand. 3RP 32-46. The court permitted the State to show the jury a redacted video of a March 2008 interview of Adams and introduce a

portion of Adams's January 2008 journals to show Adams's "state of mind." Exs. 31, 36;⁸ 8RP 126, 130.

Over defense objection, the State also moved to admit certain statements by Adams as excited utterances. 4RP 86-99. According to the State's briefing, on December 27, 2007, Adams told Tokarczyk over the phone: (1) that Barbara and Albert had "written a lot of checks" and "swindled her out of her bank accounts;" (2) that Barbara had taken Adams's bank statements; (3) that Adams had retrieved a bank statement from the mail and hidden it, but Barbara found and took it; and (4) that Adams was "stupid" to trust Barbara. The State also sought to admit statements from Tokarczyk's visit to Adams's home a few hours after the phone call, including: (5) that Adams gave Tokarczyk a promotional letter from Bank of America on which she had written certain statements and said, "This is all I have to go on now;" (6) that Barbara took good care of Adams but there wasn't much money left; (7) that Adams asked Tokarczyk, "What makes a good person turn bad"; and (8) that Adams regretted giving Barbara and Albert the \$60,000 loan because "now they just keep taking my money." In early January 2008, Tokarczyk went to Adams's house after asking the police to check on Adams. Adams told

⁸ Undersigned counsel could not play exhibit 36. Pretrial exhibit 3 is the unredacted version and exhibit 32 is a transcript reflecting the redactions.

Tokarczyk (9) “Now they’re telling me the money was a loan.” State’s Trial Brief (Supp. CP __ (sub no. 106, no. 08-1-02680-5 SEA, case of co-defendant)); 8RP 36; 12RP 922-23.

The State’s theory of the “startling event” provoking the statements was Adams’s discovery, via receipt of an unidentified bank statement rather than the letter Adams showed Tokarczyk,⁹ that Barbara was taking her money. 4RP 88-89; 12RP 922-23; Ex. 29. The State’s alternate theory was that the police visit provoked Adams’s 2008 statements. 4RP 89-90; Supp. CP __ (sub no. 106, no. 08-1-02680-5 SEA, co-defendant).

The court ruled statement 4 was admissible to show Adams’s state of mind and that statement 7 was a question and thus was not hearsay. 5RP 66. But the court also ruled it would not admit the other statements unless the State provided additional foundation as to what constituted the startling event. 5RP 66-67.

Hoping to provide such foundation, the State presented Tokarczyk’s testimony outside the jury’s presence. Adams called her home and spoke with Tokarczyk’s son, who relayed Adams message.

⁹ At trial, State’s witness Baker testified that Adams said she called Tokarczyk because she received something in the mail about a bankcard but didn’t know what it meant. 8RP 182.

7RP 119. When Tokarczyk phoned Adams, the woman spoke quickly and her voice was higher-pitched than usual. Adams told Tokarczyk she needed help because Barbara had swindled her. 7RP 120. She feared she had no money left, but Barbara took all of her bank statements. 7RP 120, 133.

Tokarczyk left work in Olympia and arrived in Adams's Ballard home an hour later. 7RP 121. Adams, agitated and wringing her hands, again said she feared she had no money left. Adams produced the letter with the word "swindle" scrawled in Adams's writing from under the cushion of her chair. 7RP 122. Adams claimed Barbara had been taking her bank statements, including one Adams kept under her bed. 7RP 122. Adams gestured to the drawer where she kept financial paperwork and tearfully stated, "I have nothing left . . . [T]hey've taken it all." 7RP 122. Adams then asked Tokarczyk to leave because Barbara would arrive soon. 7RP 123. The next day, Tokarczyk called Washington Mutual regarding Adams's account and learned it had diminished significantly in value since being transferred from Smith Barney in early 2007. 7RP 124.

On January 4 or 5, 2008, Tokarczyk called the police and drove to Adams's home. The police permitted Tokarczyk five minutes with

Adams. 7RP 126.¹⁰ Adams was hunched over in her chair. Based on Adams's skin color and breathing, Tokarczyk believed Adams was frightened. 7RP 127-28. Adams apologized for involving Tokarczyk in a "civil war" and said "now they're telling me that the \$60,000 was a loan." 7RP 129.

Tokarczyk acknowledged she did not know when Adams received the Bank of America correspondence Adams showed her on December 27. 7RP 130-31. Tokarczyk provided no testimony as to when Adams may have received the bank statement she purportedly hid from Barbara. She also acknowledged she had not seen Adams for months before December 27, and was therefore unaware of Adams's day-to-day mental state around that time. 7RP 139; see also 8RP 34-35 (Tokarczyk's similar testimony at trial).

Lamenting the lack of "clear guidance" from Washington courts, the trial court nonetheless ruled Adams's statements were admissible as excited utterances. 7RP 213-19. The court found Adams's statements on December 27 and January 2008 related to a startling event: Adams's discovery "at least in her mind, that individuals very close to her . . . had taken her money." 7RP 215. The court found Adams was under the stress

¹⁰ Holdridge testified Tokarczyk and the police arrived while he and his wife were dealing with Adams's deteriorating medical situation. 11RP 663.

of the excitement caused by that event “even though it was over a period of time.” 7RP 215. The court also found sufficient corroborating evidence of the “event,” i.e., a decrease in Adams's account balances. 7RP 216. The court observed, moreover, that “any concerns about [Adams’s] dementia would go to the weight [not] admissibility” of the evidence. 7RP 216.

4. Trial testimony regarding excited utterances

Tokarczyk testified consistently with her pretrial testimony regarding the 2007 statements but also provided the following: that Adams regretted loaning the Holdridges \$60,000 because they took more than that. 7RP 281-88, 294-99; 8RP 39-40. According to Tokarczyk, Adams also asked, “[W]hat makes a good person turn bad.”¹¹ 7RP 286. Tokarczyk also clarified at trial that Adams may have made certain statements, not the day of Adams’s call, but the next day when she returned to Adams’s home. 8RP 37, 39-41. Regarding the 2008 statements, Tokarczyk testified Adams told her she was sorry for getting Tokarczyk “mixed up in this” and that she had given Barbara a \$60,000 loan but “now they had taken all of [Adams’s] funds.” 7RP 295. Tokarczyk later testified that according to her contemporaneous notes of

¹¹ Tokarczyk never testified as to statement 4, that Adams was “stupid” to trust Barbara.

the 2008 incident, Adams said, “now they’re telling me the money was a loan.” 8RP 47-49, 84-85. A photocopy of the Bank of America promotional letter with the words “swindler” and “what a daughter” in Adams’s writing was admitted into evidence and used by the State to cross-examine the defense expert and in closing argument. Ex. 29; 7RP 283-84; 8RP 89; 12RP 879, 922-23.

C. ARGUMENT

THE COURT ERRED IN ADMITTING ADAMS’S PREJUDICIAL STATEMENTS UNDER THE “EXCITED UTTERANCE” EXCEPTION.

1. The court abused its discretion when it admitted Adams’s statements absent sufficient evidence of continuing excitement between the alleged startling event and the statements themselves.

Hearsay is a statement other than one made by a declarant while testifying at trial offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is generally inadmissible unless it falls within an exception to the rule barring hearsay such as the exception for “excited utterances.” ER 802; ER 803(a)(2).

An excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2); Warner v. Regent Assisted Living, 132 Wn. App. 126, 139, 130 P.3d 865 (2006). The

underlying rationale is that “‘under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.’” State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (quoting 6 J. Wigmore, Evidence, § 1747 at 195 (1976)). The statement of a person in this excited condition is considered “‘a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,’ rather than an expression based on reflection or self-interest.” Id. (quoting Wigmore at 195).

A statement must therefore meet three requirements to qualify for this exception: there must be a startling event or condition; the declarant must make the statement while still under the stress or excitement of the event or condition; and the statement must relate to the event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992); Warner, 132 Wn. App. at 139. Although the statement need not be made contemporaneously with or immediately after the event, it must be spontaneous and made under circumstances that negate the concern that it was made by design or after premeditation. Id.; see also State v. Young, 160 Wn.2d 799, 813, 161 P.3d 967 (2007) (“The theory of [Federal Rule of Evidence (FRE) 803(2)] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection

and produces utterances free of conscious fabrication.”) (quoting FRE 803(2) advisory committee's note);¹²

“The longer the interval between the underlying event and the statement, ‘the greater the need for proof that the declarant did not actually engage in reflective thought.’” Warner, 132 Wn. App. at 839 (quoting Chapin, 118 Wn.2d at 688); see also State v. Sellers, 39 Wn. App. 799, 804, 695 P.2d 1014 (1985) (crucial question is whether declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment); Reed v. Thalacker, 198 F.3d 1058, 1061 (8th Cir. 1999) (so holding).

The State has the burden of demonstrating a hearsay exception applies. United States v. Marrowbone, 211 F.3d 452, 455 (8th Cir. 2000). The trial court must find by a preponderance of the evidence that the declarant remained continuously under the influence of the event at the time the statement was made. ER 104(a); State v. Ramirez, 109 Wn. App. 749, 757, 37 P.3d 343 (2002). This Court should interpret ER 803(a)(2) in a restrictive manner so as to “not lose sight of the basic elements that

¹² Because the Washington rule is identical to FRE 803(a)(2), this Court may look to federal case law for assistance in its interpretation. See, e.g., State v. Burton, 101 Wn.2d 1, 6, 676 P.2d 975 (1984), overruled on other grounds by State v. Ray, 116 Wn.2d 531, 806 P.2d 1220 (1991).

distinguish excited utterances from other hearsay statements. This is necessary . . . to preserve the purpose of the exception and prevent its application where the factors guaranteeing trustworthiness are not present.” State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984)

Holdridge challenges the sufficiency of the State’s proof as to second criterion: whether Adams remained continuously under the stress of the startling event. In this regard, Warner is instructive and, contrary to the trial court’s ruling, compels exclusion of Adams’s hearsay.

In Warner, assisted-living facility resident Helen Mantooth approached the front desk angry and crying at around 11:15 a.m. She told a staff member that before breakfast a man had tried to make her take a shower even though she told him she already took one, and that he tried to climb in bed with her. When aide Lujan passed by in the lobby, she identified him as the man in question. This Court held the statement was inadmissible as an excited utterance because even though Mantooth was agitated and emotional when she made the statement, the statement occurred more than two hours after the purported startling event and there was no evidence that she remained agitated during that period. Warner, 132 Wn. App. 140.

[Mantooth] needed to provide at least some evidence that she remained in a state such that she had not engaged in reflective thought between the event and the statement.

Because she could not do so, she did not demonstrate the spontaneity necessary for an excited utterance. The trial court properly excluded her hearsay statement

Id. at 140-41 (internal citations omitted); cf. State v. Sunde, 98 Wn. App. 515, 985 P.2d 413 (2008) (statement by complainant that defendant pointed a gun at her and pulled trigger was admissible where there was evidence the complainant was scared, shaking, and nervous throughout the two-hour period).

Here, while there was evidence that on December 27 Tokarczyk found Adams in an agitated state, as well as evidence of a possible startling event, there is no evidence establishing when that event occurred, i.e., when Adams might have learned her funds had diminished. See Reed, 198 F.3d at 1061-62 (child's statement to her mother alleging assault by father and similar statement to babysitter not admissible as excited utterances where record did not reveal how much time passed between alleged assaults and child's statements); United States v. Kenyon, 481 F.3d 1054 (8th Cir. 2007) (statements made by child relating to her alleged sexual abuse by defendant were inadmissible where statements made approximately three years after first alleged instance of abuse and approximately a week after the most recent allegation).

A court abuses its discretion if it bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342

(2008). A court's evidentiary ruling may likewise be an abuse of discretion if it is based upon facts that are not supported by the evidence. Ramires, 109 Wn. App. at 757.

The State's theory was that the startling event was Adams's discovery via some unidentified bank statement that her account balances were reduced.¹³ 4RP 88-89; 8RP 36; 12RP 922-23; cf. United States v. Napier, 518 F.2d 316, 317-18 (9th Cir.) (startling event was seeing newspaper photograph of assailant eight weeks after attack, not attack itself), cert. denied, 423 U.S. 895 (1975). While the passage of time is not necessarily dispositive,¹⁴ there is no indication when Adams received such a statement; it could have occurred days or weeks earlier.

In Warner, this Court held that two hours was too long because the plaintiff could not establish Mantooh maintained an ongoing state of excitement during those two hours. The time lapse in the present case could have been much longer, especially considering that a number of the

¹³ Despite the State's original theory of a new startling event, after hearing Tokarczyk's testimony, the court explicitly admitted the 2008 statements on the same grounds as the 2007 statements: that they were the result of the excitement based on Adams's discovery of the diminution of her accounts. 7RP 214-16.

¹⁴ See State v. Strauss, 119 Wn.2d 401, 832 P.2d 78 (1992) (citing for this proposition two cases in which the delay between the alleged incident and the statements was a matter of hours but the evidence established the declarants remained excited during the pertinent time period).

statements occurred the day and the week after Adams's first call. And without any indication as to when the startling event occurred, there was no way for the court to evaluate whether Adams remained continuously under the stress of some startling event. See, e.g., 7RP 139 (Tokarczyk's acknowledgement she was unfamiliar with Adams's usual mental state in late 2007-early 2008).

As this Court recently held, while the alleged victim's mental state is one factor to consider, the touchstone of the excited utterance exception is a continuous state of excitement triggered by a startling event. Warner, 132 Wn. App. at 140-41; Sellers, 39 Wn. App. at 804; Reed, 198 F.3d at 1061; see, e.g., State v. Cotto, 182 N.J. 316, 328, 865 A.2d 660, 667 (2005) (court should consider the passage of time, the circumstances of the incident, the mental and physical condition of the declarant, and the nature of the utterance but "[t]he crucial element is the presence of a continuing state of excitement."); State v. Sims, 348 S.C. 16, 21-22, 558 S.E.2d 518, 521 (2002) (statement after extended period admissible only if made under continuing state of excitement). Any argument that the exception applies because (1) a startling event may have occurred and (2) the declarant was distressed at some later time eliminates an essential requirement of the exception. This Court should not lose sight of an essential component an exception to the rule barring hearsay. Dixon, 37 Wn. App. at 873.

Because the trial court's ruling lacked evidentiary support, it was untenable. Quismundo, 164 Wn.2d at 504; Ramires, 109 Wn. App. at 757. There was no way for the court to evaluate Adams's statements as the evidence rule and cases require. Put another way, because the State had the burden to show Adams remained in a continuing state of excitement following a startling event, and it failed to carry that burden, Adams's damaging statements were inadmissible as a matter of law.

2. The erroneous admission of the evidence prejudiced Holdridge and requires reversal.

When a court errs by admitting hearsay that does not fall within a hearsay exception, this Court must also consider whether the hearsay, within reasonable probabilities, affected the outcome of the trial. Dixon, 37 Wn. App. at 875.

Because of the trial court's error, jurors learned that Barbara took bank statements — even one Adams had hidden, and that Adams concluded the Holdridges not only swindled her out of her money but also attempted to recast the taking as a "loan." 7RP 281-88, 294-99; 8RP 39-40, 47-49, 84-85.

This evidence prejudiced Holdridge. As a preliminary matter, Tokarczyk never testified regarding statement 4, which the court ruled was admissible under the "state of mind" hearsay exception, during either the

pretrial hearing or at trial.¹⁵ Thus, the only arguably admissible statement was 7, “[W]hat makes a good person turn bad.” But this statement would have appeared ambiguous at best if it lacked the context of the other, inadmissible statements. 7RP 286.

The State relied heavily on the inadmissible statements at trial and in closing argument to prove its case, including exhibit 29. 12RP 922-25 (closing argument referring to writing on Ex. 29 and other statements). For example, forensic accountant Norberg testified most of the money from Adams’s accounts was apparently used to finance the improvements on the bed and breakfast and the Holdridge’s transactions did not set off “red flags” for malfeasance. 12RP 851-56. On cross-examination, Norberg acknowledged that had she seen the notations on exhibit 29, she might have looked at the case “a little deeper.” 12RP 879-80.

Moreover, as the State argued in closing, exhibit 29 and Adams’s other statements rebutted the Holdridges’ testimony that Adams was aware the couple was using her money to fund the bed and breakfast, consistent with the goal of protecting Adams’s initial investment in the property. 11RP 752; see also 9RP 454-56 (testimony of attorney Barbara West). It also rebutted the Holdridges’ assertion that the use of the money

¹⁵ While the prosecutor referred to statement 4 in closing argument, 12RP 922, the parties’ argument is not evidence.

was consistent with the provisions in the power of attorney, including the provision permitting gifts. 9RP 453; 12RP 948-49. The statements were therefore crucial to the State's theory that the Holdridges use of Adams's funds was unauthorized, an element the State had to prove to the jury beyond a reasonable doubt. Instructions 15-50 (Supp. CP __ (sub no. 118, case no. 08-1-02680-5 SEA, co-defendant)). The statements were also critical to rebutting the Holdridges' defense that they believed in good faith they were permitted to use the funds in the joint account to improve the bed and breakfast. Instructions 52-54, supra.

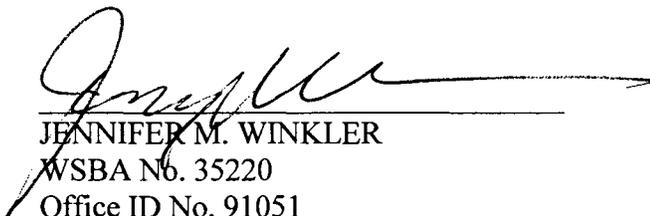
D. CONCLUSION

The trial court erred in admitting Adams's prejudicial hearsay statements. The introduction of such damaging statements likely affected the outcome as to all counts. The remedy is reversal of Mr. Holdridge's convictions.

DATED this ^{30TH} day of August, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65039-4-I
)	
ALBERT HOLDRIDGE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ALBERT HOLDRIDGE
2612 HAVARD AVENUE E.
SEATTLE, WA 98102

- [X] WASHINGTON APPELLATE PROJECT
1511 3RD AVENUE
SUITE 701
SEATTLE, WA 98101

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF AUGUST, 2010.

x *Patrick Mayovsky*