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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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No. 67424-2-I

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

STATE OF WASHINGTON, Respondent,

v.

MANUEL VILLAREAL-CRUZ, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion admitting a statement made by S.M. to Detective Crosswhite under the excited utterance exception to the hearsay rule when her statement was made hours after she was raped but while S.M. continued to be emotionally upset and under the stress of the rape.

C. FACTS

On December 13th 2010, Shuksan Middle School office assistant and Spanish interpreter, Debra Wentz noticed something was wrong with eleven year old sixth grader S.M., who had arrived late for school at 8:48 a.m. and was waiting in line to obtain a tardy slip. 3RP 93-94, 98. Wentz asked S.M. to step out of line and asked her if she was ok. 3RP 94. S.M. just stared, looked scared, was shaking and spontaneously hugged Wentz in response. 3RP 94. When Wentz tried to reassure her that it was ok to be late, S.M. started crying but would not say what was wrong. 3RP 95. Instead, S.M. told Wentz "I can't say anything" and wanted to go to class. 3RP 94-96. Later that morning, S.M. returned to the office, said she didn't feel well and asked to go home. 3RP 99. School officials eventually authorized S.M. to walk home around 11 am because her mom could not

drive to come pick her up. 3RP 100, 102. Wentz testified S.M. was still upset and crying when the school permitted her to walk home. 3RP 100.

S.M.'s uncle, Librado Morales, testified he called 911 after his niece S.M. came home from school crying and he overheard her tell her mom Adela that Villareal-Cruz raped her on the way to school. 3RP 117-8, 126. Librado explained that S.M. lived in an apartment with her mom Adela, Villareal-Cruz and younger brother and sisters. 3RP 116.

Detective Gina Crosswhite of the Bellingham Police Department arrived just before 2 p.m. and asked if she could speak privately with S.M. 3RP 497-8. Crosswhite noticed S.M. was initially very quiet but appeared to have been crying, was shaking and rocking back and forth holding a baby girl. 3RP 499. Once alone Crosswhite asked S.M. if she knew why she was there. In response S.M. immediately started crying again and then told Crosswhite how Villareal-Cruz put his "private part in her privacy" prior to taking her to school. 3RP 506. S.M. said her dad told her in Spanish he wanted to have sex with her and that she started crying and saying no. 3RP 505. S.M. cried while she told Crosswhite what happened explaining that Villareal-Cruz took her to a dead-end street, parked, got in the back seat and pulled her pants and underwear off and raped her. 3RP 505-8. S.M. then explained Villareal-Cruz put his private into her privacy. 3RP 506. S.M. explained her privacy was where her period came out and

Villareal-Cruz's private was his penis. 3RP 506. After they had sex, Villareal-Cruz asked S.M. if she liked it. 3RP 507. When S.M. said no, Villareal-Cruz told her that if she didn't like it he would do it again, so S.M. then said she liked it. 3RP 507. S.M. continued to cry as she recounted the details to Crosswhite, including that it hurt, that Villareal-Cruz had kissed her on her privacy and made her promise not to tell anyone. 3RP 508.

Following S.M.'s statements, Crosswhite took S.M. and her mother Adela, accompanied by S.M.'s younger siblings to the hospital. 3RP 511-12. S.M. then gave a consistent account of the rape to SANE Nurse Jane Gibbon at approximately 3:30 p.m. 5RP 348, 434, 359. S.M. explained to Nurse Gibbon that she promised Villareal-Cruz she wouldn't tell anyone about the rape and that if she did, Villareal-Cruz would hit or possibly kill her. 5RP 361. S.M. also told Nurse Gibbons that Villareal-Cruz held her down with his hands and ejaculated on her tummy area below her belly button. 5RP 369. A black light confirmed, consistent with S.M.'s statement and Villareal-Cruz admissions, there was residue on S.M.'s stomach-prompting Nurse Gibbons to swab for DNA in that area. 5RP 369. Nurse Gibbons also noted that she found injuries to the vaginal tissue around the opening to S.M.'s vagina. 5RP 373.

When Villareal-Cruz was first asked by Officer Bass of the Bellingham Police Department, Villareal-Cruz stated calmly that it was S.M.'s fault. 3RP 197. S.M. asked him to do to her what he did to her mom and he did. Id. Villareal-Cruz explained that he had been using cocaine the night before and drinking and that he had 'bad thoughts' about S.M. 3RP 23, 31-32. He also stated he was coming 'down' when he was with S.M. 3RP 38-39. Villareal-Cruz explained that S.M. asked him to do to her what he did to her mother and that S.M. provoked him by previously hitting him on his butt and penis. 3RP 23-24. Villareal-Cruz explained he drove S.M. to a dead end street, got in the backseat, took off her clothes and his, put his penis in her vagina and pulled out to ejaculate on her stomach. 3RP 26. After he was done, Villareal-Cruz drove her to middle school and dropped her off. 3RP 26. Villareal-Cruz acknowledged S.M. seemed to regret having sex with him, made noises like it hurt and appeared frightened but never asked him to stop. 3RP 34-35. Villareal-Cruz repeatedly confirmed to police both at the apartment and later at the police department that S.M.'s allegations were true but that the sex was consensual.

Villareal-Cruz' DNA was confirmed to be present in the DNA swab taken from S.M.'s stomach by nurse Gibbons. 3RP 430, 431. Both Villareal-Cruz and S.M.'s DNA were detected following DNA testing

completed on the boxers Villareal-Cruz was wearing the morning of the rape. 3RP 432. Additionally, testing of a wet spot found in the backseat of Villareal-Cruz' vehicle also confirmed both Villareal-Cruz and S.M.'s DNA were present. 3RP 452.

Three days after the alleged rape, Adela obtained a no-contact order against Villareal-Cruz. 3RP 55. Villareal-Cruz made six telephone calls from the jail to Adela's telephone within the following two weeks. 3RP 58-61.

Subsequently, Villareal-Cruz was charged with one count of rape of a child in the first degree, two counts intimidating a witness and three counts of violation of a no contact order. CP 73-76.

In March 2010, prior to trial, S.M. recanted her allegations. 3RP 531. S.M. testified at trial she made everything up because her mom was mad at Villareal-Cruz. 3RP 150. When pressed, S.M. responded, "it's hard to remember. It's passed, okay?" 3RP 157. S.M. also explained that her aunt would no longer talk to her when she came by to pick up S.M.'s siblings following these allegations. 3RP 162. Adela also changed her story testifying she conspired with S.M. to make up these allegations because Villareal-Cruz was drinking and they were having problems at home. 3RP 184. Villareal-Cruz testified that he did not have intercourse

with S.M. and that he lied because he was mad at Adela and wanted to hurt her. 3RP 660.

Following a jury trial, Villareal-Cruz was convicted of one count of first degree rape of a child and three counts of violation of a no contact order. CP 73-76, 18-36. The trial court dismissed the remaining intimidating a witness counts prior to sending the case to the jury. 3RP 637-38, 642. Villareal-Cruz timely appeals. CP 2-17

D. ARGUMENT

- 1. S.M.'s statements to Detective Crosswhite were admissible as an excited utterance under ER 801(a)(2) because S.M. was still behaving in a manner that reflected she was still under the stress of the rape at the time she told Crosswhite what happened.**

Villareal argues the trial court abused its discretion admitting S.M.'s hearsay statements to Detective Crosswhite pursuant to the excited utterance exception to the hearsay rule. *See*, ER 803(a)(2), Br. of App. at 9.

A trial court's decision to admit hearsay statements as an excited utterance for review on appeal as an abuse of discretion will not be reversed unless the discretion is manifestly unreasonable or based on untenable grounds. State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001), State v. Athen, 160 Wn.2d 354, 382, 158 P.3d 27 (2007). Under

ER 803(a)(2), a statement is not excluded as hearsay if it is an excited utterance “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” such that the declarant’s statement is not the product of reflection or deliberations. ER 803(a)(2); 5B KARL B. TEGLAND, WASHINGTON PRACTICE EVIDENCE §803.5-803.9 (4th Ed. 1999).

An excited utterance derives its reliability primarily from the heightened emotional state of the declarant as a result of the startling event. State v. Young, 160 Wn.2d 799, 161 P.3d 967 (2007). Spontaneity, the passage of time and the mental state of the declarant are all key. State v. Palomo, 113 Wn.2d 789, 791, 783 P.2d 575 (1989). To be admissible as an excited utterance the statement must meet three requirements: (1) that the startling event or condition occurred; (2) the declarant made the statement while under the stress of excitement of the startling event or condition; and (3) the statement relates to the startling event or condition. State v. Woods, 143 Wn.2d at 597.

The startling event, in this case the rape, need not be the principle act underlying the statement. *See*, State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992), *citing*, 6 J. Wigmore, *Evidence* §1753 at 225-26. A later event may trigger associations with the trauma recreating the stress earlier produced. *Id* at 685. For purposes of determining if a statement

constitutes an excited utterance, it is the event's effect on the declarant that must be focused on. *Id.* Spontaneity is a factor but the issue is not whether the statements were made contemporaneously or close in time to the startling event so much as whether the statement was made while the declarant was still under the influence of that event such that the statement could not have been the result of fabrication, intervening actions, or the exercise of choice or judgment. State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Doe, 105 Wn.2d 889, 893, 719 P.2d 554 (1986). Length of time between the startling event and the statement is not determinative but may be considered as an important factor. *See, State v. Flett*, 40 Wn.App. 277, 699 P.2d 774 (1985) (statement made seven hours after rape occurred admissible as an excited utterance).

The trial court did not abuse its discretion in this case because Detective Crosswhite's testimony demonstrates S.M. was still under the stress of the day's earlier events when S.M. emotionally recounted, consistent with Villareal-Cruz' own admissions, how Villareal-Cruz raped her on the way to school. Detective Gina Crosswhite arrived at the apartment where S.M. resided just before 2 p.m. – five hours after the rape occurred – 2 hours after S.M. arrived home from school and asked if she could speak privately with S.M. RP 497-8. Crosswhite noticed S.M. was initially very quiet but that S.M. appeared to have been crying, was

shaking and rocking back and forth holding a baby girl. RP 499. Once alone Crosswhite asked S.M. if she knew why she was there. In response S.M. spontaneously started crying and she told Crosswhite how Villareal-Cruz put his “private part in her privacy” prior to taking her to school. RP 506. S.M. cried throughout explaining to Crosswhite what happened to her hours earlier. RP 507-08.

After hearing Crosswhite’s testimony, the trial court determined S.M.’s statements to Crosswhite were admissible as excited utterances because her testimony established S.M. made those statements while still under the stress of the event. 3RP 493. The evidence presented at trial reflects S.M. was emotionally reacting to the rape throughout the day: first when she arrived at school appearing upset, she remained upset when she asked to leave school early, was reportedly crying and visibly distraught when she arrived home, appeared quiet but nonetheless appeared still upset when Crosswhite came to her home and then spontaneously started crying all over again when Crosswhite asked her if she knew why she was there. 3RP 94-95, 99, 170, 499. The trial court did not abuse its discretion under these circumstances, to admit S.M.’s statements to Crosswhite at trial.

Villareal-Cruz argues nonetheless, relying on State v. Chapin and State v. Dixon, S.M.’s statement to Crosswhite should not be considered

an excited utterance because she spoke to Crosswhite hours after the rape and therefore had an opportunity to reflect on the incident and because her later recantation calls into question the reliability of these statements. Br. of App. at 14.

In State v. Dixon, 37 Wn.App. 867, 684 P.2d 725 (1984), the trial court erred admitting a four page narrative under the excited utterance hearsay exception where the narrative detailed how Dixon had sexually assaulted the victim earlier that evening. The appellate court determined that the trial court went too far admitting a detailed four page narrative because the narrative itself demonstrated that that the victim was detailing a completed event, particularly, where the victim added additional lines at the end of the narrative detailing facts she previously forgot, and where she took several hours to complete the written statement. Dixon, 37 Wn.App. at 869-70, 873-7.

In contrast, the trial court here did not admit a detailed written statement that took over two hours to narrate but a verbal statement made by S.M. within minutes of Crosswhite arriving on the scene, within hours of the rape, and made while S.M. remained visibly upset and physically shaking from the rape. Moreover, S.M.'s statement was made in response to an open ended generic question. The record does not reflect S.M. took the time to reflect but rather was still emotionally reacting to the stress of

the earlier rape. *See, State v. Strauss*, 119 Wn.2d 401,416, 832 P.2d 78 (1992) (not error to admit declarant's statement made three and a half hours after incident where declarant appeared distraught, very red in the face, crying and appeared to be in a state of shock); *State v. Thomas*, 46 Wn.App. 280, 284, 730 P.2d 117 (1986) (not error to admit statements by declarant to mother made six or seven hours after the rape where questions were not leading).

Chapin similarly does not support Villareal-Cruz' argument. In Chapin, a 69 year old male, suffering from dementia and living in a retirement home when questioned by his wife on why he was angry spontaneously stated "Raped me." *State v. Chapin*, 118 Wn.2d at 683. Chapin allegedly was referencing on of the nursing home attendants. *Id.* The appellate court determined the trial court abused its discretion admitting this statement because it was made a full day after the alleged incident, the victim had calmed down in between and most importantly, the victim had a history of being confused, "prone to confabulation, subject to persecutory delusions" and hostile to those who tried to direct his behavior. Chapin, 118 Wn.2d at 691. The Court concluded that under those circumstances the victim's statement was neither spontaneous nor a reliable statement made while still under the stress of the event.

There is nothing in S.M.'s statement or circumstances surrounding the making of her statement that undermines the spontaneity or reliability of her statements. While she later recanted, her initial statement was corroborated by Villareal-Cruz himself repeatedly, by physical evidence at the scene and DNA evidence. Additionally, S.M.'s statement was made in response to a non-leading question and made while she was still under the influence of the trauma she earlier experienced. Under these circumstances, the trial court did not abuse its discretion admitting S.M.'s statement to Crosswhite.

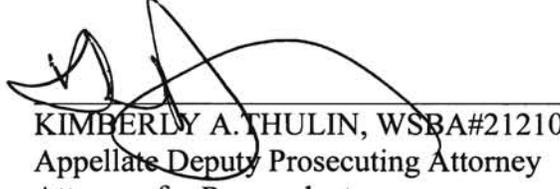
Even if the trial court abused its discretion by admitting S.M.'s statement to Crosswhite the error was harmless because there is no reasonable probability the error would have affected the outcome of the trial given the overwhelming evidence otherwise presented. State v. Watt, 160 Wn.2d 626, 160 P.3d 640 (2007). Even without S.M.'s statement to Crosswhite, the jury would have heard S.M.'s statement to Nurse Gibbons detailing how Villareal-Cruz raped her, would have heard that the physical exam and DNA evidence corroborated S.M. allegations. The jury would have known Villareal-Cruz' repeated admissions corroborated important details in S.M.'s report, such as Villareal-Cruz' admission that he ejaculated on S.M.'s stomach during the rape and that DNA testing confirmed the presence of Villareal-Cruz' DNA on S.M.'s stomach. Error

if any in admitting S.M.'s statement to Crosswhite, given these overwhelming facts, was harmless.

E. CONCLUSION

For the foregoing reasons, the State respectfully requests Villareal-Cruz' convictions for rape of a child in the first degree and three counts of violation of a no contact order be affirmed.

Respectfully submitted this 19th day of June, 2012



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Jared B. Steed, addressed as follows:

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06/20/2012
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