Supreme Court No. (to be set)
Court of Appeals No. 57863-8-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
DIVISION 2

State of Washington
v.
Nathan Alexander Freeman

Pierce County Superior Court

Cause No. 22-1-00979-1

PETITION FOR REVIEW

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Introduction and Summary of Argument

At Nathan Freeman's trial for violating a no-contact order, the State did not present testimony of any eyewitness to the violation. Instead, it relied exclusively on the recording of a 911 call. Without the recording, there could have been no charge.

The recording included testimonial hearsay and out-of-court statements that did not fit within any exception to the rule against hearsay. Its admission violated ER 802 and Mr. Freeman's constitutional right to confront adverse witnesses.

Decision Below and Issues Presented

Petitioner Nathan Freeman asks the Court to review the Court of Appeals' opinion entered on August 13, 2024.[1] This case presents one issue: Did the

[1] A copy of the opinion is attached.

admission of testimonial hearsay violate ER 802 and Mr. Freeman's Sixth Amendment confrontation right?

Statement of the Case

Shamika Coe was named as the protected party in a restraining order that she had not asked for and did not want.[2] Ex. 3; Report of Proceedings (RP)[3] 381-382. Neither she nor her children were afraid of the restrained party, Nathan Freeman. RP 381. He had "never, never put his hands on [her] in [that] way." RP 382.

The protection order expired in June of 2022. Ex. 3. However, in December of that year, Mr. Freeman was convicted of violating the order based on conduct that had occurred prior to its expiration. CP 90.

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[2] She had asked to have the order modified. RP 382.

[3] Volumes I-VII of the Report of Proceedings are numbered sequentially and will be cited RP. Other portions of the transcript are not cited in this brief.

Ms. Coe did not testify at Mr. Freeman's trial. RP 178-282. The State did not present the testimony of anyone who witnessed the alleged violation. RP 178-282.

Instead, the prosecutor relied on a recording of a conversation between Ms. Coe's daughter and a 911 operator.[4] RP 255, 256-257; Ex. 6, Ex. 12. The prosecutor asked jurors to consider the recording as proof that Mr. Freeman had contact with Ms. Coe. RP 178-282. No other evidence was introduced to prove the violation. RP 178-282.

Prior to trial, Mr. Freeman asked the court to exclude portions of the recording. CP 8-14, 45-67; RP 47-71. He argued that admitting the entire recording would violate his confrontation right and the evidence

[4] A transcript of the recording is attached.

rule prohibiting introduction of hearsay. CP 8-14, 45-67; RP 47-71. He agreed that the initial part of the call could be admitted but objected to later portions of the recording. CP 13, 53.

The trial judge concluded that the call, in its entirety, consisted of nontestimonial statements, and admitted the recording.[5] RP 70-71. The court also decided that the call was admissible as a "present sense impression" and as an "excited utterance." RP 70.

The call was played for the jury. RP 255-257; Ex. 12. Jurors were also allowed to review a transcript. Ex. 6. The first portion of the call included the sounds of an argument in the background. Ex. 6, pp. 1-7; Ex. 12. The caller, Ms. Coe's daughter, told the operator "[W]e need help." Ex. 6, p. 3, 4, 7; Ex. 12. With some prompting

[5] The court excluded portions on relevance grounds; those portions were redacted. RP 70-71.

from the operator, she gave her address. Ex. 6, pp. 1-7; Ex. 12. She was not asked and did not describe what the problem was, or why help was needed. Ex. 6, pp. 1-7; Ex. 12.

The caller told the operator that no one had been injured. Ex. 6, p. 6; Ex. 12. She confirmed that she had not seen any weapons. Ex. 6, p. 6; Ex. 12.

During the first portion of the call, she did not provide her own name, her mother's name, or Mr. Freeman's name. Ex. 6, pp. 1-7; Ex. 12. Nor did she mention a restraining order. Ex. 6, pp. 1-7; Ex. 12. She did not express fear or ask the police to hurry. Ex. 6, pp. 1-7; Ex. 12.

The first part of the call concluded when she told the operator that "he left." Ex. 6, p. 7; Ex. 12. At no point did she say she was worried that "he" might come back. Ex. 6, pp. 7-15; Ex. 12.

After "he left," the caller mentioned Mr. Freeman's name for the first time. Ex. 6, p. 7; Ex. 12. Instead of describing what happened, expressing fear, or repeating a request for help, she told the operator "My mom has to go to work." Ex. 6, p. 7; Ex. 12. As reflected on the recording, she did not sound upset or under stress after she told the operator "he left." Ex. 12.

The operator then asked her a series of questions. Ex. 6, pp. 7-15; Ex. 12. During this conversation, she mentioned the restraining order. Ex. 6, p. 11; Ex. 12. Near the end of the call, she gave the operator her mother's name and her own name. Ex. 6, p. 12-14; Ex. 12. She had not provided this information previously. Ex. 6, pp. 1-15; Ex. 12.

At no point did she describe the events that prompted her to call. Ex. 6, pp. 1-15; Ex. 12. Neither

she nor her mother (who could be heard in the background) told the officer they were afraid. Ex. 6, pp. 1-15; Ex. 12.

She did not ask the operator to stay on the line with her until the police arrived. Ex. 6, p. 15; Ex. 12. The operator did not suggest that she stay on the line. Ex. 6, p. 15; Ex. 12.

Instead, the operator told her that the police "might do an area check for him and then come back to the apartment." Ex. 6, p. 14; Ex. 12. He told her to call again "if he returns… so we can reroute the units to the apartment rather than looking for him over there." Ex. 6, p. 15; Ex. 12. The police did not arrive before the call ended. Ex. 6, p. 15; Ex. 12.

Mr. Freeman was convicted of violating the no contact order. CP 90. At his sentencing hearing, Ms. Coe addressed the court, telling the judge:

> I just wanted to put it on record that I'm not afraid of Nathan. My kids are not afraid of Nathan. I've never been afraid of Nathan.
> RP 381.

She went on to say that Mr. Freeman shouldn't be going to prison "for a violation of a no-contact order that we both tried to have modified and he took steps and completed those steps to modify." RP 382. She concluded by saying:

> And I'm sitting here today honestly telling you that I'm not a victim of domestic violence. Never have been, and I never will be. That just is not going to happen. He's never, never put his hands on me in [that] way.
> RP 382.

The court sentenced Mr. Freeman to an exceptional sentence below the standard range. CP 92, 96. Mr. Freeman timely appealed. CP 105. The Court of

Appeals affirmed in an unpublished decision.[6] Mr. Freeman now seeks review of that decision.

Argument

I. The introduction of testimonial hearsay violated Mr. Freeman's right to confront adverse witnesses.

Over objection, the trial judge allowed the prosecution to introduce a recorded conversation between Ms. Coe's daughter and a 911 operator. The recording included testimonial hearsay. Its admission violated Mr. Freeman's confrontation right.

The Sixth Amendment prohibits the introduction of testimonial hearsay at a criminal trial unless the declarant is unavailable, and the defendant had a prior opportunity for cross-examination. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Crawford v. Washington*,

[6] The court remanded with instructions to strike a community custody condition.

541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The proponent of the evidence bears the burden of establishing that its admission does not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The core definition of testimonial hearsay includes statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford,* 541 U.S. at 52.

Where a 911 call is concerned, "a conversation which begins as an interrogation to determine the need for emergency assistance" can "evolve into testimonial statements…once that purpose has been achieved." *Davis v. Washington*, 547 U.S. 813, 828, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quotation marks and citations omitted).

For example, statements to a 911 operator may be testimonial if made after the defendant "drove away from the premises." *Id.* Subsequent questions can resemble "the 'structured police questioning' that occurred in *Crawford*." *Id.,* at 828-829.

Courts must "recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial [and] should redact or exclude the portions of any statement that have become testimonial," *Id.,* at 829.

To determine if hearsay is testimonial, courts examine the "primary purpose" of the statement. *Davis*, 547 U.S. at 822. Four factors are important in assessing a conversation's primary purpose. *State v. Koslowski*, 166 Wn.2d 409, 418–19, 209 P.3d 479 (2009). The inquiry is an objective one, focusing on "the circumstances in which the encounter occurs and the

statements and actions of the parties." *Michigan v. Bryant*, 562 U.S. 344, 359, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).

First, courts inquire whether the declarant was "speaking about current events… [or] describing past events." *Koslowski*, 166 Wn.2d at 418. Second, courts ask if "a 'reasonable listener' [would] conclude that the speaker was facing an ongoing emergency that required help." *Id.,* at 419. Third, courts examine the statements to determine if they are "necessary to resolve the present emergency" or if they instead show "what had happened in the past." *Id.* Fourth, courts determine the level of formality – "[t]he greater the formality, the more likely the statement was testimonial." *Id.*

The existence of an emergency is only "one factor… that informs the ultimate inquiry regarding

the 'primary purpose' of an interrogation." *Bryant*, 562 U.S. at 366. Furthermore, "informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent." *Id.* Statements that are "[l]ess formal… can also be testimonial." *State v. Burke*, 196 Wn.2d 712, 726–27, 478 P.3d 1096, *cert. denied,* 211 L. Ed. 2d 74, 142 S. Ct. 182 (2021).

Koslowski illustrates these principles. In *Koslowski,* police immediately responded to a 911 call regarding a robbery. *Koslowski*, 166 Wn.2d at 414. They questioned the victim, who was visibly upset. *Id.* The Supreme Court found the victim's statements testimonial and reversed. *Id.,* at 430, 432.

The *Koslowski* court noted that the declarant was "describing events that had already occurred" following a completed crime. *Id.,* at 422. Although she was frightened, she was not making "a cry for help in the

face of an ongoing emergency." *Id.,* at 426. Instead, she was "describing crimes that had occurred and [providing] information to apprehend the suspects." *Id.,* at 427; *See also State v. Mechling*, 219 W. Va. 366, 378, 633 S.E.2d 311 (2006), *modified on other grounds by State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474 (2021) ("[T]he defendant had clearly departed the scene when the interrogation occurred.") The court noted that conversations are somewhat formal "whenever police engage in a question-answer sequence with a witness." *Koslowski*, 166 Wn.2d at 429.

In this case, the recording of the 911 call included testimonial hearsay.[7] An objective witness would

[7] There was no suggestion that the caller was unavailable, and Mr. Freeman did not have a prior opportunity for cross-examination. Thus, any testimonial portions should have been excluded under *Crawford.*

reasonably believe that portions of the call would be available for use at a later trial. *Crawford,* 541 U.S. at 52.

The declarant's initial statement – providing an address and telling the officer "[W]e need help"— may have been nontestimonial, as defense counsel conceded. CP 13, 53.

However, midway through the call she told the operator that the person causing the problems had left. Ex. 6, p. 7; Ex. 12. With his departure, she and her mother had "an opportunity to lock the door." *United States v. Arnold*, 486 F.3d 177, 189 (6th Cir. 2007). The conversation then turned into the more formal "question-answer sequence" that characterizes testimonial statements. *Koslowski*, 166 Wn.2d at 429.

Prior to that point, the declarant had not named Mr. Freeman. Ex. 6, pp. 1-7; Ex. 12. She had not

provided her own name, or her mother's name. Ex. 6, pp. 1-7; Ex. 12. Nor had she mentioned a restraining order. Ex. 6, pp. 1-7, 11; Ex. 12. She had not described anything that happened. Ex. 6, pp. 1-7, 11; Ex. 12.

As soon as "he" left, instead of expressing fear or asking police to hurry, the caller told the operator "[M]y mom has to go to work." Ex. 6, p. 7; Ex. 12. At no point did she say she was worried that he might return. Ex. 6, p. 7; Ex. 12.

Nearly everything she said after the departure came as a response to a question. Ex. 6, pp. 7-15; Ex. 12. After she'd answered all the questions, the operator did not ask her to remain on the line. Ex. 6, p. 15; Ex. 12. Nor did she ask the operator to stay with her. Ex. 6, p. 15; Ex. 12.

Officers did not go directly to the apartment; instead, the operator noted that they "might do an area

check for him and then come back to the apartment." Ex. 6, p. 14; Ex. 12. He instructed the caller to call back "if he returns… so we can reroute the units to the apartment rather than looking for him over there." Ex. 6, p. 15; Ex. 12. The operator ended the call before the police arrived. Ex. 6, p. 15; Ex. 12.

The call included testimonial hearsay that should have been excluded. After the caller's initial statements, any emergency dissipated. The turning point came when the man left. After that, the caller did not ask for help, express fear that he might return, or otherwise suggest there was an ongoing emergency. The 911 operator clearly did not sense an ongoing emergency; otherwise, he would have sent officers directly to the home and would not have ended the call.

Even if the emergency persisted beyond the moment the caller said "he left," it had clearly

dissipated at some point before the conclusion of the call. Under these circumstances, the introduction of the entire recording[8] violated Mr. Freeman's right to confront the witnesses against him. *Id.* The error requires reversal. *Crawford,* 541 U.S. at 52-69.

The Supreme Court should grant review under RAP 13.4(b)(1) and (2). The Court of Appeals' decision conflicts with *Koslowski* and with the U.S. Supreme Court's decision in *Davis.*

II. The trial court should have excluded portions of the recording under ER 802, the rule against hearsay.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is generally

[8] Except for those irrelevant portions redacted by the court.

inadmissible; however, there are exceptions to the rule against hearsay. ER 802.

In this case, the court relied on the "excited utterance" and "present sense impression" exceptions. RP 70. Neither exception supports the court's decision.

Excited utterance. 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).

More than the statement itself is required to meet this foundation. Instead, extrinsic evidence is necessary to establish "that a startling event or condition occurred and that the declarant made the statement while under the stress thereof." *State v. Young*, 160 Wn.2d 799, 809–10, 161 P.3d 967 (2007).

The statement itself "can establish only…that the utterance relates to the event." *Id.,* at 809.

Here, the record does not include any extrinsic evidence describing the "startling event or condition." ER 803(a)(2). Indeed, the caller herself never described what prompted her to call 911. Ex. 6, 12. Although parties were arguing in the background, the State never provided extrinsic evidence showing that the argument qualified as a startling event or condition. Ex. 6, 12.

Nor is there any indication that the caller was "under the stress of excitement caused by the event or condition." ER 803(a)(2). This is especially true after the caller told the operator "he left." Ex. 12. Following that statement, the recording shows that the caller's voice remained calm. Ex. 12. She did not repeat her request for help or express any concern.

Instead, soon after "he left," she said "My mom has to go to work." Ex. 6, p. 7; Ex. 12. No one testified that she showed signs of being upset. Nor was there any other extrinsic evidence about the caller's demeanor or emotional state. Even if the first portion of the call (prior to the departure) included excited utterances, nothing suggests that Ms. Coe's daughter was "under the stress of excitement" after the departure.

Instead, she calmly answered questions posed by the operator. Ex. 6, 12. When statements are made in response to questioning, "this tends to counter the element of spontaneity" that justifies admission of an excited utterance. *State v. Ramires*, 109 Wn. App. 749, 758, 37 P.3d 343 (2002). She was able to "provide detailed information… [which] tends to show a calm,

reflective state of mind" rather than a mind under the stress of excitement. *Id.*

Finally, the caller's statements did not "relat[e] to [the] startling event or condition." Ex. 6, 12. She was not asked what happened. Ex. 6, 12. She did not describe what happened. Ex. 6, 12. Instead, in response to the operator's questions, she identified Mr. Freeman and gave the operator her mother's name, thereby establishing the alleged violation.

The recording should not have been admitted as an excited utterance. ER 803(a)(2).

Present sense impression. 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).

The recording did not qualify as a present sense impression. The caller was not describing or explaining an event or condition. Instead, she was answering questions posed by the operator. None of the questions and none of her answers described or explained an event or condition. At no point did she tell the operator what happened.

The court should have excluded the recording under ER 802.

The Supreme Court should grant review under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision conflicts with *Young* and *Ramires*. In addition, review is warranted under RAP 13.4(b)(4). The proper interpretation and application of ER 803(a)(1) is an issue of substantial public interest that should be determined by the Supreme Court.

III. Preservation of Error, Standards of Review, and Harmlessness

Preservation. Mr. Freeman's arguments are preserved. His attorney raised them in the trial court. CP 8-14, 45-67; RP 47-71. In addition, the confrontation violation is a manifest error affecting a constitutional right and may be raised for the first time on review. RAP 2.5(a)(3).

Standards. Courts review *de novo* whether evidentiary rulings abridged the right to confront adverse witnesses. *State v. Orn*, 197 Wn.2d 343, 350, 482 P.3d 913 (2021). Claims raised under the rules of evidence are reviewed for abuse of discretion.[9] *Id.,* at 351.

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[9] An abuse of discretion occurs when the court "applies the wrong legal standard or bases its ruling on an erroneous view of the law." *Id.* (internal quotation marks and citation omitted). Thus, "a court necessarily abuses its discretion by denying a criminal defendant's

(*Continued*)

Applying a *de novo* standard, the trial court violated Mr. Freeman's confrontation right by admitting testimonial hearsay, as outlined above. Furthermore, the court abused its discretion by allowing the State to introduce the 911 call under ER 803(a)(1) and (2).

Harmlessness. Constitutional errors are presumed prejudicial. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The State bears the burden of proving such errors harmless beyond a reasonable doubt. *Id.*

An erroneous evidentiary ruling that does not affect a constitutional right is grounds for reversal if it results in prejudice.[10] *Bengtsson v. Sunnyworld Int'l,*

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constitutional rights." *Id.* (internal quotation marks and citation omitted).

[10] However, "[a]n erroneous evidentiary ruling that violates the defendant's constitutional rights… is

(*Continued*)

Inc., 14 Wn. App. 2d 91, 99, 469 P.3d 339 (2020). An error is prejudicial "if within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *Id.* (internal quotation marks and citations omitted).

Here, the errors require reversal under any standard. Challenged portions of the 911 call provided the only evidence supporting the alleged violation. Accordingly, the State cannot show beyond a reasonable doubt that the erroneous admission of the call was harmless. *Franklin*, 180 Wn.2d at 382.

Reversal is required even if the error was merely a violation of the rule against hearsay. The outcome of the trial would have been materially affected if the

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presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt." *Franklin*, 180 Wn.2d at 377.

court had excluded the challenged portions of the 911 call. *Bengtsson*, 14 Wn. App. 2d at 99.

Conclusion

The trial court infringed Mr. Freeman's constitutional right to confront adverse witnesses by admitting a recorded conversation that established the elements necessary for conviction. The admission of the recording also violated the rule against hearsay.

Mr. Freeman's conviction must be reversed. The case must be remanded with instructions to exclude the inadmissible hearsay. Unless the State has additional evidence of the violation, the case must be dismissed with prejudice.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in

RAP 18.17(b)) is 3624 words, as calculated by our word processing software. The font size is 14 pt.

Respectfully submitted September 10, 2024.

BACKLUND AND MISTRY

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CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Nathan Freeman, DOC #324141
Reynolds Reentry Center
410 4th Ave.
Seattle, WA 98104

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on September 10, 2024.

_____

Jodi R. Backlund, No. 22917
Attorney for the Appellant

Filed
Washington State
Court of Appeals
Division Two

August 13, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NATHAN ALEXANDER FREEMAN, Appellant.	No. 57863-8-II UNPUBLISHED OPINION

LEE, J. — Nathan A. Freeman appeals his felony conviction for violating a no-contact order. Freeman argues that the trial court violated his right to confront the witnesses against him by admitting into evidence a recorded 911 call that included statements made by witnesses who did not testify at trial. Because the primary purpose of the statements in the 911 call was to allow police to respond to an ongoing emergency, we hold that the admission of the statements did not violate Freeman's confrontation clause rights. Furthermore, the statements in the 911 call were admissible under the excited utterance and present sense impression hearsay exceptions.

Freeman also argues that the trial court erred by giving a to-convict jury instruction that contained different standards for conviction and acquittal. We hold that the challenged instruction did not provide different standards. Moreover, Freeman invited any alleged error. Therefore, the trial court did not err.

We affirm Freeman's conviction. However, we remand to the trial court with instructions to correct the scrivener's error in Freeman's judgment and sentence by striking the community custody condition prohibiting Freeman from contacting S.C.

FACTS

On June 19, 2020, the King County Superior Court issued a no-contact order prohibiting Freeman from contacting or coming within 1,000 feet of S.C. The order expired on June 19, 2022.

A. ALLEGED NO-CONTACT ORDER VIOLATION AND 911 CALL

On January 2, 2022, S.C.'s daughter, N.C.-C., called 911 for help. In a recording of the 911 call, S.C.[1] and a man can be heard arguing in the background.

During the first part of the 911 call, N.C.-C. asked for help five times. In response to the 911 operator's questions, N.C.-C. relayed the address of the apartment from where she was calling, indicated that no one was injured, and stated that she had not seen a gun or knife. The 911 operator also asked if anyone had been drinking or doing drugs, and N.C.-C. stated that the man was high on crack.[2]

At that point, the 911 operator asked N.C.-C. to identify the man and N.C.-C. responded, "He – he – he left. He left so. . . ." Clerk's Papers (CP) at 37. The 911 operator then asked for the man's name, and N.C.-C. identified the man as "Nate Freeman." CP at 37. The 911 operator also asked what was Freeman's relationship to S.C., and N.C.-C. responded, "This is her boyfriend, or whatever he—I don't know." CP at 37. The 911 operator then asked N.C.-C. for information

[1] The parties do not dispute that the other female voice that can be heard on the 911 call was S.C.

[2] The trial court excluded this statement and that ruling is not challenged on appeal.

"in case he comes back," including Freeman's physical appearance. CP at 38. N.C.-C. stated that Freeman had left "on foot." CP at 40.

After N.C.-C. told the 911 operator that Freeman had left, S.C. and N.C.-C. both stated that Freeman lived at the apartment. S.C. also said, "We got a restraining order," and N.C.-C. agreed with S.C.'s statement. CP at 40. The 911 operator proceeded to ask for Freeman's date of birth, S.C.'s name and date of birth, and confirmed that no one needed medical attention. The 911 operator also asked whether N.C.-C. knew in what direction Freeman left, and N.C.-C. said she was "not sure." CP at 42. S.C. then told the 911 operator that Freeman would "go under the bridge." CP at 42. N.C.-C. also told the 911 operator that Freeman would hide under a bridge or freeway overpass and that would be the place to check for him. The 911 operator ended the call by advising N.C.-C. that "if anything changes before we get back to you there . . . if he returns, just call us and let us know, so we can reroute the units to the apartment rather than looking for him over there." CP at 44.

On May 20, 2022, the State filed an amended information charging Freeman with several crimes, including one count of domestic violence felony court order violation—domestic violence. The State later filed a second amended information charging Freeman only with one count of domestic violence felony court order violation and one count of residential burglary.[3]

[3] After the State rested its case in chief, Freeman moved to dismiss the residential burglary charge, arguing the State did not produce any "evidence that [Freeman] unlawfully entered any dwelling." 4 Verbatim Rep. of Proc. (VRP) (Dec. 21, 2022) at 283. The trial court dismissed the charge for insufficient evidence.

B. PRETRIAL MOTIONS

Freeman moved to suppress the 911 recording, arguing that admitting portions of it would violate his confrontation clause rights. After a hearing on the motion to suppress, the trial court ruled that N.C.-C.'s statements were "clearly nontestimonial" and that the confrontation clause did not bar their admission.[4] 2 Verbatim Rep. of Proc. (VRP) (Dec. 19, 2022) at 69. The trial court also ruled that N.C.-C. and S.C.'s hearsay statements were admissible under the excited utterance and present sense impression exceptions to the hearsay rule. The trial court noted that the recording depicted "an ongoing situation which is quite chaotic, and [N.C.-C.'s] calling and asking for help. She's not really saying . . . what necessarily is going on, but she's asking for help. And I think that that is both a present-sense impression and an excited utterance." 2 VRP (Dec. 19, 2022) at 70-71.

In addition to the motion to suppress the 911 recording, Freeman sought to bifurcate the trial and proposed bifurcated jury instructions. Freeman argued that the jury should first be instructed on the no-contact order violation, determine whether Freeman violated the order, and *then* be instructed on and determine whether he had two previous convictions for a no-contact order violation. This would, according to Freeman, protect him "from juries drawing unfair, unreasonable, unlawful conclusions based upon [his] prior conviction." 3 VRP (Dec. 20, 2022) at

[4] Although the trial court found the majority of the statements in the 911 recording were not testimonial and admissible, the trial court did exclude a few of N.C.-C. and S.C.'s statements made in the 911 recording. First, the trial court excluded N.C.-C. and S.C.'s statements that Freeman stole S.C.'s phone because they were testimonial. Second, the trial court excluded N.C.-C. and the operator's statements that Freeman was on drugs because "there's no indication or any basis of knowledge for that." 2 VRP (Dec. 19, 2022) at 71. Finally, the trial court excluded N.C.-C.'s statement that the 911 operator had "probably heard of [Freeman]." 2 VRP (Dec. 19, 2022) at 71. The trial court's exclusion of these statements is not challenged on appeal.

147. The trial court declined bifurcating the trial but stated it would consider Freeman's proposed jury instructions.

C. TRIAL

The case proceeded to a jury trial. Neither N.C.-C. nor S.C. testified at trial.

The State called as its first witness Officer David A. Temple, Jr., one of the officers who responded to the scene on January 2nd. Officer Temple testified that dispatch advised him of a no-contact order violation. When Officer Temple arrived on the scene, he found S.C. and N.C.-C. Officer Temple testified that there were two other children in the apartment. Officer Temple did not find Freeman in the apartment or the surrounding area. Officer Temple identified S.C. as the protected party and Freeman as the restrained party in the no-contact order. On cross-examination, Officer Temple acknowledged that he had no personal knowledge of whether Freeman was present in the apartment on January 2nd.

The State's next witness was Bridget Adams, a disclosure analyst for South Sound 911. As a disclosure analyst, Adams "provide[s] 911 audio and CAD logs to requestors." 3 VRP (Dec. 20, 2022) at 207. During Adams' testimony, the State offered, and the trial court admitted, a redacted recording of the 911 call into evidence. The redacted 911 call admitted into evidence complied with the trial court's pretrial ruling on Freeman's motion to suppress.

The State then called Sergeant Kevin Karuzas, another officer who responded to the 911 call, as its final witness. Like Officer Temple, Sergeant Karuzas testified that he responded to a no-contact order violation. Freeman was not on the scene when he arrived. The State played the redacted 911 recording for the jury during Sergeant Karuzas's testimony. On cross-examination,

Sergeant Karuzas acknowledged that he had no personal knowledge of whether Freeman was present in the apartment on January 2nd.

No other witnesses testified at the trial.

D. JURY INSTRUCTIONS

The trial court's to-convict instruction for the no-contact order violation charge included an element that Freeman had two previous convictions for violating a no-contact order. Freeman objected to the trial court's to-convict instruction. Specifically, Freeman argued that the trial court should "bifurcate the trial or the jury's deliberations" such that "they [would] have to [decide] . . . whether or not [Freeman] actually violated a no-contact order" before addressing "whether or not he had two prior[] [no contact order violation convictions]." 4 VRP (Dec. 21, 2022) at 302. Freeman expressed concern that unless the jury's deliberations were bifurcated, "the jury will basically look at the fact that he has committed two priors and reach the conclusion that he has a propensity to violate the no-contact order." 4 VRP (Dec. 21, 2022) at 302.

The trial court rejected Freeman's argument. However, to ameliorate any potential prejudice to Freeman, the trial court accepted a stipulation that Freeman had two previous convictions for violating a no-contact order and included language warning the jury it could consider the previous convictions only as "evidence . . . of the prior convictions elements" and for no "other purpose." Ex. 13, at 1.

The to-convict instruction ultimately given to the jury included the following language:

> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 81. Freeman did not object to this language, and his proposed to-convict instruction included the same language.

The jury found Freeman guilty of violating the no contact order, and that Freeman and S.C. were intimate partners.[5]

E. SENTENCING

Freeman was sentenced to an exceptional downward sentence of 48 months in custody with 12 months community custody. At sentencing, the State asked whether "the Court wish[ed] to impose another no-contact order? I'm sure [S.C.] does not want another no-contact order." 7 VRP (Feb. 3, 2023) at 398. The trial court responded that it would not "impose another [no-contact order] based on this conviction." 7 VRP (Feb. 3, 2023) at 398. The trial court also crossed out the no-contact provision from Freeman's judgment and sentence. However, Freeman's judgment and sentence included a community custody condition prohibiting Freeman from contacting S.C.

Freeman appeals.

ANALYSIS

A. THE CONFRONTATION CLAUSE

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. "The Fourteenth Amendment renders the [Confrontation] Clause binding on the States." *Michigan v. Bryant*, 562 U.S. 344, 352, 131 S. Ct.

[5] The verdict forms were not included in the record on appeal.

1143, 179 L. Ed. 2d 93 (2011). The confrontation clause bars admission of an absent witness's testimonial statements at trial unless "the declarant is unavailable" and "the defendant has had a prior opportunity to cross-examine" the declarant. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *see also State v. Burke*, 196 Wn.2d 712, 725, 478 P.3d 1096 ("The confrontation clause prohibits the admission of testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination."), *cert. denied*, 142 S. Ct. 182 (2021). "Nontestimonial hearsay . . . is admissible under the Sixth Amendment subject only to the rules of evidence." *State v. Pugh*, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009).

We review confrontation clause challenges de novo. *Burke*, 196 Wn.2d at 725. "For purposes of determining whether the statements were admissible, the facts are limited to those presented at the admissibility hearing."[6] *Id.* at 729 n.8.

[6] At the pretrial suppression hearing, both parties provided a full, unredacted transcript of the 911 recording. The trial court excluded several statements from the 911 recording: N.C.-C. and S.C.'s statements that Freeman had stolen S.C.'s phone, N.C.-C.'s statement that the 911 operator had likely heard of Freeman before, and N.C.-C. and the 911 operator's comments that Freeman was high on drugs. Because we determine admissibility using "the facts . . . presented at the admissibility hearing," we consider the unredacted transcripts in addition to the redacted recording in making our decision. *Burke*, 196 Wn.2d at 729 n.8. In doing so, however, we note that the State's and Freeman's transcripts differ slightly. For example, what the State transcribed as "hit me," Freeman transcribed as "kicked me." *Compare* CP at 31 *with* CP at 56. But, it appears that the trial court provided the jury with a redacted version of the State's transcript to use as an aid while listening to the recording. Thus, we consider the State's unredacted transcript in assessing the confrontation clause issue.

Freeman also attached transcripts of two additional 911 calls made by Linda Wilson to his suppression motion. It is unclear who Wilson is or how she is related to this case, and neither Freeman nor the State appears to have referenced these transcripts in their motions or arguments before the trial court. Thus, we do not consider these transcripts.

Washington courts apply the primary purpose test to determine whether out-of-court statements are testimonial or nontestimonial. *Id.* at 725-26 A statement is testimonial "'when the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 726 (alteration in original) (quoting *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)); *see also State v. Hart*, 195 Wn. App. 449, 459, 381 P.3d 142 (2016) ("Generally, a statement is testimonial if made to establish or prove some fact or if a reasonable person in the declarant's position would anticipate that his or her statement would be used against the accused in investigating or prosecuting a crime."), *review denied*, 187 Wn.2d 1011 (2017), *abrogated on other grounds by State v. Burns*, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[7] *Davis*, 547 U.S. at 822.

[7] In *Davis*, the Court acknowledged that "[i]f 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." 547 U.S. at 823 n.2. The Court assumed without deciding that statements made to a 911 operator could be testimonial. *Id.* Our supreme court did the same in *Burke*, noting that "a person conducting an interrogation *for* the police may be considered an agent of the police for purposes of the confrontation clause," citing the *Davis* Court in support. 196 Wn.2d at 728. The *Burke* court then went on to analyze whether statements made to a sexual assault nurse examiner were testimonial or not. *Id.* at 729-38. Washington courts have also analyzed statements made to a 911 operator under the confrontation clause in other cases. *See, e.g.*, *Pugh*, 167 Wn.2d at 831-34 (analyzing whether statements made to a 911 operator were testimonial); *State v. Robinson*, 189 Wn. App. 877, 892, 359 P.3d 874 (2015) (concluding "that the statements in the 911 call were not testimonial"); *State v. Reed*, 168 Wn. App. 553, 562-71, 278 P.3d 203 (analyzing whether statements made to 911 operators over two calls were testimonial), *review denied*, 176 Wn.2d 1009 (2012). Thus, we determine the testimonial nature of N.C.-C.'s statements under the confrontation clause regardless of the fact that they were made to a 911 operator rather than a police officer.

In applying the primary purpose test, we "'objectively evaluat[e] the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs.'" *Burke*, 196 Wn.2d at 726 (quoting *Bryant*, 562 U.S. at 370). Determining "whether an emergency exists and is ongoing is a highly context-dependent inquiry." *Bryant*, 562 U.S. at 363.

Washington courts look at four factors to determine the primary purpose of a challenged statement. *State v. Koslowski*, 166 Wn.2d 409, 418-19, 421, 209 P.3d 479 (2009).

First, the court asks, "Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? The amount of time that has elapsed (if any) is relevant." *Id.* at 418. Describing "events as they [are] actually happening" suggests the statements are nontestimonial. *Id.* at 422; *see also State v. Ohlson*, 162 Wn.2d 1, 12, 168 P.3d 1273 (2007).

Second, the court asks, "Would a 'reasonable listener' conclude that the speaker was facing an ongoing emergency that required help? A plain call for help against a bona fide physical threat is a clear example where a reasonable listener would recognize that the speaker was facing such an emergency." *Koslowski*, 166 Wn.2d at 419. Where the record lacks "any evidence from which to conclude that there was an ongoing emergency requiring help, such as a bona fide physical threat," this factor weighs in favor of finding the statements are testimonial. *Id.* at 425.

Third, the court asks,

> What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? For example, a 911 operator's effort to establish the identity of an assailant's name so that officers might know whether they would be encountering a violent felon would indicate the elicited statements were nontestimonial.

Id. at 419.

Fourth, the court asks, "What was the level of formality of the interrogation? The greater the formality, the more likely the statement was testimonial. For example, was the caller frantic and in an environment that was not tranquil or safe?" *Id.*

"[A] conversation which begins as an interrogation to determine the need for emergency assistance" can become testimonial "once that purpose has been achieved." *Davis,* 547 U.S. at 828; *see also State v. Reed,* 168 Wn. App. 553, 565, 278 P.3d 203 ("[T]he trial court was permitted to determine that, although the latter portion of [the victim's] second 911 call was testimonial, the statements in the first portion of the call did not implicate [the defendant's] right to confrontation."), *review denied,* 176 Wn.2d 1009 (2012).

B. STATEMENTS MADE AFTER FREEMAN LEFT THE APARTMENT WERE NONTESTIMONIAL

Here, Freeman argues that N.C.-C. and S.C.'s statements made in the 911 call after N.C.-C. said "he left" are testimonial, and because neither N.C.-C. nor S.C. testified at trial, the admission of those statements at trial violated his rights under the confrontation clause. Freeman appears to concede that the statements preceding Freeman's leaving the apartment are nontestimonial. *See* Br. of Appellant at 18 ("The call included testimonial hearsay that should have been excluded. After the caller's initial statements, any emergency dissipated. The turning point came when the man left."). Thus, we focus on whether the statements made after N.C.-C. told that 911 operator that "he left" are testimonial.

With regard to the first factor—whether the challenged statements described current or past events—after stating "he left," N.C.-C. named and described Freeman to the 911 operator, described Freeman's relationship to S.C., stated that Freeman lived at the location from where

N.C.-C. called 911, identified herself and S.C. by name, alerted the 911 operator that S.C. had a no-contact order against Freeman, and speculated as to where Freeman might have fled. S.C. also described Freeman, confirmed the existence of a no-contact order, provided Freeman's date of birth, and speculated as to where Freeman might have fled. N.C.-C. and S.C.'s descriptions of Freeman and his relationship to them, provided information about the event that precipitated the 911 call (i.e., the no-contact order violation), and described the situation to the 911 operator. The statements were made immediately after Freeman's departure and may be considered to have been "made contemporaneously with the events described." *Ohlson*, 162 Wn.2d at 17; *see also Reed*, 168 Wn. App. at 566 ("As our Supreme Court has observed, where statements are made 'within minutes of the assault,' such events may properly be considered as 'contemporaneous[] with the events described.'" (alteration in original) (quoting *Ohlson*, 162 Wn.2d at 17)). Thus, the first factor weighs in favor of finding N.C.-C. and S.C.'s statements were nontestimonial.

Regarding the second factor—the existence of an ongoing emergency—a reasonable listener would conclude that despite Freeman's departure, N.C.-C. and S.C. were still facing an ongoing emergency because an assailant's departure from the scene does not automatically terminate an emergency if the circumstances indicate he might return. While N.C.-C. and S.C. speculated that Freeman would go hide elsewhere, N.C.-C. also told the 911 operator she was not sure what direction Freeman went after he left. Furthermore, N.C.-C. and S.C. both told the 911 operator Freeman lived in the apartment that they were calling from, a strong indication Freeman could return. Furthermore, because Freeman lived in the apartment, Freeman presumably had a way to enter his own dwelling; therefore, Freeman's contention that N.C.-C. and S.C. could have locked the door after he left and thus mitigated any ongoing emergency is unpersuasive.

In *Reed*, Division One concluded that the defendant's departure from the scene of an assault did not end an ongoing emergency. 168 Wn. App. at 567-68. Reed argued that the admission of two recorded 911 calls made by the victim violated the confrontation clause. *Id.* at 562. After initially calling 911 to report she was being assaulted by Reed, the victim called 911 again several hours later, reporting that Reed had just beat her again. *Id.* at 559-60. The victim said Reed "had left her by the side of the road in an unfamiliar area," she "struggled to convey her location to the operator," and "told the operator that she needed a 'cop' but did not require medical assistance." *Id.* at 560. In applying the second factor, Division One concluded that Reed's departure from the scene did not vitiate the emergency: "[The victim] was alone and injured," and "[t]he operator was aware that Reed, having driven away only moments before [the victim] placed the call, was highly mobile and could potentially return to the scene to resume the assault." *Id.* at 568.

Similarly, here, N.C.-C. and S.C. were alone in the apartment with two other children. At the beginning of the 911 recording, S.C. and Freeman could be heard engaging in a heated argument that involved physical contact. While Freeman had left the apartment, he could easily return and pose a risk of physical harm. Because a reasonable listener would conclude that N.C.-C. and S.C. faced an ongoing emergency despite Freeman's departure, the second factor weighs in favor of finding their statements were nontestimonial.

With regard to the third factor—the nature of what was asked and answered—most of the 911 operator's questions following Freeman's departure elicited information that was necessary to allow officers to "know whether they would be encountering a violent felon." *Koslowski*, 166 Wn.2d at 419. For example, N.C.-C.'s responses identifying and describing Freeman provided information that allowed officers to "know whether they would be encountering a violent felon."

Id. In the context of "domestic disputes[,] . . . '[o]fficers called to investigate . . . need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.'" *Davis*, 547 U.S. at 832 (some alterations in original) (quoting *Hiibel v. Sixth Judicial Dist. of Nevada, Humboldt County*, 542 U.S. 177, 186, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004)). The statements in response to the 911 operator's inquiry about whether N.C.-C. and S.C. needed medical attention provided similarly necessary information. *See Reed*, 168 Wn. App. at 566-67 ("[T]he nature of the questions asked indicates that the purpose of the interrogation was to resolve an emergency. The [911] operator's questions . . . were designed to ascertain [the victim's] . . . need for medical assistance," among other things); *see also Bryant*, 562 U.S. at 365 ("The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public."). And N.C.-C. and S.C.'s speculation about Freeman's location helped responding officers "determine whether [Freeman] remained in the area where he could continue to pose a threat to [the victim] and responding officers." *Reed*, 168 Wn. App. at 567. Because the exchange with the 911 operator after Freeman left provided information officers needed to assess and resolve the ongoing emergency, the third factor weighs in favor of finding N.C.-C. and S.C.'s statements were nontestimonial.

Regarding the fourth factor—the formality of the exchange—the 911 operator's post-departure questions occurred in an atmosphere that was significantly calmer than it had been prior to Freeman's departure. Also, the 911 operator's questions to N.C.-C. advanced from asking about Freeman's identity to seeking a description of his physical attributes and information about the no-contact order. *See Davis*, 547 U.S. at 828-29 (because the operator's questions were like the

questions posed by the "structured police questioning" in *Crawford*, the victim's statements in response were testimonial (quoting *Crawford*, 541 U.S. at 53 n.4)). Thus, the fourth factor weighs in favor of finding N.C.-C. and S.C.'s statements were testimonial.

Overall, three of the four factors weigh in favor of finding that the primary purpose of the statements made following Freeman's departure was to allow police to respond to an ongoing emergency, meaning N.C.-C. and S.C.'s statements were nontestimonial. Because there was reason to believe that Freeman might return to the apartment, his initial departure did not end the emergency posed by his being in S.C.'s presence despite the no-contact order. Furthermore, N.C.-C. and S.C.'s statements regarding Freeman's identity, description, relationship to S.C., and location were necessary to allow officers to assess and resolve the ongoing emergency. Thus, the trial court did not violate the confrontation clause when it admitted the statements made in the 911 call after Freeman left the apartment.

C. EVIDENTIARY ANALYSIS

Freeman argues that even if admitting the 911 call did not violate the confrontation clause, the trial court abused its discretion by admitting the call under the excited utterance and present sense impression exceptions to the hearsay rule. We disagree.

Evidentiary rulings are reviewed for an abuse of discretion. *Burke*, 196 Wn.2d at 740. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Numrich*, 197 Wn.2d 1, 27, 480 P.3d 376 (2021). A trial court does not abuse its discretion unless it can be said "'that no reasonable judge would have made the same ruling.'" *Burke*, 196 Wn.2d at 741 (quoting *Ohlson*, 162 Wn.2d at 8).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay statements are inadmissible at trial unless one of the exceptions to the hearsay rule applies, such as the excited utterance or present sense impression exceptions. ER 802.

1. Excited Utterance

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). The party seeking admittance of a statement as an excited utterance must meet three requirements: "(1) a 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 related to the startling event or condition." *Ohlson*, 162 Wn.2d at 8. "Often, the key determination is whether the statement was made while the 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." *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001), *cert. denied*, 534 U.S. 964 (2001), *overruled on other grounds by State v. Schierman*, 192 Wn.2d 577, 739 n. 69, 438 P.3d 1063 (2018).

The first two requirements "must . . . be established by evidence extrinsic to the declarant's bare words." *State v. Young*, 160 Wn.2d 799, 810, 161 P.3d 967 (2007). Said evidence "can include circumstantial evidence, such as the declarant's behavior, appearance, and condition; appraisals of the declarant by others; and the circumstances under which the statement is made." *Id.*

Here, the argument between S.C. and Freeman, which can be heard in the background of the 911 call, was a startling event. The trial court found that there was "an ongoing situation which is quite chaotic, and [N.C.-C.]'s calling and asking for help." 2 VRP (Dec. 19, 2022) at 70-71. The 911 recording supported this finding: N.C.-C. asked for help multiple times during the 911 call; N.C.-C. had trouble answering the 911 operator's questions, with the background fight often interrupting N.C.-C. and forcing her to begin her answers again; and N.C.-C. made her statements on a 911 call, a context tending to indicate the existence of a startling event or condition. Thus, there was sufficient circumstantial evidence that a startling event or condition occurred, satisfying the first requirement.

Also, the 911 recording shows that N.C.-C.'s statements were made while she was under the stress of the excitement caused by S.C. and Freeman's argument. N.C.-C.'s voice is distressed in the call and she has trouble speaking over the argument in the background. As the trial court stated, "Comments have been made about [N.C.-C.] being calm on the call. I don't think that that factors into the way she's actually presenting on the phone. We've got an ongoing situation which is quite chaotic, and she's calling and asking for help." 2 VRP (Dec. 19, 2022) at 70-71.

Freeman argues that "[w]hen statements are made in response to questioning, 'this tends to counter the element of spontaneity' that justifies admission of an excited utterance." Br. of Appellant at 21 (quoting *State v. Ramires*, 109 Wn. App. 749, 758, 37 P.3d 343, *review denied*, 146 Wn.2d 1022 (2002)). While it is true that "[a] declarant's ability to provide detailed information about the event . . . tends to show a calm, reflective state of mind," N.C.-C.'s state of mind was anything but calm or reflective before Freeman left: the 911 operator had to ask N.C.-C. where she was three times before she answered, and when she did, she was interrupted repeatedly

before she provided a full address. *Ramires*, 109 Wn. App. at 758. And, "[t]he fact that a statement is made in response to a question will not by itself require the statement be excluded." *State v. Chapin*, 118 Wn.2d 681, 690, 826 P.2d 194 (1992). Here, there was sufficient evidence that N.C.-C. was under the stress of a startling event when she made her statements before Freeman left, satisfying the second requirement.

Finally, N.C.-C.'s statements clearly related to S.C. and Freeman's argument: she repeatedly called for help, provided her location, and stated that she had not seen any weapons and that nobody around her was injured. These statements were all spurred by, and directly related to, the argument heard going in the background of the 911 call. Thus, the third requirement of the excited utterance exception is satisfied. Because the trial court's decision to admit the first portion of the 911 call under the excited utterance exception was not based on untenable grounds or reasons, and was not a decision that no reasonable judge would make, the trial court did not abuse its discretion.

The same is true about the statements S.C. made before Freeman left: her voice is raised in argument with Freeman and her statements suggest she was involved in some sort of altercation, all indicating a startling event. Like N.C.-C., S.C.'s tone demonstrates her statements were made while she felt the stress of the argument. Finally, S.C.'s statements were in direct response to the altercation she was embroiled in, so they related to the startling event. Thus, the trial court did not err in admitting the redacted 911 recording that included S.C.'s excited utterances.

2. Present Sense Impression

As for the statements made after Freeman left the apartment, the trial court did not err in admitting those statements because they were present sense impressions. 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). "Present sense impression statements must grow out of the event reported and in some way characterize that event." *State v. Martinez*, 105 Wn. App. 775, 783, 20 P.3d 1062 (2001), *overruled on other grounds by State v. Rangel-Reyes*, 119 Wn. App. 494, 499-500 n.1, 81 P.3d 157 (2003). "The statement must be a 'spontaneous or instinctive utterance of thought,' evoked by the occurrence itself, unembellished by premeditation, reflection, or design. It is not a statement of memory or belief." *Id.* (quoting *Beck v. Dye*, 200 Wash. 1, 9, 92 P.2d 1113 (1939)). A statement made in response to a question can be a present sense impression. *See State v. Robinson*, 189 Wn. App. 877, 889-90, 359 P.3d 874 (2015) (911 call where speaker responded to dispatcher's questions deemed a present sense impression).

Here, N.C.-C.'s statements made after Freeman left the apartment were a continuation of the situation that precipitated the 911 call. N.C.-C. called 911 to ask for help as S.C. and Freeman engaged in a heated argument. As the trial court observed, "[S]he's asking for help." 2 VRP (Dec. 19, 2022) at 71. In response to N.C.-C.'s pleas for help, the 911 operator tried to assess the situation, asked questions about who and what was involved, and N.C.-C. responded in turn, providing the necessary information to describe what was going on (i.e., describing who she and her mother were, and who and where Freeman might have been) and whether anyone was hurt. S.C. provided similarly necessary information by confirming Freeman lived at the apartment, stating there was a restraining order, providing Freeman's date of birth, describing Freeman's clothing, and describing where Freeman might be.

Overall, N.C.-C. and S.C.'s statements helped "characterize th[e] event" by establishing that it was a potential no-contact order violation and identifying the protected and restrained parties. *Martinez*, 105 Wn. App. at 783. Given the circumstances, there was no time for N.C.-C. or S.C. to embellish, reflect on, or design their responses to the 911 operator; the statements were made immediately after Freeman left the apartment. Thus, the trial court did not abuse its discretion in admitting N.C.-C. and S.C.'s statements as present sense impressions.

D. JURY INSTRUCTION ERROR

Freeman assigns error to the trial court's to-convict jury instruction. Specifically, he argues that because the instruction told jurors they could convict Freeman if they "*find from the evidence* that each of these elements has been proved beyond a reasonable doubt," but could acquit only "after *weighing all the evidence*," the instruction suggested a "less onerous [standard]" for conviction than for acquittal. CP at 81; Br. of Appellant at 25 (emphasis added). We disagree.

We review alleged jury instruction errors de novo. *State v. Weaver*, 198 Wn.2d 459, 464, 496 P.3d 1183 (2021). "'To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.'" *Id.* at 465-66 (quoting *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009)). "Jurors are presumed to follow the court's instruction." *Id.* at 467.

Here, the challenged instruction does not create varying standards for conviction and acquittal. Both clauses that Freeman challenges as differentiating how jurors are to examine the evidence use the phrase "the evidence." CP at 81. The challenged instruction does not say "some of the evidence" or delineate what evidence need be considered under either clause. Ultimately,

the instruction directs the jury to convict or acquit only after considering the evidence and to base its verdict on the evidence.

Other instructions reiterate as much, and we presume jurors follow instructions. *Weaver*, 198 Wn.2d at 467. For example, the jury was instructed that it is their "duty to decide the facts in this case based upon the evidence presented . . . during this trial" and the jury was cautioned that the jury's "decision[] . . . must be made solely upon the evidence presented during these proceedings." CP at 73. The jury was also instructed that they "must consider *all* of the evidence . . . admitted that relates to the proposition" and that "[e]ach party is entitled to the benefit of *all* of the evidence." CP at 73, 74 (emphasis added). Thus, when considered in the context of all the jury instructions, the trial court did not err in giving the challenged to-convict instruction.

Even if we were to assume there was error, any alleged error was invited. The invited error doctrine precludes this court from reviewing errors in jury instruction, "'even where constitutional rights are involved . . . when the defendant has proposed an instruction or agreed to its wording.'" *Weaver*, 198 Wn.2d at 465 (quoting *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005)); *see also State v. Summers*, 107 Wn. App. 373, 381, 28 P.3d 780 (2001) ("When a defendant proposes an instruction that is identical to the instruction the trial court gives, the invited error doctrine bars an appellate court from reversing the conviction because of an error in that jury instruction."). Here, Freeman's proposed to-convict instruction contained language identical to the language he now challenges on appeal.

In his reply brief, Freeman argues that the invited error doctrine does not apply because by agreeing to the stipulation regarding his prior no-contact order violation convictions, "he implicitly withdrew [his] proposed instruction." Reply Br. of Appellant at 16. But regardless of whether a

jury instruction can be "implicitly withdrawn" or not, the language Freeman now challenges on appeal is identical to the language he proposed. Freeman also fails to cite any authority suggesting that jury instructions can be implicitly withdrawn, and that if they are, the invited error doctrine no longer applies. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

The trial court did not err in its to-convict jury instruction. Even assuming there was error, the invited error doctrine precludes review of the alleged error. Freeman's challenge fails.

E. COMMUNITY CUSTODY CONDITION PROHIBITING CONTACT WITH S.C.

Freeman argues that even if his conviction is affirmed, this court should remand the case with instructions to correct the community custody condition prohibiting him from contacting S.C. because it is a clerical error. The State concedes. We accept the State's concession.

"A scrivener's error is one that, when amended, would correctly convey the intention of the trial court as expressed in the record at trial." *State v. Starr*, 16 Wn. App. 2d 106, 110 n.3, 479 P.3d 1209 (2021) (emphasis omitted). At sentencing, the trial court expressly stated that it would not "impose another [no-contact order] based on this conviction." 7 VRP (Feb. 3, 2023) at 398. The trial court also crossed out the no-contact provision from Freeman's judgment and sentence. Despite this, the judgment and sentence includes a community custody condition prohibiting Freeman from contacting S.C. Striking the no contact condition "would correctly convey the intention of the trial court as expressed" at sentencing. *Starr*, 16 Wn. App. 2d at 110 n.3 (emphasis omitted). Thus, we remand to the trial court with instructions to correct the scrivener's error by striking the community custody condition prohibiting Freeman from contacting S.C.

CONCLUSION

Because the challenged statements in the 911 call were nontestimonial, their admission at trial did not violate Freeman's rights under the confrontation clause. Moreover, the statements were admissible under the excited utterance and present sense impression exceptions to the hearsay rule. Furthermore, the to-convict jury instruction was not erroneous. Therefore, we affirm Freeman's conviction, but we remand to the trial court with instructions to strike the community custody condition prohibiting Freeman from contacting S.C.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Cruser, C.J.

Price, J.

BACKLUND & MISTRY

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Appellate Court Case Number:	57863-8
Appellate Court Case Title:	State of Washington, Respondent v. Nathan Alexander Freeman, Appellant
Superior Court Case Number:	22-1-00979-1

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