No. 80850-3

CHAMBERS, J. (concurring) — I concur with the majority largely because I agree that "we need not address the question whether excited utterances admissible under ER 803(a)(2) are, ipso facto, constitutionally admissible under article I, section 22." Majority at 21. I believe the statements before us pass constitutional muster. I write separately because I have serious reservations about the broadest applications of the excited utterance rule being made in the wake of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

First, I agree that because we have already held that article I, section 22 is interpreted independently of the Sixth Amendment, a *Gunwall*[1] analysis is not a precondition to considering Timothy Pugh's state constitutional challenge. *See State v. Foster*, 135 Wn.2d 441, 473, 481, 957 P.2d 712 (1998) (Alexander, J., concurring and dissenting; C. Johnson, J., dissenting); *accord State v. Shafer*, 156 Wn.2d 381, 391, 128 P.3d 87 (2006). But I wish to emphasize that a *Gunwall* analysis is always helpful when we are first asked to decide whether a provision of our state constitution provides greater protection to individual liberty than its federal counterpart. The *Gunwall* factors are the best analytical framework this court has for determining how and why the state constitution may offer protections different from the federal constitution. In my view, unless we have already specifically so

[1] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).

held, anyone wishing to seriously argue that a provision of the Washington Constitution has a different application than the United States Constitution would be wise to brief the *Gunwall* factors.[2]

Next, I agree with the majority that the excited utterance exception stems from the "res gestae" doctrine recognized at the time our state constitution was adopted. But those doctrines have evolved into two distinct concepts with differing rationales. Although hearsay statements have historically been admitted on the theory that they were part of the res gestae, that rule is more than a simple hearsay exception. One often cited commentator around the time our state constitution was adopted defined the term as "events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants when narrating the events." Francis Wharton, A Treatise on the Law of Evidence in Criminal Issues §§ 262, at 192 (9th ed. 1884). It encompasses every act forming the main event at issue, not just statements made at the time. Unfortunately, courts have used the doctrine as a wastebasket catchall to admit any evidence that could be said to have arisen out of the event or transaction itself. *See State v. Ripley*, 32 Wash. 182, 190-91, 72 P. 1036 (1903) (admitting out-of-court statements made by prosecution's witness after robbery occurred because statements were deemed part of the res gestae). The broad and unrefined use of the doctrine has earned the criticism of some commentators. *See* Black's Law Dictionary 1423 (9th ed. 2009) (quoting John H. Wigmore, A Students' Textbook of the Law of Evidence 279 (1935)) ("'[I]ts indefiniteness has served as a basis for rulings where it was easier for the

[2] We may decline to decide a *Gunwall* issue if we determine it has been insufficiently briefed by the parties. *State v. Wethered*, 110 Wn.2d 466, 472, 755 P.2d 797 (1988).

judge to invoke this imposing catchword than to think through the real question involved.'")).

While res gestae was accepted at the time our constitution was adopted, the excited utterance exception, as a separate concept, was not. While admissibility of res gestae evidence is premised upon the fact that the evidence arises out of the event itself, the admissibility of an excited utterance is now premised on the age old belief that the declarant has not had an opportunity to fabricate following a startling event. Robert H. Aronson, The Law of Evidence in Washington § 803.04[3][a] at 803-27 (4th ed. 2008). *But cf. United States v. Napier*, 518 F.2d 316, 317-18 (9th Cir. 1975) (affirming admission of an excited utterance spoken seven weeks after incident when victim became agitated after seeing a picture of the defendant); Aviva Orenstein, *"MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 Cal. L. Rev. 159 (1997) (questioning factual assumption underlying the excited utterance exception in light of modern psychology). It was John Henry Wigmore who advocated that "the spontaneous utterance exception should be unmoored from *res gestae*" and "that people are physically incapable of lying when they are under great stress." Josephine Ross, Crawford's *Short-lived Revolution: How* Davis v. Washington *Reins in* Crawford's *Reach*, 83 N.D. L. Rev. 387, 402 (2007). Unlike res gestae, excited utterances are an exception to the hearsay rule premised not on the fact that they form some part of the event itself but upon the belief that statements made pursuant to some startling event are inherently reliable. The excited utterance rule has become a broad exception based on the notion that people cannot lie when they are startled. I have serious doubts as to the

reliability of that assumption.

For these reasons, I have reservations about whether the broadest applications of our excited utterance exception, based upon current assumptions of reliability, pass scrutiny under article I, section 22. However, having read numerous opinions by this court around the time of the adoption of our constitution, I am persuaded that the statements before us would have been admitted under the res gestae doctrine as it was then understood. Bridgette Pugh was seeking help and called 911. She started by exclaiming, "[m]y husband was beating me up really bad." Clerk's Papers (CP) at 315. When questioned further she said, "He's beatin' me up (unintelligible)." CP at 319. She said she needed an ambulance and when asked if she could still see her husband from where she was she responded, "Do you want me to go out there and see him so he can beat me up some more?" *Id*. These statements naturally arose out the event itself and form part of the res gestae as the term was historically understood. The statements made by Bridgette Pugh can be admitted under the res gestae doctrine.

Finally, I agree with the majority's analysis of the Sixth Amendment. I again wish to emphasize that when a court assesses out-of-court statements to determine if they are testimonial, the court should focus on the purpose of the person asking the questions, not on the declarant's purpose in making the statements. *See State v. Ohlson*, 162 Wn.2d 1, 20, 168 P.3d 1273 (2007) (Chambers, J., concurring) (noting a shift in focus from the Supreme Court's decisions in *Crawford*, 541 U.S. at 52 and *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). Understanding this shift is important because when assessing the

admissibility of a 911 call, the caller's purpose is often solely to seek help for an emergency. On the other hand, the person responding to the call may be more focused on information gathering than on responding to the emergency. The purpose of the questions is, of course, only one of the factors to be considered when determining whether a statement is testimonial. *Ohlson*, 162 Wn.2d at 22 (Chambers, J., concurring).

With these observations, I concur with the majority.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Debra L. Stephens