IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67569-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
IBN RASUL AQUIL,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: January 17, 2012
	)	
	)	

Cox, J. – Ibn Aquil appeals his judgment and sentence for second degree attempted murder and first degree assault. The trial court did not either abuse its discretion or violate Aquil's constitutional rights by admitting into evidence a recording of the 911 call by the victim's wife. Nor did it abuse its discretion by admitting testimony from police officers about the scope of their investigation. The prosecutor did not commit prosecutorial misconduct by arguing that, based on the evidence, Aquil's testimony was not credible. And, the trial court correctly included three of Aquil's out-of-state convictions in his offender score. But, as the State correctly concedes, the trial court's failure to vacate the assault conviction at sentencing did subject Aquil to double jeopardy. Accordingly, we

affirm the conviction, but remand with directions to vacate Aquil's assault conviction, leaving undisturbed his attempted murder conviction.

Tiara Carroll and her husband, Barry Maletzky, lived together in Brush Prairie. Carroll's aunt, Elma Myles, and her cousins, Ashley Myles and Aquil, came to visit her from their home in Baltimore.[1]

One night during their visit, Carroll and Aquil went to a party. Maletzky, Elma, and Ashley stayed home. Carroll and Aquil returned home early the next morning. Maletzky then awoke to a black male choking him. He passed out before he could further identify the person. Carroll called 911. She told the dispatcher that she was in the bathroom during the incident, but identified Aquil as the person who strangled Maletzky.

Shortly thereafter, a neighbor called 911 to report that there was a man on her roof. When the police arrived, the man identified himself as Aquil. He told the officers "just shoot me," "I just want to die," and "I fucked up."

The State charged Aquil by amended information with attempted murder in the second degree and assault in the first degree. At trial, the State's theory was that Aquil tried to murder Maletzky so that Carroll could collect money from an insurance policy on Maletzky's life. Carroll did not appear for trial. Aquil and Elma testified that one of Carroll's boyfriends assaulted Maletzky and that Aquil broke up the assault. The jury convicted Aquil on all counts.

[1] We adopt the naming convention of the parties and refer to Elma and Ashley Myles by their first names.

Aquil appeals.

911 RECORDING

Aquil argues that the trial court abused its discretion in admitting into evidence a recording of Carroll's 911 call because the admission violated the confrontation clause and Carroll's statements were not excited utterances. We disagree.

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."[2] It is not admissible unless an exception applies.[3] An excited utterance is such an exception.[4] It is defined as "[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."[5] In determining whether a statement is an excited utterance, the court does not solely look to the event itself, but to the event's effect on the declarant.[6] This determination is a fact-specific inquiry.[7]

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[2] ER 801(c).

[3] ER 802.

[4] ER 803(a)(2).

[5] Id.

[6] State v. Chapin, 118 Wn.2d 681, 687, 826 P.2d 194 (1992).

"'The admission of hearsay frequently raises concerns under the Confrontation Clause.'"[8] Under the Sixth Amendment, an accused has the right to confront witnesses bearing testimony against him.[9] In Crawford v. Washington,[10] the Supreme Court held that the admission of out-of-court testimonial statements violates a defendant's rights unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[11] But, "nontestimonial" hearsay is not subject to the confrontation clause and is admissible, subject only to the rules of evidence.[12]

The Supreme Court has not comprehensively defined what constitutes "testimonial" evidence.[13] But, as the Court explained in Davis v. Washington,[14] statements made during a police interrogation are nontestimonial if they were made under circumstances objectively indicating that the statement's primary

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[7] State v. Brown, 127 Wn.2d 749, 757-59, 903 P.2d 459 (1995).

[8] State v. Lee, 159 Wn. App. 795, 815, 247 P.3d 470 (2011) (quoting State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007), abrogated on other grounds by State v. Jasper, 158 Wn. App. 518, 245 P.3d 228 (2010)).

[9] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

[10] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[11] Id. at 68.

[12] State v. Pugh, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009) (citing Davis v. Wash., 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

[13] Crawford, 541 U.S. at 68.

[14] 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

purpose was "to enable police assistance to meet an ongoing emergency."[15] On the other hand, statements are testimonial if the circumstances "objectively indicate that there [wa]s no such ongoing emergency" and "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution."[16] This definition applies equally to statements made in response to questioning and to volunteered statements.[17]

The trial court's admission of evidence is reviewed for abuse of discretion.[18] A decision is an abuse of discretion if it is outside the range of acceptable choices given the facts and the applicable legal standard.[19] A violation of the confrontation clause is reviewed de novo.[20]

Here, before trial, the court held that Carroll's 911 call was admissible as an excited utterance and that it did not violate the Confrontation Clause.

During the 14 minute call, Carroll frantically describes Maletzky's injuries. She states that there are no weapons involved but that the person who committed the assault is still in the house. The dispatcher explains that she just

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[15] Id. at 822.
[16] Id.

[17] Melendez-Diaz v. Mass., __ U.S. __, 129 S. Ct. 2527, 2535, 174 L. Ed. 2d 314 (2009).

[18] State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995).

[19] In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

[20] Lee, 159 Wn. App. at 815 (citing Kronich, 160 Wn.2d at 901).

wants to ensure that Carroll stays safe and asks who hit Maletzky. Carroll tells the dispatcher that her cousin did it and the dispatcher asks Carroll to describe the cousin. Carroll is non-responsive except to describe him as black. The dispatcher asks Carroll to find out where Maletzky is bleeding from and instructs her how to open his airway. Again, the dispatcher asks Carroll to describe her cousin and Carroll responds that he is in his 20s with a light build. The dispatcher asks if he is inside the house and Carroll responds that he is outside and about five feet, five inches tall. She then identifies the cousin as "Ibn Aquil" and hangs up soon thereafter.

Carroll's statements during the call are exited utterances because they related to a startling event, Maletzky's strangulation, and were made while Carroll was under the stress and excitement caused by the strangulation. Furthermore, the statements are not testimonial. They were made under circumstances objectively indicating that their primary purpose was to enable law enforcement to meet an ongoing emergency. The dispatcher was asking Carroll to identify the person who hurt Maletzky in order to help police secure the area and keep the home's occupants safe. Therefore, the trial court did not abuse its discretion or violate the Confrontation Clause by admitting the 911 recording.

Aquil argues that the statements are not excited utterances because Carroll did not witness Maletzky's strangulation and "made a snap judgment that Aquil must be the perpetrator" when she walked in on a chaotic situation. He is mistaken. Even if Carroll did not witness the actual strangulation, her

subsequent observation of Maletzky unconscious and bleeding on the floor is a startling event in and of itself. And the statements she made were made when she was under the stress of that event.

OFFICER TESTIMONY

Aquil argues that the trial court abused its discretion by admitting improper and irrelevant opinion testimony from the deputies who interviewed the witnesses. We disagree.

Under Evidence Rule (ER) 401, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that is not relevant is not admissible.[21] Evidence Rule 701 requires opinion testimony by lay witnesses to be "rationally based on the perception of the witness . . . ." Issues of credibility are reserved for the trier of fact and opinion testimony regarding the credibility of the witness may be improper.[22]

A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.[23]

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[21] ER 402.

[22] City of Seattle v. Heatley, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993).

[23] Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

Here, Elma testified that "D.J." strangled Maletzky, not Aquil. Deputy Kerr testified that, at the scene of the crime, he gave Elma, Ashley, and Carroll the opportunity to fully explain what happened that night. Deputy Gosch testified that, after talking with Elma, Ashley, and Carroll, he identified Aquil as the perpetrator. Finally, Detective Buckner testified that he gave Elma, Ashley and Carroll an opportunity to tell him what happened.

Aquil argues that testimony by these officers was irrelevant under ER 401 and improper opinion testimony about the credibility of the witnesses under ER 701. Neither claim is persuasive. First, the testimony was relevant to Elma's credibility because she did not tell police at the scene that "D.J." committed the crime. Second, the Deputies' testimony was simply a description of extent of the interview used to obtain Elma's statements. None of the Deputies testified that they believed Elma or that she was telling the truth. Therefore, the trial court did not abuse its discretion in admitting this testimony.

Without further argument, Aquil states that the testimony about the scope of the interviews with Carroll violates the Confrontation Clause. We will not review an issue that is unsupported by authority or persuasive argument.[24]

PROSECUTORIAL MISCONDUCT

Aquil argues that the prosecutor committed misconduct during closing argument by saying that Aquil advanced a mental health defense. We disagree.

"Prosecutorial misconduct is grounds for reversal if the prosecuting

[24] See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

attorney's conduct was both improper and prejudicial."[25] Comments that "'encourage [the jury] to render a verdict on facts not in evidence are improper.'"[26] We evaluate a prosecutor's conduct by examining it in the full trial context, which includes the evidence presented, the total argument, the issues in the case, and the evidence addressed in the argument.[27] A defendant suffers prejudice only where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict.[28] The defendant bears the burden of showing both prongs of prosecutorial misconduct.[29]

In closing argument, a prosecutor has wide latitude to draw and express reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences based on evidence in the record.[30]

Here, Dr. Marilyn Ronnei, a psychologist at Western State Hospital,

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[25] State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks and citations omitted).

[26] State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993) (quoting State v. Stover, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992)).

[27] Monday, 171 Wn.2d at 675 (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997))).

[28] Id. (quoting State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561))).

[29] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

[30] State v. Millante, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

testified that she evaluated Aquil twice. The second interview was to determine whether Aquil had the capacity to form the mental state necessary to commit the crime. During the evaluation, Aquil attributed his behavior that night to having been involuntarily drugged. According to Aquil's medical records, he had a blood alcohol level of .166 and some marijuana metabolites in his system, but there were no other drugs in his system. Dr. Ronnei concluded that there was no evidence that Aquil's capacity to form intent was impaired.

Based on this testimony, the prosecutor made the following statements during closing arguments:

> [Prosecutor:] . . . . He surrenders, doesn't say anything to the police when he surrenders about I saved Barry. It's, I F'd up, kill me, you know, I want to die for my mother, I want to die for my sister. Those are the Defendant's words when he's caught.
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> Then months, months later, last September, Western State Hospital, Dr. Ronnei, not a cop, you know. She just says, hey, what happened? ***Because the Defendant now is trying to go for a mental defense, you know, he's trying to get evaluated***.
>
> [Defense Counsel:] Objection, Your Honor. Facts not in evidence.
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> [Prosecutor:] I submit to you that's a reasonable inference.
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> THE COURT: Let me respond, please.
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> [Prosecutor:] If I could argue that.
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> THE COURT: To the jury, you, again, are the ones who decide the facts. You'll have to rely on your collective memories as to what facts have been proven and make that decision during your deliberations.
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> [Prosecutor:] Thank you, Your Honor.[31]

[31] Report of Proceedings (May 19, 2010) at 500-01 (emphasis added).

The prosecutor went on to state that Aquil told Dr. Ronnei that he was drugged, but because there were no drugs in his system, she believed he was capable of acting intentionally. The prosecutor then stated that Aquil's defense at trial—that another person committed the crime—was made up because his original "mental defense" would not work.

The prosecutor's statements were not improper. The reference to Aquil's "mental defense" was based on Dr. Ronnei's testimony, which created a permissible inference that Aquil was not credible. Such an inference is permitted because it is based on the evidence presented at trial. Therefore, Aquil's argument is not persuasive.[32]

DOUBLE JEOPARDY

Aquil argues, and the State concedes, that the trial court erred by failing to vacate his first degree assault conviction during sentencing. We agree.

The Washington and U.S Constitutions protect persons from being punished multiple times for the same offense.[33] "Double jeopardy may be implicated when multiple convictions arise out of the same act, even if the court has imposed concurrent sentences."[34] Such claims are reviewed de novo.

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[32] See Johnson, 119 Wn.2d at 171.

[33] U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006) (citing State v. Graham, 153 Wn.2d 400, 404, 103 P.3d 1238 (2005)).

[34] State v. Meas, 118 Wn. App. 297, 304, 75 P.3d 998 (2003) (citing State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995)).

[35]

Here, the trial court entered judgment against Aquil and imposed concurrent sentences on two counts: Count I for attempted murder in the second degree and Count II for assault in the first degree. Both counts arose from Aquil's strangulation of Maletzky. As the State properly concedes, this is a violation of double jeopardy.[36] Remand to vacate the first degree assault conviction, the less serious offense, is the proper remedy. The second degree attempted murder conviction should remain undisturbed.

COMPARABILITY OF OUT-OF-STATE CONVICTIONS

Aquil argues that the trial court improperly classified three of his previous, out-of-state convictions as comparable to felony crimes in Washington and included them in his offender score calculation. We disagree.

The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior felony convictions.[37] The Sentencing Reform Act (SRA) requires courts to translate out-of-state convictions according to the comparable offense definitions and sentences provided by Washington law.[38] To do this, the sentencing court must compare the elements of the out-of-

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[35] State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010) (citing State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010)).

[36] See Turner, 169 Wn.2d at 463-64 (holding that a court may violate double jeopardy by reducing to judgment both the greater and the lesser of two convictions for the same offense*).*

[37] State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).

state offense with the elements of potentially comparable Washington crimes.[39] If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look to the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.[40]

The use of a comparable prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence.[41] We review de novo the calculation of an offender score.[42]

Here, Aquil was previously convicted in Virginia of one count of burning or destroying a dwelling and two counts of burglary. The Virginia Criminal Code requires that burning or destroying a dwelling be committed with malice:

> If any person ***maliciously*** (i) burns . . . or causes to be burned or destroyed, or (ii) aids, counsels or procures the burning or destruction . . . .[43]

The trial court found that this definition was legally comparable to the

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[38] State v. Larkins, 147 Wn. App. 858, 862, 199 P.3d 441 (2008) (citing RCW 9.94A.525(3)).

[39] Ford, 137 Wn.2d at 479.

[40] Id.

[41] RCW 9.94A.500(1).

[42] State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011) (citing State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)).

[43] Va. Code Ann. § 18.2-77(A) (emphasis added).

Washington crime of first degree arson, which requires the crime to be committed with knowledge and malice:

> (1) A person is guilty of arson in the first degree if he or she ***knowingly*** and ***maliciously*** . . . .[44]

Aquil argues that these statutes are not comparable because Washington requires that a person act "knowingly and maliciously" and Virginia only requires a person act "maliciously." The Virginia statute does not define "maliciously" but "[i]t is well-settled in Virginia that '[m]alice inheres in the doing of a wrongful act intentionally, or without just cause or excuse, or as a result of ill will. . . .'"[45]

In Washington, "intent" and "knowledge" are statutorily defined as follows:

> (a) INTENT. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.
>
> (b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:
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> (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
>
> (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.[46]

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[44] RCW 9A.48.020 (emphasis added).

[45] Bell v. Commonwealth, 11 Va. App. 530, 532-33, 399 S.E.2d 450 (1991) (quoting Long v. Commonwealth, 8 Va. App. 194, 198, 379 S.E.2d 473 (1989)). See also Thomas v. Commonwealth, 279 Va. 131, 160-61, 688 S.E.2d 220 (2010); Waters v. Commonwealth, 39 Va. App. 72, 79, 569 S.E.2d 763 (2002); Williams v. Commonwealth, 13 Va. App. 393, 398, 412 S.E.2d 202 (1991).

[46] RCW 9A.08.010.

Malice is also statutorily defined:

> (12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty . . . .[47]

The Washington crime of first degree arson only requires knowing and malicious action, not intentional action. Because the Virginia crime requires "malicious" action, which is by definition "intentional," the Washington crime of first degree arson is broader than the Virginia crime of burning or destroying a dwelling. Therefore, the offenses are comparable and the trial court did not err by including the crime in Aquil's offender score.

The Virginia Criminal Code defines burglary as follows:

> If any person break and enter the dwelling house of another in the nighttime with intent to commit a felony or any larceny therein, he shall be guilty of burglary, punishable as a Class 3 felony . . . .[48]

The trial court found that this definition was legally comparable to the Washington crime of second degree burglary:

> (1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building . . . .[49]

We agree that the offenses are legally comparable. Felonies and

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[47] RCW 9A.04.110.

[48] Va. Code Ann. § 18.2-89.

[49] RCW 9A.52.030 (1989).

larcenies are types of crimes in Washington.[50] Therefore, the Washington definition requiring the intent to commit a "crime" is broader than the Virginia definition requiring the intent to commit a "felony" or a "larceny." The trial court did not err by including the Virginia burglary convictions in Aquil's offender score.

Aquil argues that the statutes are not legally comparable because all felonies under Virginia law are not necessarily crimes in Washington. Because of this distinction, he insists that it is necessary to determine whether the crime Aquil intended to commit in Virginia is a crime in Washington. Here, the record shows that Aquil was convicted of burglary with the intent to commit larceny. Larceny is a crime in Washington, so the offenses are comparable and Aquil's distinction is not persuasive.

We remand to the trial court to vacate Aquil's first degree assault conviction on double jeopardy grounds, leaving undisturbed his second degree attempted murder conviction. In all other respects, we affirm.

Cox, J.

WE CONCUR:

[50] See RCW 9A.56.100 ("All offenses defined as larcenies outside of this title shall be treated as thefts as provided in this title."); RCW 9A.20.010 ("Classification and designation of crimes" includes felonies, misdemeanors, and gross misdemeanors).

Spearman, J.

Dwyer, C. J.