IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FREDERICK STEVEN FOSTER, Appellant.	No. 39406-5-II UNPUBLISHED OPINION

Hunt, P.J. — Frederick Steven Foster appeals his jury trial convictions for fourth degree domestic violence assault and second degree assault, together with a deadly weapon sentencing enhancement on the second degree assault, of his wife, Lora Foster.[1] He argues that the trial court erred in admitting (1) a 911 tape recording of the assaults, because no one identified the voices as required under ER 901(b)(5); (2) Lora's 911 call statements as excited utterances under ER 803(a)(2); and (3) Foster's 911 call statements as statements against interest under ER 804(b)(3).[2] Foster also argues that the deadly weapon sentencing enhancement constitutes double

[1] For clarity, we refer to Lora Foster by her first name in the remainder of this opinion; we intend no disrespect.

[2] We note, however, that the trial court admitted the statements under ER 801(d)(2) as admissions by a party-opponent.

jeopardy.[3] We affirm.

FACTS

I. Assaults

A. 911 Call

At 2:54 am on November 1, 2008, a 911 operator received a call from 5110 Chicago Ave. SW, Apartment 34, in Lakewood, and dispatched several officers, including Lakewood Police Officer Brian Wurts. The 911 call, which was recorded, lasted just over 15 minutes.

Although the caller did not speak directly to the 911 operator, the operator could hear a woman, later identified as Lora, sounding angry and frightened, sobbing and repeatedly screaming at a man, whom she later identified as Foster, to stop hitting her and punching her in the head; telling him periodically to leave her alone; asking why he was hitting her when she was his wife; and, later, pleading with him not to kill her. At one point, Lora picked up the telephone and started to dial, telling Foster that she was trying to call a cab. But she abruptly stopped dialing, let out a sharp scream, and then yelled, "I'm calling a cab! Leave me alone, man! What the [f**k] is wrong with you, punching me in the head like that!" Ex. 1 at 0:40-1:20. After a brief silence, Lora screamed again, yelled at Foster to stop, and asked him why he was hitting her in the head when she was his "[f**king] wife." Ex. 1 at 1:08.

Foster responded by repeating, "Who's my [f**king] wife?" Ex. 1 at 1:20-1:30, repeatedly and aggressively asking where his "wife" was going, yelling obscenities, asserting that his "wife" was leaving with someone else, and stating that he did not have "no mother [f**king] wife!" Ex.

[3] U.S. Const. amend. V; Wash. State Const. art. 1, sec. 9.

1 at 1:30-1:40. Immediately after Lora apparently told Foster where she was going, she again began to scream at Foster, asking him to stop punching her in the head as he asked her repeatedly where she was going. Eventually, Lora responded, "I guess I'm staying here, right? Or you're going to beat my [f**king] head in or try to kill me? Right? Right?" Ex. 1 at 1:45-2:05. After another brief silence, Lora started shouting at Foster to leave her alone and that he was hurting her. For the next two minutes, there were no audible voices.

Then, over some rustling sounds, the dispatcher repeated, "Hello?"[4] Ex. 1 at 3:00-5:00. Sounding somewhat further away from the telephone than before, the dispatcher heard Lora say, "Leave me the [f**k] alone," after which Lora seemed to converse for a short time with Foster. Ex. 1 at 5:00-5:26. Their words were unintelligible to the dispatcher until Lora said that she had not "done anything," shouted, "Don't Frederick! . . . Don't, don't stab me, I'll stay here! Please don't," and then begged him not to kill her and to stop. During this time Foster repeated, "I'm gonna [f**king] kill you, Lora," Ex. 1 at 5:26-5:45, and "I love you too much to let you go! I'm gonna [f**king] kill you Lora. . . . . I will kill you before I let you leave." Ex. 1 at 5:45-6:20. Eventually, Foster said and repeated that he would "take [her] back home" and made some other unintelligible statements. Ex. 1 at 6:20-6:30. During another long silence, there were occasional sounds of someone crying nearby and perhaps some muffled voices or music in the background.

After more than five minutes of silence on the 911 tape recording, Foster can be heard swearing in the distance and some new voices responding. After another three-minute period of silence, someone can be heard moving around near the telephone and a police officer commenting

[4] It is unclear whether the rustling sounds were coming from the dispatcher or the caller's phone.

about a knife on the floor. Fifteen minutes into the call, a police officer can be heard picking up the telephone and telling the dispatcher that the police are there. At this point, the dispatcher ended the call.

B. Police Investigation

Officer Wurts and several other officers found Lora, holding her head, and Foster, staring at the officers, standing in the apartment's doorway. Wurts separated Lora from Foster. Out of Foster's sight, Lora told Wurts that her head hurt, and she started to cry. When she moved her hand, Wurts could see "significant swelling above her right temple"; he also observed redness on her neck and a "small amount of blood on her leg where she had a laceration." Clerk's Papers (CP) at 13.

Sobbing, Lora told Wurts that Foster, had been in the military, that he had been having problems, and that he had gone "'crazy'" and started punching her in the head and kicking her when she was on the ground. CP at 13. She also stated that, at some point, Foster had choked her until she was unconscious and, when she regained consciousness, he had jumped on top of her with a knife in his hand. She confirmed that she had called 911, but she thought she had not made the call until after she had regained consciousness. Inside the apartment, officers noticed signs of a struggle,[5] found a knife on the bedroom floor, and arrested Foster.

II. Procedure

The State charged Foster with second degree assault, with an accompanying deadly

[5] For example, one of Lora's earrings was on the apartment's floor. She was still wearing the other earring.

weapon sentencing enhancement, and with fourth degree domestic violence assault. Foster moved in limine to exclude the 911 call tape recording, arguing that the tape was inadmissible because (1) it contained inadmissible hearsay; and (2) "absent a witness with personal knowledge as to who made the (911) call, and whose voices are heard on the tape," the State had not established the proper foundation. CP at 5. Foster attached a copy of Wurts's police report to support his motion in limine. Lora had fled to Canada before this hearing and was unavailable to testify.

In its offer of proof, the State presented the 911 tape and photographs of Lora's injuries. The State argued that that Lora's 911 statements were admissible under (1) ER 803(a)(1), the present sense impression exception to the hearsay rule; or (2) ER 803(a)(2), the excited utterance exception to the hearsay rule.[6] The State asserted it would prove at trial that (1) during the call, the 911 operator established the address from which the call originated and dispatched officers to that address; and (2) when the officers arrived at that address, they contacted Foster and Lora.

The trial court ruled that Lora's 911 statements were admissible under the excited utterance exception to the hearsay rule, the present sense impression exception to the hearsay rule (ER 803(a)(1)), or as res gestae. The trial court also ruled that Foster's 911 statements were admissible against him as admissions by a party-opponent (ER 801(d)(2)). Before admitting the 911 call tape recording, but without directly addressing the supporting evidence, the trial court

[6] The State also argued that the tape was admissible under *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Foster conceded below that the statements on the 911 call recording were not testimonial. On appeal, Foster does not argue that the 911 tape was inadmissible under *Crawford*.

acknowledged that ER 901 requires identification of the persons speaking on the recording. In addition, Foster stipulated to the authenticity of the recording, thereby relieving the State of the burden of presenting testimony from Tape Research Analyst Denise Severson, the person who created the tape.[7]

Lora remained unavailable to testify at trial. Nor did Foster testify. The State played the 911 tape to the jury during its opening statement and closing argument. The jury had the tape and a tape player during its deliberations.

The jury convicted Foster as charged. Foster appeals his convictions and the deadly weapon sentencing enhancement.

ANALYSIS

I. 911 Tape Admissibility

Foster argues that the trial court erred in admitting the 911 call tape recording because (1) the voices were not identified as ER 901(b)(5) requires, (2) Lora's statements were not excited utterances under ER 803(a)(2), and (3) Foster's statements were not statements against interest under ER 804(b)(3). The record does not support Foster's first argument. Because the 911 tape recorded a crime in progress, including Foster's ER 801(b)(2) admissions, his recorded statements were not hearsay; therefore, his second and third arguments also fail.

We review a trial court's admission of evidence for abuse of discretion. *State v. Magers*,

[7] Accordingly, the State did not call Severson or any other witness to testify about how the tape was made, whether it was a true representation of the 911 call, or the chain of custody. Foster, however, continued to argue that the 911 call tape was not a recording of the actual assaults and that, instead, this was a "set up . . . scenario" that Lora or someone else had fabricated. VRP at 145.

164 Wn.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Magers*, 164 Wn.2d at 181. We find no such abuse here.

A. Voice Identification

Before a trial court can admit a recording as evidence, the party introducing the recording must authenticate or identify it by presenting "evidence sufficient to support a finding that the matter in question is what its proponent claims." ER 901; *State v. Williams*, 136 Wn. App. 486, 499, 150 P.3d 111 (2007). If the evidence records a human voice, the person speaking must be identified. ER 901 (b)(5); *Williams*, 136 Wn. App. at 500 (citing *State v. Jackson*, 113 Wn. App. 762, 769, 54 P.3d 739 (2002)). The State can satisfy ER 901 by producing evidence sufficient to support the identification; direct identification of the voice by someone who participated in the call is not required. *Williams*, 136 Wn. App. at 499-501.

Because Lora was not available at trial and Foster did not testify, the trial court was not able to do a voice comparison to verify that Lora's and Foster's voices were on the tape. Nevertheless, sufficient corroborating evidence established that Lora and Foster were the woman and the man speaking during the 911 call: (1) The man on the recording refers to the woman as "Lora"; (2) the woman on the recording refers to the man as "Fredrick"; (3) the officers found Lora and Foster in the doorway of the apartment to which the 911 dispatcher had traced the call; (4) the man's voice heard on the recording after the officers arrived at the scene appears to match the voice of the man who was speaking to Lora on the recording before the officers arrived; (5) Lora told Wurts that she was the person who had placed the 911 call and that she had been

arguing and struggling with Foster when she made the 911 call; and (6) the evidence the officers saw when they arrived at the apartment, such as Lora's recent injuries, the signs of a struggle, and the knife in the bedroom, were consistent with the events audibly recorded during the 911 call. Ex. 1. Because there was sufficient prima facia evidence that the people speaking on the tape were Lora and Foster, we hold that the trial court did not abuse its discretion in admitting evidence under ER 901.

B. Non-Hearsay Statements

Foster next argues that the trial court erred when it admitted the tape recording of Lora's and his 911 call hearsay statements, including his as statements against interest under ER 804(b)(3). Because the 911 call tape recorded crimes in progress, including Foster's admissions by a party-opponent (ER 801(d)(2)), the recorded statements are not hearsay; thus, Foster's argument fails.

1. Res gestae

Our Supreme Court recently described the res gestae doctrine in *State v. Pugh*, 167 Wn.2d 825, 837-38, 225 P.3d 892 (2009)[8]:

"Res gestae" "is a doctrine which recognizes that, under certain circumstances, a

[8] Justice Chambers notes in his concurrence:

> 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.

Pugh, 167 Wn.2d at 847 (Chambers, J., concurring) (emphasis added).

> declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event." *Beck v. Dye*, 200 Wash. 1, 10-11, 92 P.2d 1113 (1939) (summarizing numerous earlier cases). The theory underlying admissibility of statements under the res gestae doctrine was that "'[w]hat is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted.'" *State v. Aldrick*, 97 Wash. 593, 596, 166 P. 1130 (1917) (quoting 1 Francis Wharton & O.N. Hilton, A Treatise on the Law of Evidence in Criminal Issues § 262 (10th ed.1912)). Res gestae statements "raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design." *Heg v. Mullen*, 115 Wash. 252, 256, 197 P. 51 (1921) (internal quotations omitted). Cross-examination is unnecessary when the action speaks for itself.
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> To be considered res gestae,
>
> "(1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation; and (6) it must appear that the declaration or statement was made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made."

Pugh, 167 Wn.2d at 839 (quoting *Beck*, 200 Wash. at 9-10). The tape recording of the crimes in progress that occurred in the background after Lora placed the 911 call clearly meets each of these six requirements.[9]

[9] In his "excited utterance" argument, Foster asserts that because the 911 tape recorded no sounds of a struggle, there is no evidence that the injuries actually occurred during the phone call.

2. Admissions by party-opponent

Addressing Foster's ER 804(b)(3) "statements against penal interest" argument, Br. of Respondent at 13, the State responds that ER 804(b)(3) is not generally applied in this context and, instead, Foster's recorded statements were admissible as non-hearsay statements by a party-opponent under ER 801(d)(2). We agree with the State.

ER 801(d)(2)(i) provides that a statement is "not hearsay" if "[t]he statement is offered against a party and is . . . the party's own statement." Under this rule, Foster's statement is admissible if it "is in some way inconsistent with [his] position at trial." 5B Karl B. Tegland, Washington Practice: Evidence § 801.35, at 389 (5th ed. 2007). "The true test of admissibility is whether the evidence is competent, relevant and material to any issue before the jury." *State v. Peterson*, 2 Wn. App. 464, 468, 469 P.2d 980 (1970). On appeal, Foster does not argue that his 911 call statements were not competent, relevant, or material.[10]

The State offered Foster's recorded statements against him, in part at least, to rebut his theory that the altercation recorded on the 911 tape had not been between him and Lora. But, as we note above, the evidence showed that Foster was the man making the threatening statements on the 911 call tape recording. Thus, the trial court did not err in admitting Foster's statements

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Although this argument could apply to res gestae factor five, it is not persuasive: (1) Lora's statements captured on the 911 tape clearly indicate that she was commenting on contemporaneous events, such as Foster's hitting her in the head and threatening to stab her; and (2) Lora's injuries, which the officers observed upon arriving at the apartment, were consistent with her comments recorded after she placed the 911 call.

[10] Instead, as we address and reject in the first section of this Analysis, he argues only that the man's voice recorded on the tape was not his.

recorded on the 911 call tape.[11] Accordingly, we hold that the trial court did not abuse its discretion when it admitted the 911 call tape recording.

II. Deadly Weapon Sentencing Enhancement

Finally, Foster argues that under *Apprendi v. New Jersey*,[12] *Blakely v. Washington*,[13] and *Washington v. Recuenco*,[14] the deadly weapon enhancement constitutes double jeopardy because the underlying substantive offense of second degree assault also required the jury to find that he committed the offense using the same deadly weapon. Our Supreme Court recently rejected this identical argument in *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010). Accordingly, Foster's argument fails.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, PJ.

We concur:

[11] We may affirm the trial court's evidentiary rulings on any ground supported by the record. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Thus, we further note that Foster's statements were also admissible as statements against penal interest under ER 804(b)(3) because Foster's express threats against Lora's life clearly tended to subject him to criminal liability. *See State v. Flores*, 164 Wn.2d 1, 8, 186 P.3d 1038 (2008) (ER 804(b)(3) provides for admission of statements against a declarant's penal interest).

[12] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[13] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

[14] 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Quinn-Brintnall, J.

Van Deren, J.