IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent,	No. 40986-1-II
v.	
ADAM DEAN HORD, Appellant.	UNPUBLISHED OPINION

Worswick, A.C.J. — Adam Dean Hord appeals his conviction of harassment (domestic violence), claiming that the trial court erred in admitting a domestic violence victim statement. We affirm.

Facts

In March 2009, A.M. and her daughter Grace began living with her friend Misha Condon. A.M. had been living for seven and a half years with Hord. On March 27, A.M. took Grace to Hord's parents' home so that Hord could have time with Grace. Hoping that he could have a longer visit with Grace, Hord became angry and aggressive toward A.M. when she started to leave with Grace. During this discussion, Hord allegedly told A.M., "People get killed for this" and "I could kill you." Suppl. Clerk's Papers (Suppl. CP) at 45.

Later that same day, Hord telephoned A.M. in order to find out where Condon lived. After A.M. told him, Hord responded that he was going to come over and snap her neck. He then qualified it, saying, "I'm just joking." Report of Proceedings (RP) at 59. Dawn Durgan was present during this call and described A.M. as shocked and scared when the call ended. She stayed with A.M. until Hord's niece showed up to be with A.M., as Condon had gone out with family and friends. A.M. sent Condon a text message asking her to come home and describing what Hord had said.

Around midnight, Hord came to Condon's home and, after Condon let him in, he walked down the hallway looking for A.M. and Grace. Bill and Dawn Durgan were present at the time and Bill tried to stop Hord, who Dawn described as being mean, very agitated, and frustrated. Hord got face-to-face with Bill until Bill finally got Hord to sit down on the couch and talk. Hord then asked the Durgans if they would baby-sit because he wanted to take a walk with A.M. When A.M. responded that she was not going with him, Hord responded, "What do you think I'm going to do, cut you up into little pieces?" RP at 111. Hord then left but, according to Condon, returned at 2:00 AM, holding a pair of Condon's garden shears and asking if he could come in. When Condon said no, Hord asked, "Do you think you can keep me out of your house?" RP at 115. Condon replied, "No." RP at 115. Hord then responded, "You're lucky I'm not burning your house down." RP at 115.

The next morning, A.M. spoke with her father, who was the Chief of Police for the City of Washougal, asking him what he thought she should do about Hord. He advised her to go down to the police station and file a report for her own peace of mind. Later though, he called back and

said that he was sending an officer down to talk with her. That officer was Corporal Tyson Ferguson, who asked A.M. if she would fill out a written statement. He testified that she voluntarily filled it out, that he read the perjury clause to A.M., that she signed it, and that he witnessed and signed it.

The State charged Hord by amended information with felony harassment based on death threats (domestic violence).[1] The matter proceeded to a jury trial where A.M., Condon, Dawn Durgan, and Corporal Ferguson testified. A.M. downplayed the conflict, testifying that she was never afraid of Hord, that she did not take his threat to break her neck seriously, that his threat of chopping her up in little pieces was “ridiculous,” that she never felt that he would hurt her, that she still loves him, that everything was blown out of proportion, and that she simply called her dad for advice, not because he was the police chief.

Condon testified that A.M. was scared, nervous, and wringing her hands after Hord threatened A.M. on the telephone. She testified that she had known Hord for years and was not afraid of him but that evening, he scared her to the point where she hid weapons in the house. Dawn Durgan testified that she was with A.M. when Hord made his telephone threat about breaking A.M.’s neck and that A.M. looked shocked and scared when she hung up the telephone. Dawn Durgan also testified that she had known Hord for eleven years, that he used to be her husband’s best friend, and that she had never seen him act like he had that evening.

The State offered and the court admitted A.M.’s domestic violence victim statement. The jury found Hord not guilty of felony harassment but guilty of the lesser offense of harassment

[1] RCW 9A.46.020(1)(a)(i) and (2)(b)(ii); RCW 10.99.020.

(gross misdemeanor) and found that it involved domestic violence. The sentencing court imposed a 365-day sentence, suspended 305 days, and gave Hord credit for 31 days previously served. Hord appeals.

Discussion

I. Admission of A.M.'s Statement

Hord argues that the trial court erred in admitting A.M.'s written statement as substantive evidence because the State failed to establish the four criteria necessary for admitting a witness's prior inconsistent statements. He also argues that without the affidavit, the State did not present sufficient evidence to support his conviction. We disagree with his first assertion and thus need not reach the second as sufficient evidence supports his conviction.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). "An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable." *State v. Zunker*, 112 Wn. App. 130, 140, 48 P.3d 344 (2002).

ER 801(d)(1)(i)[2] permits the admission of a trial witness's prior inconsistent statement as substantive evidence when that statement was made as a written complaint (under oath subject to

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[2] ER 801(d)(1) provides:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if—
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> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

penalty of perjury) to investigating police officers. This type of victim statement is frequently referred to as a "*Smith* affidavit" based on *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982). *See State v. Nelson*, 74 Wn. App. 380, 386, 874 P.2d 170 (1994) (discussing "*Smith*" affidavit).

The *Smith* court instructed the trial courts to consider four factors when assessing the reliability of the prior inconsistent statement:

> (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

Nelson, 74 Wn. App. at 387 (footnote omitted) (citing *Smith*, at 861-63). The four legally permissible methods for determining the existence of probable cause include:

> (1) filing of an information by the prosecutor in superior court (*see* Const. art. 1, § 25, and RCW 10.37.026); (2) grand jury indictment (*see* RCW 10.[27]); (3) inquest proceedings (*see* RCW 36.24); and (4) filing of a criminal complaint before a magistrate (*see* RCW 10.16).

Smith, 97 Wn.2d at 862 (quoting *State v. Jefferson*, 79 Wn.2d 345, 347, 485 P.2d 77 (1971)).

Hord argues that A.M.'s statement satisfied only the fourth *Smith* criteria, namely, that A.M. was subject to cross-examination regarding the prior inconsistent statement and thus the trial court should not have admitted it into evidence at trial.

A. *Voluntariness*

Hord argues that A.M. did not provide her statement voluntarily because she had confided in her father as a father and not as a police officer. Her father then sent Corporal Ferguson to her home. Hord contends that A.M. did not understand that she did not have to fill out the statement.

A.M.'s testimony at trial is as follows:

Q. Okay. And, again, you spoke with law enforcement, you agreed to give this written statement, correct?
A. Oh, I just—I mean, it was just a piece of paper put in front of me so I just certainly filled it out. I mean, —
Q. Okay.
A. I didn't really know I had the option not to, I guess.
Q. Okay. And, you signed the form, correct?
A. Yes, I did.
Q. And, what is the date and time for that?
A. It is March [28], 2010, at 9:22 PM.
Q. Okay. And, that is signed under penalty of perjury, correct?
A. Yes.

RP at 78.

While no Washington court applying this exception has defined "voluntary" in this context, *Black's Law Dictionary* defines "voluntary" as: "1. Done by design or intention. 2. Unconstrained by interference; not impelled by outside influence." Black's Law Dictionary 1710-11 (9th ed. 2009).

It is clear from A.M.'s testimony that giving the statement was a voluntary act. There was no coercion. While she may not have fully understood the statement's legal significance, it was still a product of her free will. In *State v. Thach*, 126 Wn. App. 297, 308, 106 P.3d 782 (2005), this court found the following facts sufficient to show voluntariness: "Officer Martin provided the domestic violence form to Ms. Thach. She then filled out the first page of the form. At trial, Ms. Thach testified that she wrote and signed her statement while seated in an ambulance after the assault." Similarly here, Corporal Ferguson gave A.M. the form, A.M. wrote out her own statement and signed it. At trial she admitted writing the statement and signing it under penalty of

perjury. She did not show any confusion about what she was doing. This was sufficient to satisfy the first *Smith* factor.

B. *Minimal Guaranties of Truthfulness*

Hord next contends that the statement did not meet minimal guaranties of truthfulness because it was not given under oath because the document A.M. signed did not say it was under penalty of perjury. Rather, it said: "I have written or had this statement written for me and this statement truly and accurately reflects my recollection of the event. The police officer has explained to me that *I have to certify*, or declare, under penalty of perjury, that the above information is true and correct, under penalty of law." Ex. 4a (emphasis added). Beneath A.M.'s signature is the line: "I, Officer Ferguson, confirm that [A.M.] authored or dictated this entire statement without input from any other person or myself. I also confirm that I read the above perjury clause to [A.M.] before this statement was signed." Ex. 4a. Hord argues that A.M.'s statement is insufficient because it says "I have to certify" rather than "I certify," or declare, under penalty of perjury, the truth of the information she gave.

Again, *Thach* is analogous. There, this court found that the statement carried minimal guaranties of truthfulness from the following:

> In the present case, Ms. Thach testified that she signed her statement under penalty of perjury. Officer Martin also testified that Ms. Thach filled out the first part of the domestic violence form and he assisted her with the final questions as Ms. Thach received medical care. The officer witnessed Ms. Thach sign her statement. From this evidence a reasonable person could find that Ms. Thach's statement carried minimal guaranties of truthfulness.

Thach, 126 Wn. App. at 308. Here, A.M. testified that she signed her statement under penalty of

perjury. Corporal Ferguson testified that he read the perjury clause to A.M. before she signed it and that he then signed the form as well. This is sufficient to show minimal guaranties of truthfulness.

Similarly in *Nelson*, the court found sufficient: "I have read the attached statement or it has been read to me and I know the contents of the statement." 74 Wn. App. at 390. The court also relied on evidence that the prosecutor had reviewed the statement with the witness and explained the importance of the affidavit, and the notary testified that it was her standard practice to ask the witness whether she had read the affidavit and executed the affidavit only if the witness answered affirmatively. *But see State v. Nieto*, 119 Wn. App. 157, 161-162, 79 P.3d 473 (2003) (no evidence that victim gave statement under penalty of perjury); *State v. Sua*, 115 Wn. App. 29, 48, 60 P.3d 1234 (2003) (statements not given under oath or penalty of perjury).

C. *Probable Cause*

Hord argues that the statement was not used to establish probable cause because Corporal Ferguson's declaration of probable cause did not reference A.M.'s statement. *See* Suppl. CP at 44-45.

Again, *Thach* undermines Hord's claim. There this court held:

> Officer Martin took Ms. Thach's statement as part of a standard procedure for determining probable cause. He testified that obtaining a signed, written victim statement in a domestic violence case was standard procedure. The statement was part of the evidence Officer Martin gathered and forwarded to the prosecutor. He also forwarded police reports to the prosecutor. The prosecutor used all of this information in order to establish probable cause and to determine whether to file an information in the superior court.

Thach, 126 Wn. App. at 309.

Here, Corporal Ferguson testified that he took A.M.'s statement as a standard domestic violence procedure:

> A. We ask them if they want—or, if they are willing to fill out a statement form and then they tell us yes or no.
> Q. Okay. Did you do that with [A.M.] in this case?
> A. Yes.
> Q. And, how did she respond?
> A. She said she would fill out the statement form.
> . . . .
> Q. Okay. And, did you in fact witness [A.M.] fill that out and sign it?
> A. Yes, I did.
> Q. Is that standard procedure in these types of cases?
> A. Yes, we witness them fill the statement out and then we actually read the perjury clause underneath after they have completed it. And then, they sign it after that—after we read the clause.
> Q. Okay. So, do you actually read that—that perjury clause to [A.M.]?
> A. I did.
> Q. Okay. And, she agreed to sign after that?
> A. Yes.

RP at 133-34. Corporal Ferguson took A.M.'s statement as a standard procedure in his investigation of the harassment allegations. While he did not reference A.M.'s statement in his declaration in support of probable cause, his declaration includes information he obtained from A.M. and that A.M. included in her statement. He also provided the statement to the prosecuting attorney. This *Smith* factor is satisfied.

II. Conclusion

We do not find that the trial court abused its discretion in admitting the *Smith* affidavit. *State v. Nieto*, 119 Wn. App. at 161 ("If the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of legal issues, the ruling may be an abuse of discretion."). Accordingly, Hord's sufficiency claim also fails as the State properly used A.M.'s

statement to show that Hord's conduct put A.M. in fear that he would carry out his threats.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.