No. 29172-3-III

Sweeney, J. (dissenting) — Officer Stephen Arredondo approached Aleksandr Pavlik immediately following this shooting. Mr. Pavlik said, "[y]ou saw that, it was in self-defense." He said to Officer Zachary Dahle, "[i]t was self defense, he was punching me" and "[r]elax guys, I have a concealed pistol license." Clerk's Papers (CP) at 47. And he told Officer David Daddato at the scene, "[y]ou saw him punching me in the face! I shot him in defense!" CP at 47. He reported again to Detective Chet Gilmore that he shot in self-defense and said that he tried to aim for a "not fatal area." CP at 47.

Not surprisingly, Mr. Pavlik argued to admit the statements for what they were—excited utterances. Report of Proceedings (RP) at 23-27. But the court refused to admit the statements because they were self-serving: "the self-serving quality of that statement under these circumstances is something that takes it outside of its admissibility." RP at 35.

I cannot find a case that holds that excited utterances are inadmissible if they are self-serving. Indeed, one party or the other wants them admitted because they tend to support a theory of the case, here self-defense.

We review a court's decision not to admit evidence for abuse of discretion, but only after we decide that the trial court properly interpreted the appropriate evidentiary

rule. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). Here the question distills into a strictly legal question: Is an excited utterance excludable as evidence because it is self-serving? And so, whether the standard of review is characterized as abuse of discretion or de novo, the analysis is the same.

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). This exception to the general prohibition against hearsay is based on the idea that "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control." 6 John Henry Wigmore, Evidence § 1747, at 195 (rev. James H. Chadbourn 1976). The utterance of a person in such a state is believed to be "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock," rather than an expression based on reflection or self-interest. *Id.* As a "firmly rooted hearsay exception," excited utterances are so "trustworthy that adversarial testing can be expected to add little to [their] reliability." *State v. Davis*, 141 Wn.2d 798, 846, 10 P.3d 977 (2000) (citing *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *White v. Illinois*, 502 U.S. 346, 357, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992)).

ER 803(a)(2) includes three "closely connected requirements." *State v. Woods*, 143 Wn. App. 561, 597, 23 P.3d 1046 (2001). These requirements are (1) a startling event or condition, (2) the declarant must have made the statement while under the stress or excitement of the startling event or condition, and (3) the statement must relate to the startling event or condition. *Id*.

The second requirement of ER 803(a)(2) is that the declarant must have made the statement while the declarant was under the stress of excitement caused by the startling event or condition. "This element constitutes the essence of the rule." *State v. Chapin*, 118 Wn.2d 681, 687, 826 P.2d 194 (1992). The "key" to this requirement is spontaneity, which means that it is important that "the utterance should be made contemporaneously with or soon after the startling event giving rise to it." *Id*. at 688. This is because there is a greater danger of fabrication as the length of time between the startling event and the statement increases. *Id*.

The third element of ER 803(a)(2) is that the utterance "related to" the startling event. ER 803(a)(2) is derived from the common law res gestae rule. *Chapin*, 118 Wn.2d at 688. Res gestae required the utterance to "'explain, elucidate, or in some way characterize [the] event.'" *Id*. (alteration in original) (quoting *Beck v. Dye*, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939)). ER 803(a)(2), however, does not have these requirements.

Chapin, 118 Wn.2d at 688. ER 803(a)(2) only requires that the utterance "relate to" the event and this is a much broader standard. *Id.* An utterance "about, connected with, or elicited by" the startling event meets the "related to" requirement. *Id*.

To decide whether a statement can be admitted as an excited utterance, the court must make some preliminary findings. ER 104(a). The court here found that the "spontaneity of the statement is there." RP at 35. So the second requirement of ER 803(a)(2) is satisfied. The fact-finding on the other two requirements is a bit hazy on this record, but still sufficient. The court found that

> [t]his event occurred over a period of time where the bicycle rider and the vehicle became involved in an altercation of some sort . . . . It continued over a period of distance and time, culminating in the final confrontation where the bicycle rider allegedly went up to the window and started thumping the defendant, who had a gun and previously had fired the gun at another point in time in another location.

RP at 35. Shooting a cyclist who had just reached into your car to perhaps harm you would be startling to most folks and would, therefore, seem easily to satisfy the first requirement of ER 803(a)(2). The trial court did not make any findings regarding the third requirement. But the statement "I shot him in self-defense!" after shooting somebody, would again certainly seem to "relate to" the startling event of having just shot somebody. The statements here are clearly excited utterances. They are also self-

serving. But that does not render them inadmissible. And no case in Washington holds that excited utterances are inadmissible because they are self-serving.

Other courts are in accord. "If a statement otherwise meets the 'excited utterance' test it should not be excluded simply because it is helpful to the declarant's position." *State v. Williams*, 673 S.W.2d 32, 35 (Mo. 1984). The refusal to admit an exculpatory excited utterance has been held to be grounds for a new trial. *People v. Melendez*, 296 A.D.2d 424, 744 N.Y.S.2d 485 (2002). In *Melendez*, a 911 call recording was suppressed. The recording supported the defense theory that a stabbing was accidental and that the defendant tried to save the victim's life. *Id*. The court reversed the conviction "since the issue of the defendant's intent was so critical to her defense, and she was deprived of the right to place admissible evidence which supported her defense before the jury, she [was] entitled to a new trial." *Id*. at 426.

Other states also conclude that a defendant's excited utterances are admissible regardless of whether the defendant testifies. *See State v. Riley*, 128 N.C. App. 265, 269, 495 S.E.2d 181 (1998) (trial court erred in not letting a witness testify as to the defendant's exculpatory excited utterance); *People v. Pack*, 797 P.2d 774, 775-76 (Colo. App. 1990) (an excited utterance is not inadmissible because it is exculpatory, but holding that the error was harmless because the evidence was cumulative); *State v. Conn*,

137 Ariz. App. 152, 155, 669 P.2d 585 (1982) (statement was inadmissible, not because it was self-serving, but because it was not spontaneous), *aff'd in part*, 137 Ariz. 148, 669 P.2d 581 (1983); *Harmon v. State*, 854 So.2d 697, 699-700 (Fla. Dist. Ct. App. 2003) (the excited utterance of the defendant would have been admissible, but holding that the trial court properly excluded it because there was no showing of relevancy); *Readо v. State*, 690 S.W.2d 15, 17 (Tex. Crim. App. 1984) (the general rule that the accused's exculpatory statements are inadmissible does not apply when the statement is res gestae, but holding that the statement in question was not admissible on other grounds).

The trial judge here noted that Mr. Pavlik's statements were excited utterances. That was correct. The court erred by refusing to admit Mr. Pavlik's excited utterance.

We should nonetheless affirm the conviction if we conclude that the error was harmless—that is that the erroneous exclusion of this excited utterance could not have affected the outcome here. But to do that, we would have to say that Mr. Pavlik's statements to these police officers immediately after this shooting did not and could not have affected the outcome of the jury trial. I cannot say that.

In my experience, police officers are usually very effective and potentially very influential witnesses. Indeed, the suggestion that statements by the first officers on the scene and the investigating detective would *not* have the potential to influence a jury

seems to me fanciful. The essential idea behind the doctrine of harmless error is that the offending testimony would not have made any difference or, at least, it should not make a difference. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). This testimony could have made a difference. The court's decision to exclude this testimony was not harmless. Mr. Pavlik's defense was self-defense and the court appropriately instructed on self-defense. CP at 126-31. His excited utterances to police at the scene were highly probative of that defense and the jury should have been allowed to weigh the probative value of that evidence.

I would reverse and remand.

_____
Sweeney, J.