

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 80850-3
Respondent,)	
)	
v.)	En Banc
)	
TIMOTHY EARL PUGH,)	
)	
Petitioner.)	Filed December 31, 2009
_____)	

MADSEN, J.—The defendant contends that his state and federal rights to confrontation were violated when the trial court admitted a recording of a 911 call at his trial. He argues that the state’s confrontation clause, article I, section 22 of the Washington State Constitution, is more protective than the Sixth Amendment of the United States Constitution in the context of excited utterance hearsay statements. We conclude that the defendant has failed to show that the statements at issue come within the protection afforded under article I, section 22.

FACTS

Defendant Timothy Pugh and Bridgette Pugh are married. In November 2004, Bridgette Pugh¹ obtained a no-contact order preventing Pugh from contacting her. On March 21, 2005, the Pughs were together at the apartment of a friend in Des Moines. At 3:13 a.m., Bridgette called 911. She reported, “My husband was beating me up really bad.” Clerk’s Papers (CP) (Tr. of 911 Call) at 215. When asked if he was still there, she said, “No he’s walking away.” *Id.* at 216. She provided a description of the defendant in response to the operator’s questions. *Id.* at 216-18. When the operator asked her whether he was still there, Mrs. Pugh said, “He’s just outside.” *Id.* at 218. She said that he did not have a vehicle and he was walking toward the street. *Id.* She again reported being beaten but this time stated it in the present sense, “He’s beating me up (unintelligible).” *Id.* at 219. She said she needed an ambulance. *Id.* The operator asked:

OPERATOR: Can you still see him from where you are?

PUGH: I’m not gonna . . . you want me to go outside so he can beat me up so [sic] more?

OPERATOR: What?

PUGH: Do you want me to go out there and see him so he can beat me up some more?

Id. The operator said “no” and repeated the question whether Bridgette Pugh could see Timothy Pugh from where she was. Bridgette responded that “he’s outside of the house.” *Id.* at 220. She answered “yes” when asked if there was a restraining order in place and,

¹ Bridgette’s first name is used for clarity.

when asked if Mr. Pugh had been drinking, answered “that’s all he ever does.” *Id.* The operator inquired about injuries and then again asked, “And you can no longer see him, correct?” *Id.* at 221. Mrs. Pugh replied, “Yes,” and clarified “I can not.” *Id.* The call terminated when police officers arrived. When the officers arrived, Bridgette Pugh had a bruised face and a chipped tooth. The officers soon arrested Mr. Pugh in the parking lot outside the apartment where Bridgette was.

Mr. Pugh was charged with one count of domestic violence, felony violation of a court order. He was also charged with two misdemeanor counts of violation of the protection order and witness tampering. These additional counts arose out of phone calls that Pugh made to Bridgette after he was confined in the King County Jail. The felony charge was severed from the other counts, with two separate trials resulting. The first trial involved the charges for witness tampering and misdemeanor violations of the protection order. Pugh was convicted of all of these counts.

At the second trial, the 911 tape was admitted as an excited utterance under ER 803(a)(2). Officer Michael Meissner, who responded to the 911 call, testified that he was dispatched at 3:15 a.m. to a domestic violence call. He arrived at 3:17 a.m. and found Mrs. Pugh obviously upset and crying. He testified she was bruised and had a chipped tooth. He took a recorded statement and photographs of Bridgette’s injuries. Meissner testified that medics also arrived at the apartment and treated her. He testified that as he was leaving the building a man matching Pugh’s description was coming toward him and Meissner called out “Timothy?” to which the man responded “yeah.” Court Proceedings

(July 28, 2005, before Honorable Theresa B. Doyle) at 31-32. Meissner immediately arrested Pugh.

The jury in the second trial also heard portions of the phone calls that Mr. Pugh made from the jail in which he urged Bridgette Pugh not to testify. These calls include Pugh's acknowledgments of his assault on her. Although the State had delivered a subpoena to Mrs. Pugh at her Auburn address, she did not comply with the subpoena and did not appear at trial as a witness. Pugh was convicted of felony violation of the court order, domestic violence.

Mr. Pugh appealed both verdicts, arguing that the witness tampering conviction was unconstitutional because he was charged with two alternative means of committing the crime but the jury was instructed as to three. The Court of Appeals reversed this conviction and it is not at issue at the present stage of the proceedings. Pugh also argued that admission of the 911 tape at his felony trial violated the confrontation clauses of the state and federal constitutions. The Court of Appeals rejected these claims and affirmed his conviction for domestic violence, felony violation of a protection order. *State v. Pugh*, noted at 139 Wn. App. 1079, 2007 WL 2171361.

ANALYSIS

Sixth Amendment

Mr. Pugh contends that admission of the 911 tape violated his right to confrontation under the Sixth Amendment. He maintains that the statements made to the 911 operator were testimonial and he had no prior opportunity to cross-examine Bridgette

regarding them.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI. The confrontation clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citation omitted). It “bars ‘admission of testimonial statements of a witness who did not appear at trial unless’ the witness ‘was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (quoting *Crawford*, 541 U.S. at 53-54). Nontestimonial hearsay, on the other hand, is admissible under the Sixth Amendment subject only to the rules of evidence. *Davis*, 547 U.S. at 821.

As the Court explained in *Davis*, statements made in the course of a police interrogation are nontestimonial if they were made under circumstances objectively indicating that the primary purpose of interrogating the speaker was “to enable police assistance to meet an ongoing emergency.” *Id.* at 822. But they are testimonial if circumstances “objectively indicate that there [wa]s no such ongoing emergency” and “the primary purpose of the interrogation [wa]s to establish or prove past events potentially relevant to later criminal prosecution.” *Id.*

The Court adopted four factors that help to determine whether the primary purpose of police interrogation is to enable police assistance to meet an ongoing emergency or to

establish or prove past events: (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation. *Id.* at 827.

In applying these factors in *Davis*, one of the two consolidated cases before it, the Court found the 911 call was nontestimonial because the victim's statements were made about events as they were actually occurring, a reasonable listener would recognize that she was facing an ongoing emergency, the call was a cry for help in the face of a physical threat, and the environment was chaotic and probably unsafe. *Id.* at 827-28. The Court also explained that the statements in *Davis* were taken while the declarant was alone, unprotected by police, in apparent immediate danger from the defendant, and seeking aid, not relating past events. *Id.* at 831-32. In contrast, in the second case before the Court, *Hammon*,² the Court found that statements made to police officers after they arrived were testimonial because the purpose of the interrogation was to investigate a possible crime where there was no immediate threat and no emergency in progress, and the witness testified as to what had happened rather than what was happening. *Id.* at 829-30.

Here, read out of context, some of Bridgette Pugh's statements appear to describe

² The second case reviewed was *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *rev'd on other grounds*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

past events. For example, she said that “[m]y husband was beating me up really bad.” CP at 215. She also said that he was walking toward the street and that she could not see him, indicating that she was no longer threatened by him. On the other hand, many of her statements during the call show that her overriding purpose in calling 911 was to obtain police assistance to ensure her safety and medical assistance for her injuries. Although she could not see Mr. Pugh, she expressed concerns about being beaten again if she went outside. She obviously thought he was still close by and remained a danger, and in fact he was arrested outside the apartment in the parking lot just as Officer Meissner was leaving the building.

A number of the 911 operator’s questions and Mrs. Pugh’s responses also indicate that responses were sought to resolve a present emergency, including questions about whether Pugh was armed, whether he had been drinking, and questions about his identity. The Court in *Davis* indicated that statements might be nontestimonial if police interrogation, objectively viewed, was an effort to establish an assailant’s identity so that dispatched officers might know whether they would be encountering a violent felon. That appears to be the case here.

In addition, Bridgette Pugh said that she needed an ambulance, and this statement in conjunction with her statements that she had been beaten indicated a medical emergency requiring assistance.

We conclude that Mrs. Pugh’s statements were nontestimonial and that no violation of the Sixth Amendment occurred given the back and forth, conflicting

statements about Pugh's presence and the possible threat he posed, and Bridgette Pugh's request for an ambulance.

Article I, section 22

Bridgette Pugh's statements to the 911 operator were admitted as excited utterances under ER 803(a)(2). Mr. Pugh does not dispute that the statements constitute excited utterances within the meaning of the rule. But he contends that their admission violated his state confrontation right.

Mr. Pugh asks the court to independently interpret article I, section 22 and offers two alternative interpretations. First, he urges that with regard to a complaining witness's "accusatory" statements, the statements are inadmissible unless the witness testifies or the defendant has had an opportunity to cross-examine the witness and the State demonstrates that the witness is unavailable. Alternatively, he suggests that a complaining witness's hearsay statements, of whatever kind, are inadmissible if the witness is absent from trial, unless the State demonstrates that the witness is unavailable to testify. Under either approach, he contends, his state right to confrontation was violated by admission of the 911 tape.

In *Crawford*, 541 U.S. at 68, the Court observed that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States with flexibility in their development of hearsay law—as does *Roberts*,³ and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."

³ *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

Thus, a state is free to follow its own law respecting hearsay statements that are nontestimonial.

Article I, section 22 provides that “[i]n criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face.” Pugh engages in a *Gunwall*⁴ analysis, arguing that the state constitution’s confrontation clause should be given an interpretation independent of that given the Sixth Amendment’s confrontation clause and that the state provision is more protective than the Sixth Amendment right. However, we have already concluded that an independent analysis applies. *State v. Foster*, 135 Wn.2d 441, 473, 481, 957 P.2d 712 (1998) (Alexander, J., concurring and dissenting; Johnson, J., dissenting); *State v. Shafer*, 156 Wn.2d 381, 391, 128 P.3d 87 (2006) (article I, section 22 is subject to an independent analysis with regard to both the scope of the confrontation right as well as the manner in which confrontation occurs⁵) (citing *Foster*, 135 Wn.2d at 470 (Guy, J., lead opinion), 471 (Alexander, J., concurring and dissenting), 481 (C. Johnson, J., dissenting)). Thus, a *Gunwall* analysis is no longer necessary.

The question instead is whether our state constitution precludes admission of the 911 tape. Construction of the state constitution is a question of law that is reviewed de novo. *State v. Chenoweth*, 160 Wn.2d 454, 462, 158 P.3d 595 (2007). In determining the

⁴ *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

⁵ We found it unnecessary in *Shafer* to engage in an independent analysis, however, because the statute at issue had already been found constitutional under the state confrontation clause. *Shafer*, 156 Wn.2d at 391-92 (citing *State v. Ryan*, 103 Wn.2d 165, 169-70, 691 P.2d 197 (1984)).

meaning of a state constitutional provision, the ““focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular result.”” *Id.* at 463 (quoting *City of Seattle v. McCreedy*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). We examine the constitutional text, the historical treatment of the interest at stake as disclosed by relevant case law and statutes, and the current implications of recognizing or not recognizing an interest. *Id.* at 463.

Turning first to the language of article I, section 22, read literally it would require that the “accused” “meet” the speaker “face to face.” Because Bridgette Pugh was not present at the trial and Mr. Pugh had never had an opportunity to cross-examine her about the statement, his confrontation right was violated if a literal interpretation of the clause were to apply. Pugh relies on *State v. Stentz*, 30 Wash. 134, 142, 70 P. 241 (1902), *abrogated on other grounds by State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001), for the proposition that article I, section 22’s confrontation right guarantees the right to cross-examine the witness in open court in the presence of the accused.

But the state confrontation clause has not “been read literally, for to do so would result in eliminating all exceptions to the hearsay rule.” *State v. Ryan*, 103 Wn.2d 165, 169, 691 P.2d 197 (1984). In *Foster*, we held that the state confrontation clause should not be construed literally to require a physical, face-to-face confrontation between the defendant and the speaker. *Foster*, 135 Wn.2d at 463-64 (plurality) (recognizing the clause is not to be read literally); *id.* at 474 (Alexander, J., concurring and dissenting) (article I, section 22 does not require in every circumstance “an eyeball-to-eyeball

confrontation between witnesses and the accused”; such a view “is too rigid and inflexible”). Although the dissent in *Foster* relied on the same passage in *Stentz* that Pugh cites, *id.* at 486-87 (Johnson, J., dissenting), a majority of this court disagreed with this view of the state confrontation clause.

Further, hearsay statements have long been admitted under our state confrontation clause in cases where the defendant did not meet the declarant “face to face” and had no opportunity for cross-examination. Among these are early cases involving dying declarations, *e.g.*, *State v. Eddon*, 8 Wash. 292, 36 P. 139 (1894); statements of coconspirators, *e.g.*, *State v. Payne*, 10 Wash. 545, 39 P. 157 (1895), *overruled in part by State v. Goodwin*, 29 Wn.2d 276, 186 P.2d 935 (1947); and public records, *e.g.*, *State v. Bolen*, 142 Wash. 653, 254 P. 445 (1927).

With regard to the historical treatment of statements like those made to the 911 operator, we note initially that “[t]he privilege of confrontation has at all times had its recognized exceptions, and these exceptions are not static, but may be enlarged from time to time if there is no material departure from the reason underlying the constitutional mandate guaranteeing to the accused the right to confront the witnesses against him.” *State v. Ortego*, 22 Wn.2d 552, 563, 157 P.2d 320 (1945).⁶ As mentioned, the 911 tape

⁶ Although the court in *Ortego* cited a United States Supreme Court opinion for this proposition, it clearly meant that it applies under the state constitution because the court had already recognized in its opinion that the Sixth Amendment’s confrontation clause was not then applicable to the states. *Id.* at 555; *see also Pettit v. Rhay*, 62 Wn.2d 515, 519, 383 P.2d 889 (1963) (also recognizing the federal provision had not been applied to the states by reason of the Fourteenth Amendment). In *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), the Court held that the Sixth Amendment guaranty of the right of the accused to confront the witnesses against him is a fundamental right that is made obligatory on the states by the

was admitted as an excited utterance.

The modern “excited utterance” exception to the hearsay rule arose out of the “res gestae” doctrine, which was recognized at the time our state constitution was adopted. Hearsay statements were frequently admitted under the “res gestae” exception notwithstanding the state constitution’s confrontation clause. “Res gestae” “is a doctrine which recognizes that, under certain circumstances, a 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

Fourteenth Amendment.

speaks for itself.

The doctrine was well established at the time the state constitution was adopted. *See generally, e.g.*, 1 Simon Greenleaf, *A Treatise on the Law of Evidence* 144-47 (14th ed. 1883) (Greenleaf on Evidence); Thomas Starkie, *A Practical Treatise of the Law of Evidence* 89 n.1 (10th ed. 1876) (Starkie on Evidence); 1 Horace Smith, *Roscoe's Digest of the Law of Evidence in Criminal Cases* 40 n.1 (8th ed. 1888) (Roscoe's Criminal Evidence); Francis Wharton, *A Treatise on the Law of Evidence in Criminal Issues* §§ 262-271, at 192-203 (9th ed. 1884) (Wharton on Evidence). Greenleaf's evidence treatise summarizes two main inquiries under the doctrine: "whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." Greenleaf on Evidence, *supra*, § 108, at 144-45.⁷

The res gestae doctrine was applied in *State v. Smith*, 26 Wash. 354, 67 P. 70 (1901), where statements of a robbery victim made almost immediately after the robbery were admissible as res gestae. *See also State v. Freidrich*, 4 Wash. 204, 214, 29 P. 1055 (1892) (referring to res gestae as a general rule of evidence). Although the decision in *Beck* was issued years later than *Smith* and *Freidrich*, the court in *Beck* summarized

⁷ This court often relied on Greenleaf's evidence treatise in cases decided around the time Washington became a state. *E.g.*, *Eddon*, 8 Wash. at 299 (with regard to what comes within the dying declaration hearsay exception); *see also, e.g.*, *Newman v. Buzard*, 24 Wash. 225, 229-30, 64 P. 139 (1901); *Dolan v. Scott*, 25 Wash. 214, 218, 65 P. 190 (1901); *Coey v. Darknell*, 25 Wash. 518, 522-23, 65 P. 760 (1901); *Mullen v. Sackett*, 14 Wash. 100, 102, 44 P. 136 (1896) (describing Greenleaf as a "learned author"); *Douthitt v. MacCulsky*, 11 Wash. 601, 609, 40 P. 186 (1895) (describing rule "most admirably stated by Mr. Greenleaf"); *Sayward v. Gardner*, 5 Wash. 247, 253, 31 P. 761 (1892); *Richmond v. Morford*, 4 Wash. 337, 241, 30 P. 341 (1892).

earlier cases when it set out the essential requirements of the res gestae rule:

(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.

Beck, 200 Wash. at 9-10.

Pugh contends, however, that the excited utterance exception did not come into existence until too long after the constitution was adopted for it to have been within the contemplation of the framers, and that it is so different from the res gestae exception that the fact the res gestae exception was recognized early on is not sufficient to demonstrate that excited utterances would have been admitted despite the state confrontation clause. The difference, he maintains, is that the “res gestae” exception is more restrictive than the excited utterance exception because excited utterances do not have to be contemporaneous with the event, citing *State v. Dixon*, 37 Wn. App. 867, 873, 684 P.2d 725 (1984).

The res gestae doctrine evolved into several present day hearsay exceptions, usually identified as the present sense impression, the excited utterance, and statements of

present bodily condition, mental states, and emotions. 2 Kenneth S. Broun, McCormick on Evidence § 268, at 245-46 (6th ed. 2006). Thus, contrary to Pugh’s argument, “excited utterances” did come within the res gestae exception at the time the state constitution was adopted, provided they met the standards laid out in *Beck*.⁸

Also contrary to Pugh’s argument, in this state the res gestae exception did not require that the statements always had to be exactly contemporaneous with the occurrence of the event. In one case, for example, a witness testified about statements made nearly two hours after a train wreck by a man injured in the wreck that related to its cause. The hearsay statements were objected to because of the passage of time. This court upheld admission of the testimony under the res gestae exception, stating that “it is not always essential to . . . admissibility that the declarations and principal occurrence shall be identical in point of time” and explaining that exact concurrence of the statements or admissions and the principal act is not required “if they arise naturally therefrom, without evidence of premeditation, and directly tend to characterize or explain it.” *Walters v. Spokane Int’l Ry. Co.*, 58 Wash. 293, 297-98, 108 P. 593 (1910).

Thus, the Washington court was more concerned with whether the rationale underlying the res gestae doctrine was satisfied than on rigid adherence to strict

⁸ The principle underscoring admission of hearsay statements under the res gestae doctrine is the same as that underlying the excited utterance exception to the hearsay rule. In fact, the Judicial Council Comment to ER 803 states as to *both* the exception for present sense impression and excited utterance that the exception is consistent with previous Washington law, citing *Beck v. Dye*, 200 Wash. 1. 5C Karl B. Tegland, *Washington Practice: Evidence Law & Practice* § 803.1, at 5 n.3 (5th ed. 2007). As pointed out, *Beck* summarized numerous earlier cases on the subject of statements admissible as res gestae. Both exceptions have long been, because of their character as spontaneous statements, considered to be reliable without the need for cross-examination.

contemporaneousness. *Walters* accords with the 1883 Greenleaf treatise, which states that while some decisions showed strict adherence to a rule of contemporaneousness, “the current of decisions, in the United States at least, is to admit such declarations if they are so connected with a fact in issue as to qualify, or characterize, or explain it, although not strictly contemporaneous with it.” Greenleaf on Evidence, *supra*, at 145 n.(a). Other treatises of the time made the same point. *E.g.*, Roscoe’s Criminal Evidence, *supra*, at 42 n.1 (the declarations “must be contemporaneous with the main fact” but they need not be “precisely concurrent in point of time”; rather, “[i]f they spring out of the transaction, elucidate it, are voluntary and spontaneous, and make at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous”); Starkie on Evidence, *supra*, at 89 n.1 (same). *But see, e.g.*, Wharton on Evidence, *supra*, § 262, at 194.

Pugh argues that a statement in response to a question could not fall under the traditional exception for res gestae, however, and therefore the statements made by Bridgette Pugh in response to the 911 operator’s questions do not qualify under the res gestae rule. The traditional exception for res gestae in this state did encompass responses to questions, however. In *State v. Labbee*, 134 Wash. 55, 58, 234 P. 1049 (1925), the court concluded that a statement made by the declarant within 15 to 20 minutes after the event, even though in response to a question was spontaneous and instinctive, and “was clearly a part of the res gestae.”

Mr. Pugh maintains that at the time the state constitution was adopted, the res

gestae doctrine was not recognized by this court, although by 1917 it was recognized by the court. For several reasons, we disagree. First, *Smith*, addressed above, was decided in 1901. Second, the authority Pugh cites does not support his conclusion. Mr. Pugh relies on *State v. Hunter*, 18 Wash. 670, 672, 52 P. 247 (1898), for the proposition that this court did not recognize the doctrine at the time the constitution was adopted. He claims that the court in *Hunter* held that statements made to a child rape victim “immediately, or at least within an hour, after the assault” were admissible only as to the fact of the complaint, but that anything beyond this would be “hearsay of the most dangerous character.” *Id.*

Although the quoted words appear in the opinion, Mr. Pugh mischaracterizes the case. The court actually said that it was not error “to permit the mother to testify that the prosecutrix made complaint to her immediately, or at least within an hour, after the assault was committed.” *Id.* This is an application of a particular rule that applied in rape cases and permitted admission of evidence of the fact that the victim made a complaint right after the attack occurred. *See generally* Roscoe’s Criminal Evidence, *supra*, at 41-45. The fact that a complaint was made was considered to be original evidence, not hearsay. *Id.* As this court explained, the law required that there be corroboration of the testimony of a rape victim, which could be established through the testimony of the victim or another witness that she made a complaint shortly after the commission of the alleged offense, and where, when, and to whom the complaint was made. *State v. Holcomb*, 73 Wash. 652, 656, 132 P. 416 (1913).

As a separate matter, a rape victim's statements giving additional detail might be admissible if they were made immediately after the crime and fell within the res gestae exception. *Id.*; see, e.g., *State v. Beaudin*, 76 Wash. 306, 307, 136 P. 137 (1913) (it was proper to permit the mother to testify that the complaint was made by her very young daughter, but error to permit her to repeat the child's statements, "there being no contention that the" child's statements "were any part of the res gestae"). But in *Hunter* the res gestae doctrine simply was not implicated by the mother's testimony as described by the court, and it is therefore not surprising that the court did not discuss the doctrine. Contrary to Pugh's contention, it is incorrect to conclude based on *Hunter* that this court did not recognize the res gestae rule at the time the constitution was adopted.

Finally, as explained, the res gestae doctrine was widely and well established at the time our state constitution was adopted.

Mr. Pugh contends, though, that after Washington courts began to admit res gestae statements, courts and litigants expected that either the witness would testify at trial or be genuinely unavailable for trial. He relies on three cases. In *State v. Hazzard*, 75 Wash. 5, 23, 134 P. 514 (1913), statements made by the testifying witness's sister, who was deceased at the time of trial, were admitted as res gestae statements. In *State v. Ripley*, 32 Wash. 182, 190-91, 72 P. 1036 (1903), res gestae statements of a prosecution witness who testified at trial were admitted (evidence showed the witness had been drinking and had been knocked unconscious, and made the statements after he regained consciousness). Finally, in *Smith*, the witness whose statements were admitted as res

gestae statements was mentally incompetent at the time of trial.

However, these cases simply do not support Mr. Pugh's claim. It is true that the declarants in these cases were either unavailable or testified at trial, but in none of these cases did the court address the issue of availability of the declarant. Given widespread acceptance at the time of the reliability of res gestae statements without any need for cross-examination, it is completely understandable that this court did not address availability of the declarants.

The statements made by Bridgette Pugh to the 911 operator fall within the res gestae doctrine as it existed when our state constitution was adopted. *See Beck*, 200 Wash. at 9-10, 10-11. They were natural statements growing out of the assault on her, not merely a narrative of what had happened, and they explained events that had occurred within minutes as well as present and continuing circumstances. They were statements of fact, not opinion. They were spontaneous utterances dominated and evoked by the events themselves without premeditation or reflection. They were made at a time and under circumstances that exclude any presumption, based on passage of time, that they were the result of deliberation. They were made by a participant—the victim—of the transactions described. Accordingly, Mrs. Pugh's statements are of a type that simply do not implicate the right to confrontation under article I, section 22.

Moreover, the interpretations of article I, section 22 offered by Mr. Pugh are flawed. The first alternative would require a determination of whether the statement at issue is a complaining witness's "accusatory statement." Although Pugh provides little

explanation, this approach obviously requires a threshold determination of whether statements are “accusatorial,” which Pugh says means that the declarant is asserting the defendant has committed a crime. According to Pugh, this threshold determination also involves an inquiry into the importance of the statement and its role in the case. In short, a “pretrial” would be necessary to determine how the evidence would be used and what its effect would be at trial. Pugh also says that when the State seeks to admit accusatorial hearsay statements of a complaining witness, either the witness must testify or the State must demonstrate the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.

Thus, despite the reliability attached to statements that were *res gestae*, under Pugh’s first proposed alternative excited utterances coming within the traditional *res gestae* doctrine would be inadmissible without cross-examination. This is a marked departure from prior law under our state constitution. There is simply no support for this approach in this state’s historical treatment of *res gestae* and excited utterances.

Mr. Pugh’s second proposed interpretation is that the court hold that hearsay statements of any kind are inadmissible under article I, section 22 unless the State establishes the witness is unavailable to testify. The foundation for this approach is in other state courts’ holdings that Pugh describes as establishing a preference for live testimony while safeguarding the right to confrontation and recognizing the need to yield to necessity in some cases.

Pugh is essentially saying that all hearsay implicates the state confrontation clause

and that once implicated, the state has to show unavailability of the witness. His second alternative approach therefore also rejects the theory that spontaneous statements coming within the historical contours of the *res gestae* doctrine are inherently reliable. This goes far beyond anything this court has ever held and beyond what the United States Supreme Court requires now or required even before *Crawford*. Pugh does not explain how a confrontation rule encompassing all hearsay comports with the law of this state, most likely because there is no basis for this approach in state law.

Our law has long been that *res gestae* statements, as delineated early in our state history, do not come within the protection of the state confrontation clause.

Finally, 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. We have reservations about the matter, given that the modern excited utterance exception to the hearsay rule appears, in some instances, to have expanded beyond its historical antecedents. *See, e.g., State v. Thomas*, 150 Wn.2d 821, 853-55, 83 P.3d 970 (2004) (court held that the declarant was still under the stress of the excitement caused by a murder and the excited utterance exception applied, where the declarant's statements were made one and one-half hour after the murder and in the intervening time the declarant helped dispose of the body and burglarize the victim's house, and had traveled to another city where the van in which the murder occurred was burned).

CONCLUSION

Mrs. Pugh's statements to the 911 operator were nontestimonial, and therefore

admission of a recording of the 911 call at Mr. Pugh’s trial did not violate his right to confrontation under the Sixth Amendment. The statements qualify as res gestae under the res gestae doctrine as it applied at the time the state constitution was adopted. Statements of this type do not implicate the state confrontation clause. Because the statements are nontestimonial and do not implicate article I, section 22, admission of the 911 recording violated neither the federal nor the state confrontation clause.

The Court of Appeals is affirmed.

AUTHOR:

Justice Barbara A. Madsen

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Susan Owens

Justice Charles W. Johnson

Justice Mary E. Fairhurst

Justice James M. Johnson
