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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO,
Plaintiff,

V.

BRYAN C. KOHBERGER,
Defendant.

Case No. CR01-24-31665

~~SEALED~~ REDACTED
STATE'S MOTION IN LIMINE
RE: 911 CALL

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and respectfully moves the Court for an order in limine allowing the State to admit the recording and transcript of the 911 call to Whitcom on November 13, 2022. The 911 recording was discovered as AV000002 and the transcript was discovered as Bates 12422-12426.

FACTS

The facts pertinent to the issue raised by this motion can be found in the attached excerpts from the Grand Jury Transcript (State's Exhibit S-1), the 911 call recording (State's Exhibit S-2), and the transcript of the 911 call (State's Exhibit S-3).

ARGUMENT

A. The statements on the 911 call are hearsay but fall within firmly rooted hearsay exceptions and should be allowed.

In general, testimony that is hearsay is excludable at trial. However, there are many exceptions to this rule. Two firmly rooted exceptions are:

Idaho Rule of Evidence 803(1) Present sense impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

Idaho Rule of Evidence 803(2) Excited utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

The requirements of the federal version of each of these rules are best stated in *U.S. v. Mitchell*, 145 F.3d 572, 576 (3d Cir. 1998):

There are three principal requirements which must be met before hearsay evidence may be admitted as a present sense impression: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration and the event described must be contemporaneous.

...

The requirements for a hearsay statement to constitute an excited utterance are: (1) a startling occasion, (2) a statement relating to the circumstances of the startling occasion, (3) a declarant who appears to have had opportunity to observe personally the events, and (4) a statement made before there has been time to reflect and fabricate.

In Idaho, the Court of Appeals viewed the requirements for excited utterance as follows:

To fall within the excited utterance exception, an out-of-court statement must meet two requirements. First, there must be a startling event that renders inoperative the normal reflective thought process of the observer and second, the declarant's statement must be a spontaneous reaction to that event rather than the result of reflective thought. Whether a statement falls within the excited utterance exception is left to the sound discretion of the trial court. . . . In ruling on the admissibility of a statement under the excited utterance exception, the trial court considers the totality of circumstances surrounding the statement. The circumstances to be considered include the amount of time that elapsed between the startling event and the statement, the nature of the condition or event, the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or made in response to a question.

State v. Doe, 140 Idaho 873, 876-877, 103 P.3d 967, 970-971 (Ct. App. 2004) (citations omitted).

Calls to 911 can also be deemed present sense impressions and/or excited utterances.

Hearsay statements on a 911 tape can be admitted into evidence as either a "public record," Fed.R.Evid. 803(8)(B), or a "business record," Fed.R.Evid. 803(6). *See United States v. Sallins*, 993 F.2d 344, 347- 48 & n. 4 (3d Cir.1993) (noting that a 911 tape itself is probably a "public record"); *cf. United States v. Smith*, 521 F.2d 957, 964-65 (D.C.Cir.1975) (finding that police radio broadcasts are business records). However, because citizens who call 911 are not under any "duty to report," Fed.R.Evid. 803(8)(B), a recorded statement by a citizen must satisfy a separate hearsay exception. *See* Fed.R.Evid. 805; *United States v. Pazzint*, 703 F.2d 420, 424-25 (9th Cir.1983) (excluding tapes of emergency calls from witnesses reporting defendant's assault of an IRS agent); *Sallins*, 993 F.2d at 347 (excluding 911 statement that person matching defendant's description was holding a gun). Under certain circumstances, such a statement may qualify as either a "present sense impression," Fed.R.Evid. 803(1), or an "excited utterance," Fed.R.Evid. 803(2). *See United States v. Mejia-Valez*, 855 F.Supp. 607, 613-14 (E.D.N.Y.1994) (admitting under either exception a tape of 911 call made by an eyewitness immediately following a shooting); *United States v. Campbell*, 782 F.Supp. 1258, 1260-61 (N.D.Ill.1991) (admitting under either exception a 911 tape of an eyewitness's description of a gunman).

Bemis v. Edwards, 45 F.3d 1369, 1372 (9th Cir. 1995). *See also State v. Valverde*, 128 Idaho 237, 912 P.2d 124 (Idaho App. 1996) (eight-year-old victim's statements to paramedic during 911

phone call made within approximately one-half hour of last lewd act were admissible under excited utterance exception to hearsay rule; victim was in obvious distress, and lapse of time was not so great as to render exception inapplicable).

In the case at bar, most of the declarations made were present sense impressions.

H.J. located the unresponsive body of Xana Kernodle and informed B.F. and D.M. to call 911. E.A. was present at the time. All declarants personally perceived the event (i.e. Kernodle unresponsive). The majority of the declarations were describing to Dispatcher Carolina Calvin what they were perceiving (i.e. present sense impressions). Those statements relate to Kernodle being passed out and not waking up. The declarations were made immediately after H.J. discovered Kernodle's body.

Some declarations made would also be considered excited utterances. Those statements include "Oh, and they saw some man in their house last night. Yeah" as well as the heaving breathing and crying that can be heard throughout the call. The declarants were responding to a startling occasion (discovery of unresponsive roommate). The statement regarding a person being in the home is in direct response to why Kernodle might be passed out. All statements are made while the declarants are processing what is happening and were made before an opportunity to reflect and fabricate why Kernodle is unconscious. Clearly, the statements of B.F. , D.M. , E.A. , H.J. and the dispatcher, Carolina Calvin, fall within the hearsay rule exceptions.

Judge John Judge has already ruled that the 911 call is not hearsay (i.e. not offered for the truth of the matter asserted) and even if deemed hearsay, the exceptions for present sense impression and excited utterance apply. On August 23, 2023, Defendant moved to dismiss the grand jury indictment. One basis for that motion was that the 911 call was "improperly admitted

hearsay, cumulative, irrelevant, and an improper attempt to bolster witness testimony.” In response, Judge John Judge held as follows:

Further, even if the 911 call is hearsay, the exceptions for ‘present sense impression’ and ‘excited utterance’ apply as the statements made by the callers (i.e. the surviving roommates, H.J. and another friend who had arrived) were made immediately after H.J. discovered Ms. Kernodle’s body and instructed the roommates to call 911. I.R.E. 803(1) and 803(2); *E. Side Highway Dist. V. Delavan*, 167 Idaho 325, 337, 470 P.3d 1134, 1146 (2019) (the rationale justifying the present sense impression exception is ‘that the immediacy of the statement offers no opportunity for fabrication’); *State v. Petite*, 122 Idaho 809, 839 P.2d 1223 (Ct. App. 1992) (finding statements made were excited utterances because victim was still under the stress of the event).

“Sealed Order Denying Motion to Dismiss Indictment on Grounds of Biased Grand Jury, Inadmissible Evidence, Lack of Sufficient Evidence, and Prosecutorial Misconduct”, Pages 18-19, Filed 12/15/2023.

Regarding the “emotion” in the callers’ voices, Judge Judge further held that the evidence was relevant “as to why law enforcement was sent to 1122 King Road on November 13, 2022, as opposed to just EMS when the call was for an ‘unconscious’ individual.” This testimony was deemed relevant to the effect it had on Dispatcher Calvin and was not cumulative of Officer Nunes’ testimony. *Id.*

B. The Statements Made on the 911 Call Are Admissible Regardless of Whether or Not Witnesses Testify

Under I.R.E. 803, present sense impressions and excited utterances are admissible whether or not the declarant is available as a witness. I.R.E. 803(1) and (2).

Any statement found outside of the above exceptions to hearsay are non-testimonial for purposes of a *Crawford* analysis. Further, even if somehow deemed testimonial, the Confrontation Clause of the Sixth Amendment does not bar their admission:

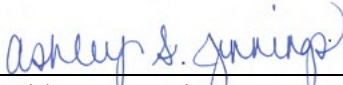
Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green*, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). It is therefore irrelevant that the reliability of some out-of-court statements " 'cannot be replicated, even if the declarant testifies to the same matters in court.' " *Post*, at 1377 (quoting *United States v. Inadi*, 475 U.S. 387, 395, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004). The State submits if any of the declarations made are deemed testimonial, each of the declarations will testify at trial.

CONCLUSION

Based on above cited authority, the State respectfully prays for the court's approval in limine of the admission of the recordings and transcripts of the 911 call to Whitcom on November 13, 2022, immediately following the discovery of Xana Kernodle unresponsive at 1122 King Road.

RESPECTFULLY SUBMITTED this 24th day of February 2025.



Ashley S. Jennings
Sr. Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S MOTION IN LIMINE RE:

911 CALL were served on the following in the manner indicated below:

Anne Taylor
Attorney at Law
PO Box 2347
Coeur D Alene, ID 83816

- Mailed
- E-filed & Served / E-mailed
- Faxed
- Hand Delivered

Dated this 24th day of February 2025.



Exhibit S-1 – Grand Jury Transcript (SEALED)

Exhibit S-2 – Audio File on Thumb Drive Hand-Delivered Separately

SEALED

State's Motion in Limine RE: 911 Call



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911 CALL
Q=Dispatch
Q1=Man
Q2=Woman1
Q3=Man1
Q4=Man2
Q5=Man3
A=Woman
A1=Woman1
A2=Man

Q: 911, location of your emergency.

A: Hi, something is happening. Something happened in our house. We don't know what. We have...

Q: What is the address of the emergency?

A: 1122 - no don't...

Q: What is the rest of the address?

A: Oh, Kings Road.

Q: Okay. And is that a house or an apartment?

A: It's a house.

Q: Can you repeat the address to make sure that I have it right?

A1: I'll talk to you guys. We're, um, we live at the right, so we're next to them.

Q: I need someone to repeat the address for verification.

A1: The - the address? 1122 King Road.



43

44 Q: And what's the phone number that you're calling from?

45

46 A1: What's your phone number?

47

48 A: [REDACTED]

49

50 A1: [REDACTED]

51

52 A: [REDACTED]

53

54 A1: [REDACTED], what's the rest?

55

56 A: [REDACTED]

57

58 A1: [REDACTED]

59

60 Q: Okay. And tell me exactly what's going on.

61

62 A1: Um, one of our - one of the roommates who's passed out and she was drunk
63 last night and she's not waking up.

64

65 A: No, we saw...

66

67 Q: Okay.

68

69 A1: Oh, and they saw some man in their house last night. Yeah.

70

71 A: Hi...

72

73 Q: And are you with the patient? Okay. I need someone to keep the phone, stop
74 passing it around.

75

76 A: Can I just tell you what happened, pretty much?

77

78 Q: What is going on currently? Is someone passed out right now?

79

80 A: I don't really know, but pretty much at 4:00 am...

81

82 Q: Okay. I need to know what's going on right now, if someone is passed out.
83 Can you find that out?

84

85 A: Yeah, I'll come - come on. Let's - we gotta go check. But we have to. Is she
86 passed out? She's passed out. What's wrong?
87

88 Q: Dispatching Moscow Law ambulance for...
89

90 A: She's not waking up.
91

92 Q: ...unconsciousness, 1122 King Road.
93

94 Q1: Seven zero is en route...
95

96 Q: Okay. One moment. I'm getting help started that way.
97

98 A: Okay maybe...
99

100 Q: (Unintelligible) 1122 King Road. All ambulance respond for unconsciousness.
101 1122 King Road...
102

103 Q2: I copy.
104

105 Q: (Unintelligible) 58. Multiple RPs on the phone advised saying the roommate
106 on scene is passed out and not waking up. Believe she got drunk last night and
107 (unintelligible) about a male being in the room with them.
108

109 Q1: (Unintelligible) being around.
110

111 Q: That one I copy about 20-year-old female unconscious trying to get further.
112

113 Q1: Copy.
114

115 A2: Yeah. Yeah, it's (Evan).
116

117 A: Okay.
118

119 Q: Okay. And how old is she?
120

121 A: Um, she's 20.
122

123 Q: 20 you said?
124

125 A: Yes, 20, here do you wanna talk to 'em?
126

127 Q: Okay.
128
129 A2: Hello? Hello?
130
131 Q: Okay. I need someone to stop passing the phone around because I've talked to
132 four different people.
133
134 A2: Okay. Sorry. They just gave me the phone.
135
136 Q: Is she breathing?
137
138 A2: Hello?
139
140 Q: Is she breathing?
141
142 A2: No.
143
144 Q: Okay.
145
146 Q1: (Unintelligible) en route.
147
148 A2: (Bethany) or (Dylan) I need you to - to talking to them, okay? I can't talk to
149 them. I need you to talk to them.
150
151 A: Okay. Hello?
152
153 Q: Okay. I have already sent the ambulance and law enforcement, stay on the
154 line.
155
156 A: Okay.
157
158 Q: If there is a defibrillator available, send someone to get it now and tell me
159 when you have it. Unit's responding RPs advising...
160
161 A: (Unintelligible).
162
163 Q: ...the patient is not conscious, not breathing.
164
165 A: (Unintelligible).
166

167 Q: Okay. If there is a defibrillator available, send someone to get it now and tell
168 me when you have it.

169
170 A: We don't have one.

171
172 Q1: Unconscious, not breathing.

173
174 A: Do you have a defibrillator?

175
176 Q3: Yep.

177
178 A: Yes, we have one.

179
180 Q: But are you talking to the officer?

181
182 A: Yes.

183
184 Q: Okay. I'm gonna let you go since he's there with you and can help you.

185
186 A: Okay. Thank you. Bye.

187
188 Q: Okay.

189
190 Q4: Moscow 46 out.

191
192 Q: Copy.

193
194 Q4: 13. I think we have a homicide.

195
196 Q5: Moscow engine 20 is en route.

197
198 Q4: 13 70.

199
200 Q1: 70 (unintelligible). 107 I relayed it.

201
202

203 This transcript has been reviewed with the audio recording submitted and it is an accurate
204 transcription.

205 Signed _____