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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 NUMBER CR01-24-31665

**DEFENDANT'S OBJECTION TO
STATE'S MOTION IN LIMINE**

RE: 911 CALL

COMES NOW, Bryan C. Kohberger, by and through his attorneys of record, and hereby objects to the State's Motion in Limine to admit the 911 call and an accompanying transcript. The State relies on the exceptions to the hearsay rule and effect on listener. Mr. Kohberger's objection is grounded in his Constitutional Rights, 5th, 6th and 14th Amendments and Article I section 13 of the Idaho Constitution.

911 Call

The State correctly recognizes the statements on the 911 call are hearsay. Idaho Rules of Evidence make hearsay inadmissible unless it meets with an exception. The State identifies two exceptions to the rule against hearsay, and further recognizes all parts of the statement must meet the exception. The State must provide foundation for an excited utterance. *State v. Hansen*, 133 Idaho 323, 348-49 (Ct.App.1999).

The State alleges that statements fall within the excited utterances or present sense impression exceptions to the hearsay rule or are non-testimonial. The State distinguishes and identifies only one statement but claims the rest of the statements fall within the exception of Present Sense Impression.

Excited Utterance

Excited Utterance "... has two requirements: (1) an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer; and (2) the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. *Parker*, 112 Idaho at 4, 730 P.2d at 924 (quoting E. Cleary, *McCormick on Evidence*, § 297 (3d ed.1984)). We consider the totality of the circumstances including: "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. Hansen*, 133 Idaho 323, 325, 986 P.2d 346, 348 (Ct.App.1999) (citing 31 Michael H. Graham, *Federal Practice and Procedure* § 6753, at 275-76 (Interim ed.1997)). *State V Field* 144 Idaho 559, 568, 165 P.3d 273, 282 (2007).

This 911 call did not come at 4:30 in the morning when DM and BF communicated with each other and ended up in the same bedroom. This 911 call came eight (8) hours later. This call came after DM and BF each made calls, corresponded through text and other messaging to family and friends. The 911 call came only after friends arrived.

BF initiated the 911 call and thereafter the phone was passed from person to person. The state lays out only one statement as an excited utterance, the statements of EA when the phone was passed to her. "Oh, and they saw some man in their house last night, Yeah." (S-3, page 2 line 69). The State claims these words are an excited utterance because they explain why XK was passed

out. The State fails to take into account why that statement was made. The same transcript, and same page reflect the dispatcher asking exactly what was going on. EA stated “Um, one of our – one of the roommates who’s passed out and she was drunk last night and she’s not waking up.” (S-3 page 2 line 62-63.) Either BF or DM said, “No, we saw ...” (S-3 page 2 line 65) After that prompt EA told dispatch about the man **they** saw. Thereafter the phone was handed back to DM.

The statements by EA do not fit within excited utterance exception. She first states she is reporting a roommate who was passed out from drinking and not waking up. She then states they saw some man in their house. EA does not have firsthand information and is repeating what DM and BF told her. *See Bemis v. Edwards* 45 F.3d 1319 (9th Cir.)(1995). All of the statements made by DM and BF must be analyzed under the applicable framework for excited utterances. *State v. Field* 144 Idaho 559, 165 P.3d 273 (2007).

In Mr. Kohberger’s Response to the State’s Motion in Limine RE: text messages and testimony he objects, in part, based on completeness of the record but also because a more complete record weighs against the State’s motion. The phone activity of the DM and BF shows the statements on the 911 call are not an excited utterance.¹ The phone activity is more extensive than a few messages between DM and BF. Phone activity did not stop once they were together. It did not begin right before 911 was called.

The 911 call was not contemporaneous with DM and BF’s stated awareness of something happening in their house. Eight (8) hours passed until they called for friends to come to the residence. An Excited Utterance is a statement that is made while under the influence of an event. *Id.* The 911 call, and statements contained therein, came after conversation, calls, texts, internet surfing and other phone activity.

¹ Exhibit “Texting objection -1 and 2” are Mr. Kohberger’s exhibits prepared from DM and BF phone records. They are incorporated here by reference.

Present Sense Impression

The State claims most of the statements in the 911 call meets the Present Sense Impression exception to the hearsay rule. The State says this is so because they all saw XK unresponsive and were told to call 911. 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. The only possible statements that qualify are those regarding XK being unresponsive. Statements regarding what DM and BF claim they saw 8 hours earlier are not contemporaneous in time.

Reviewing the Grand Jury testimony shows the State misplaces reliance on at least some of the statements about XK. The State ignores previous sworn testimony when it claims the 911 call contains present sense impression because the declarants were observing XK. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The State has not identified what exception to the rule against hearsay apply to which statements, with the exception of the previously discussed statement. Review of the record and background show neither exception applies. The State relies on the conclusion reached by Judge Judge in denying Mr. Kohberger's motion to dismiss the Grand Jury Indictment. Mr. Kohberger disagrees with the conclusion and the State's reliance on the findings. Judge Judge's findings do not include a full analysis of the applicable exception accompanied by the background information.

² Objection to State's MIL: text messages Exhibit 1, Grand Jury Transcript, select portions – under seal.

This Court is not bound by Judge Judge’s ruling. The law of the case doctrine applies “where an appellate court pronounces a ‘principle of law necessary to the decision.’” *State v. Garcia* 516 P.3d 578, 584 Idaho Supreme Court (2022) (quoting *Regan v. Owen*, 163 Idaho 359, 363, 413 P.3d 759, 763. This court has discretion to hear and decide the issues presented before the court. *State v. Hawkins* 155 Idaho 69, 72, 305 P.3d 513, 516 (2013). The court as the trial court “discretion to change its own pretrial rulings, especially evidentiary rulings.” *State v. Thorngren*, 149 Idaho 729, 736, 240 P.3d 575, 582 (2010).

Confrontation

The 911 call contains little that fits within the exception to the rule against hearsay. The statements that “they saw a man in the house” are testimonial in nature. Witnesses will need to be in court to testify to satisfy the constitutionally protected area of confrontation.

Transcript

Mr. Kohberger raises the same objections to the transcript being admitted. If the transcript is admitted, the Court should only admit a version that is certified by a court reporter. Mr. Kohberger has a certified transcript prepared and provides it as an exhibit to this motion for use should the court allow the transcript be admitted.

Mr. Kohberger objects to the State’s motion and urges the Court to deny it. Testimony in open court and subject to the adversarial process best protects Mr. Kohberger’s Constitutional Rights.

DATED this 17 day of March, 2025.



BY:

ANNE C. TAYLOR
ANNE TAYLOR LAW, PLLC

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served as indicated below on the 17 day of March, 2025 addressed to:

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