

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.

Ada County Case No. CR01-24-31665

**ORDER ON STATE'S MOTIONS IN
LIMINE RE: TEXT MESSAGES AND 911
CALL**

I. INTRODUCTION

D.M. and B.F. are the two surviving roommates of 1122 King Road. At the time the homicides were believed to have occurred, D.M. saw an masked intruder in the house and began calling and texting the other roommates, including B.F. Approximately eight hours after D.M. saw the intruder, B.F. called 911 from her phone. Before the Court is the State's motion to allow the text messages by D.M. and B.F., testimony about their conversations with each other about what D.M. saw, and the 911 call. The State argues these communications are either not hearsay or qualify under one or more exception to the hearsay rule. It also asks that a transcript of the 911 call be provided to the jury to view while listening to the audio. Defendant challenges several of the communications and objects to the use of the transcript.

Oral argument on the motions was held on April 9, 2025, after which the Court took the matters under advisement. The Court finds that some of the hearsay statements on the 911 call do not qualify under the exceptions cited by the State and, therefore, must be redacted. However, the balance of the 911 call as well as the texts and conversations noted herein are likely admissible provided that the requisite foundation is laid at trial.¹ The transcript will be allowed as a demonstrative aid, again assuming proper foundation is established.

¹ The Court's rulings on the specific text messages/phone activity and the 911 call statements are appended hereto in table format as Exhibits A and B, respectively.

II. STANDARD

Whether a statement falls within the present sense impression and/or excited utterance exceptions is a question that is left to the sound discretion of the trial court, giving consideration to the totality of the circumstances. *State v. Stover*, 126 Idaho 258, 262–63, 881 P.2d 553, 557–58 (Ct. App. 1994). Use of demonstrative aids is also a discretionary determination. *State v. Weigle*, 165 Idaho 482, 487, 447 P.3d 930, 935 (2019) (citing IRE 611). On discretionary matters, the trial court must: 1) correctly perceive the issue as one of discretion; 2) act within the outer boundaries of its discretion; 3) act consistently with the legal standards applicable to the specific choices available to it, and; 4) reach its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

III. FACTS²

After spending the evening out, roommates D.M., B.F., Kaylee Goncalves and Madison Morgan returned to their home at 1122 King Road in the early morning hours of November 13, 2022. At approximately 2:00 a.m., they met up in Kaylee’s bedroom and talked for a while before going to bed. The fifth roommate, Xana Kernodle, who was out with her boyfriend Ethan Chapin, was not home yet. The roommates debated going out to a food truck for a late snack, prompting D.M. to send a text at 2:10 a.m. to an Uber driver she knew to see if he was driving. Exh. D1. Ultimately, however, the girls decided to just go to bed.

At approximately 4:00 a.m., D.M. heard strange noises and crying coming from the bathroom. She opened her door at one point and saw a man dressed in black with a ski mask on walking by her bedroom door. She then placed calls and texts to her other roommates to see if they were awake. Only B.F., who resided on the ground floor, answered. They spoke once for 24 seconds, during which D.M. told B.F. she thought she heard something. They spoke again a

² The parties submitted various portions of the grand jury transcript as different exhibits, including the State’s Exhibit S-1 to the 911 call motion, Defendant’s Exhibit 1 to his objection to the 911 call motion and State’s Exhibits S-21 and S-3 to the text message motion. To avoid confusion, the Court will cite to the grand jury transcript, rather than cite to the individual exhibits. Citations to D.M.’s and B.F.’s phone activity in bubble format, attached as Exhibits 1 and 2 respectively to Defendant’s objection to the State’s text message motion, will be referenced as Exhibits D1 and D2.

minute later for 41 seconds when D.M. told B.F. she saw a man in a ski mask leaving the house.³ They then exchanged the following text messages between 4:22 and 4:26 a.m.:

D.M. to B.F.: No one is answering
D.M. to B.F.: I'm rily confused rn.
D.M. to Kaylee: Kaylee
D.M. to B.F.: What's going on
B.F. to D.M.: Ya dude wtf
B.F. to D.M.: Xana was wearing all black
D.M. to B.F.: I'm freaking out rn
D.M. to B.F.: No it's like a ski mask almost
B.F. to D.M.: Stfu
B.F. to D.M.: Actually
D.M. to B.F.: Like he had soemtbinf over is for head and little nd mouth
D.M. to B.F.: Bethant I'm not kidding o am so freaked out
B.F. to D.M.: So am I
D.M. to B.F.: My phone is going to die fuck
B.F. to D.M.: Come to my room
B.F. to D.M.: Run
B.F. to D.M.: Down here
D.M. to B.F.: I'm scRwd tho
B.F. to D.M.: Ya IK but it's better than being alone

Exh. D1.⁴

During the foregoing exchange, D.M. also attempted contacting Ethan Chapin through Snapchat. *Id.*; GJ Trans. at 181:6-21.⁵ She again tried calling Kaylee and Xana, but neither responded. Exh. D1; GJ Trans. at 182:4-15. D.M. then exited her room and began running toward B.F.'s bedroom. On her way, she noticed Xana lying on the floor of her bedroom, with her head towards the wall and her feet toward to the door. D.M. thought Xana was drunk. GJ Trans. at 182:16-183:7.

Once D.M. arrived at B.F.'s room, they locked the door and both made additional unanswered calls to the other roommates. At 4:32 a.m. D.M. again texted Kaylee, "Pls answer"

³ B.F. testified to her recollection of the content of these two phone calls before the grand jury; however, D.M. could not recall specifics about what was said. GJ Trans., 171:20-173:5; 236:19-238:11.

⁴ The typos and abbreviations are in the original messages.

⁵ D.M. testified before the grand jury that Instagram is a text messaging app that is used by young adults to communicate.

with no response. Exh. D1. Between approximately 5:00 a.m. and 6:30 a.m., D.M. engaged in activity on her phone, primarily creating, editing and deleting images and videos. *Id.* Her phone activity then ceased until 8:05, when D.M. accessed Instagram for a few minutes. *Id.* At 10:00 a.m., D.M. again accessed Instagram and communicated over Snapchat. At 10:23, she texted Madison, asking “R u up[.]” *Id.* She received no response. D.M. continued to access Instagram and Snapchat until 11:29 a.m., when she texted Kaylee, “R u up??” *Id.* Again, there was no response, which D.M. thought was strange because Kaylee and Madison were “early wakers.” GJ Trans. at 188:15-24. D.M. continued accessing various social media sites, included checking Ethan and Xana’s Snapmap locations. Exh. D1; GJ Trans., at 188:7-13. At approximately 11:40, D.M.’s father texted her about scheduling a time for a chat, to which D.M. responded. She also received two texts from a person named “Jenna” stating: “bro” and “do u guys need me to come get u?” Exh. D1.

At approximately 11:50 a.m., D.M. called her friend E.A. and asked her to come over and check the house because she was scared. E.A. and her boyfriend, H.J. came over. Exh. D1; GJ Trans. at 276:9-12. They met D.M. and B.F. at the bottom floor of the house. GJ Trans. at 277:2-4. Together D.M., B.F. and H.J. started to walk up the stairs to the second floor. When they reached the second floor, H.J. went to the kitchen to grab a kitchen knife. When he came back out, D.M. “saw Xana again for a split second. And I just started bawling because I thought she had just like – I don’t even know. I thought maybe she was still just drunk and all asleep on the floor.” GJ Trans. at 190:1-25; 245:22-246:20. B.F. also saw Xana lying on the floor. *Id.* at 231:13-17.

H.J. told D.M. and B.F. to “get out.” E.A., who had started up the stairs, also turned around after H.J. instructed her not to come any further. *Id.* at 276:13-21. They both went outside. Shortly afterwards, H.J. exited the house and told them to call 911. He was pale white and mentioned something about someone being unconscious. *Id.* at 191:9-18.

At 11:56 a.m., B.F. called 911 from her cell phone and spoke to Carolina Calvin, the 911 dispatcher. The call lasted four minutes and 11 seconds. During the call, the phone was passed around to different individuals, including B.F., D.M., H.J. and an unidentified female speaker. Heaving, heavy breathing and crying can be heard throughout the call. B.F. spoke first, stating “something is happening. Something’s happened in our house and we don’t know what.” State’s Exh. S-2 (911 call audio). B.F. attempted to provide the address of the house to dispatch but

could not continue. *Id.* At that point, an unidentified female speaker took the phone and provided the address and B.F.'s phone number. The following exchange ensued:

911 operator: Okay. And tell me exactly what's going on.

Female: Um, one of our – one of the roommates who's passed out and she was drunk last night and she's not waking up.

911 operator: Okay.

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

911 operator: And are you with the patient?

D.M.: Hi, this is [D.M.]

911 operator: Okay. I need someone to keep the phone, stop passing it around.

D.M.: Can I just tell you what happened, pretty much?

911 operator: What is going on currently? Is someone passed out right now?

D.M.: I don't really know, but pretty much at 4:00 a.m. –

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

DM: Yeah, I'll come — come on. B. We got to go check. But we have to. Is she passed out? She's passed out. What's wrong? She's not waking up.

H.J.: Xana

Id.

D.M. then informed dispatch that Xana was twenty years old. At that point, H.J. took the phone. Dispatch asked him if "she" was breathing, to which H.J. answered "No." Law enforcement arrived at that point and, after confirming with D.M. that the responding officer had

a defibrillator, dispatch ended the call. Later, at approximately 1:04 p.m. that day, D.M. received a Vandal Alert regarding the homicide.

IV. ANALYSIS

The State seeks to admit D.M.'s and B.F.'s phone records from November 13, 2022, including call records and text messages, as well as elicit testimony by D.M. and B.F. regarding their communications with each other on November 13, 2022 that they testified to before the grand jury. The State also seeks to admit the 911 call and the official transcript thereof. The State argues these records and communication are not hearsay, or they are excepted from hearsay as excited utterances or present sense impressions. Defendant objects, arguing that—apart from H.J.'s statement to 911 that Xana was not breathing—the exceptions do not apply to the hearsay statements. The Court finds the bulk of the statements are likely admissible, with three exceptions of statements made during the 911 call.

Hearsay is an out-of-court statement admitted to prove the truth of the matter asserted. IRE 801. To be hearsay, the statement must be intended as an assertion of fact and offered by the proponent for purposes of proving the truth of the assertion. *State v. Guerra*, 169 Idaho 486, 500, 497 P.3d 1106, 1120 (2021) (citations omitted). If a statement is hearsay, to be admitted, it must fall under an exception.

Hearsay statements on a 911 call can typically be admitted into evidence under either the public record or business record exceptions to the hearsay rule. *Bemis v. Edwards*, 45 F.3d 1369, 1372 (9th Cir. 1995) (citing FRE 803(8) and 803(6)). “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.” *Id.* Typically these exceptions include the present sense impression exception and the excited utterance exception. 4 Clifford S. Fishman, Jones on Evidence § 28:16 (7th ed) (Dec. 2024 update).

The present sense impression exception authorizes the admission of hearsay if it is “a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.” IRE 803(1). “The rationale justifying the exception is that the immediacy of the statement offers no opportunity for fabrication.” *Lola L. Cazier Revocable Tr. v. Cazier*, 167 Idaho 109, 119, 468 P.3d 239, 249 (2020) (citation omitted). The rule “recognizes that in many, if not most, instances precise contemporaneity is not possible and hence a *slight* [time] lapse is allowable.” *Id.* (quoting FRE 803(1) advisory committee note (emphasis added in

Cazier)). In *Cazier*, the Idaho Supreme Court observed that time lapses as short as forty-five minutes have been considered too long to invoke the protection of the exception. *Id.* (citation omitted).

The excited utterance exception to the hearsay rule authorizes the admission of hearsay if the testimony recounts “[a] statement relating to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition.” IRE 803(2). To fall within the excited utterance exception: 1) there must be a startling event that renders inoperative the normal reflective thought process of the observer, and; 2) the declarant's statement must be a spontaneous reaction to that event rather than the result of reflective thought. *State v. Hansen*, 133 Idaho 323, 325, 986 P.2d 346, 348 (Ct. App. 1999) (cites omitted).

In considering whether a statement meets the excited utterance requirements, the totality of circumstances must be considered, 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. *Id.* (citation omitted). “There is no bright line rule as to the allowable time span between the event and the statement, and one likely should not be drawn.” *State v. Griffith*, 144 Idaho 356, 363, 161 P.3d 675, 682 (Ct. App. 2007). As with the present sense impression exception, the rationale underlying the excited utterance exception is the “special reliability which is regarded as furnished by the excitement suspending the declarant's powers of reflection and fabrication.” *Id.*, (quoting *State v. Burton*, 115 Idaho 1154, 1156, 772 P.2d 1248, 1250 (Ct.App.1989)).

A. Text Messages and Verbal Conversations Between D.M. and B.F. are Likely Admissible.

As an initial matter, the Court finds that D.M. and B.F.’s acts of making phone calls, sending or receiving text message and other phone activity such as accessing social media are not hearsay. Hearsay only captures an “oral assertion, written assertion, or nonverbal conduct intended as an assertion.” IRE 801(a). Thus, this Order will focus on the content of those calls and texts, to the extent available.

As to the content of D.M. and B.F.’s text messages about what D.M. saw, the Court finds they are either not hearsay because they are not offered for the truth of the matter asserted or not assertions or, if hearsay, they likely qualify as a present sense impression and/or excited utterance as set forth in Exhibit A hereto. Their verbal discussions are potentially admissible for

these same reasons. The State must establish the foundational requirements for such proffered statements at the time of trial.

1. D.M. texts Uber driver at 2:10:29 to inquire if he is driving

The State seeks to introduce this text to establish a timeline, specifically to establish D.M. was awake and texting at 2:10 a.m. Defendant does not directly challenge the text. Because it is not offered for the truth of the matter asserted and/or not an assertion of fact, the Court finds it is not hearsay under IRE 801.

2. Text messages between 4:22 and 4:26 a.m.

The State argues that the four-minute series of text messages between D.M. and B.F., with one from D.M. to Kaylee, are admissible as either present sense impressions or excited utterances. Defendant suggests neither exception applies because there is no evidence they were sufficiently startled by the events. He points out that D.M. claimed only to be “confused” and, despite stating she was scared, she ran to B.F.’s room instead of leaving the house or otherwise calling other friends and family for help. The Court agrees with the State for those texts qualifying as assertions.⁶

First, the present sense impression exception does not require a startling event. It simply requires that the speaker describe or explain a condition while personally perceiving it or immediately thereafter. IRE 803(1). Most of D.M.’s texts to B.F. satisfy this exception. She first texts that “no one is answering,” which describes the results of her calls to the other roommates just moments before. She also states what she is immediately feeling, i.e., “confused,” “freaked out,” and “scared”⁷ over what she just saw and heard and the fact that none of her roommates are answering. She further describes the intruder she saw, i.e., wearing a “ski mask” or something over his forehead and mouth. She also relays that her phone is “going to die.” Thus, these statements are all likely admissible as present sense impressions.

In addition, the events are sufficiently startling to both D.M. and B.F. for purposes of the excited utterance exception. D.M. and B.F. are young female college students and the self-

⁶ Several of the texts in this exchange are not assertions of fact but rather inquiries and/or commands incapable of being proved true or false. See, *Guerra*, 169 Idaho at 500, 497 P.3d at 1120 (noting that instructions, commands, requests and inquiries are typically not assertions for purposes of the IRE 801.)

⁷ Her text states she was “scRwd.” Considering that the “A” is right next to the Caps Lock key and the “E” is right next to the “W” key, it is evident she was likely texting quickly and accidentally mistyped “scared.”

described “scaredy cats of the house.” GJ Trans. at 172:5-8. They were awoken from sleep after a night of drinking with D.M. reporting that she heard noises and saw a masked intruder in their home. None of the other roommates were responding to their calls and texts, further indicating something was amiss. It would be potentially terrifying for anyone, including these young women. To argue that they would have run out of the house or called someone else for help had they really been startled unempathetically ignores these circumstances and the trauma and confusion they were evidently experiencing, which likely offset logical thought.⁸ Indeed, the girls’ fear and confusion is evident in their words, with both questioning what was going on, D.M. stating she was “freaked out,” “scared” and “confused” and B.F. attempting to get them together quickly for safety. They were clearly under stress and attempting to make sense of frightening situation.

Additionally, the time period that elapsed between what D.M. saw and her communications with B.F. about the same was a matter of minutes. The text message exchange lasts approximately four minutes, with the messages occurring in rapid succession. This timeline left no time for the reflection or fabrication, which is ultimately what IRE 803(1) and 803(2) seek to protect against. Consequently, the Court concludes that the assertive text messages within this four-minute period are likely admissible as present sense impressions and/or excited utterances assuming the requisite foundation is provided at the time of trial.

3. D.M. texts to victims

At 4:32:57, D.M. texted Kaylee “Pls answer[.]” The State argues this text is admissible as a present sense impression and an excited utterance. Defendant does not directly address the text; however, the Court finds it is more of a command or request than an assertion of fact. It is not a fact capable of being proved true or false. Thus, it is not barred by IRE 801.⁹

At 10:23, D.M. texted Madison, asking “R u up” and, approximately an hour later, D.M. texted Kaylee “R u up??” The State argues the foregoing texts are not hearsay because they will not be introduced for the truth of the matter asserted. Alternatively, the State contends they are

⁸ Defendant’s argument also ignores the fact that D.M. indicated to B.F. that the intruder was leaving the house, in which case it is not surprising the girls did not want to run outside, had the thought crossed their minds at all.

⁹ Even if it were an assertion, it would qualify as a present sense impression and/or excited utterance. D.M. had just seen a masked man in her home minutes prior after hearing unusual noises and none of her roommates other than B.F. are responding to her calls and texts. Her fear is evident in the words she uses: “Pls answer.” It is less of a request or assertion and more of a desperate plea made out of concern that something is wrong.

present sense impressions because they represent a consistency and continuation of D.M.'s texts from the prior night. Defendant disputes that the exception applies, pointing out that D.M. had been awake and accessing social media before she sent the texts.

Again, the Court does not find these texts to be assertions. They are inquiries, not declarative statements. Even if they were assertions, however, if the State intends to admit the statements to establish a timeline of events, they are not hearsay because they are not offered to establish their truth. Therefore, they are not barred by IRE 801.

5. D.M.'s calls and texts to/from others

The State contends that the texts between D.M. and her dad, the texts from J.M. and the Vandal Alert are not hearsay because they will be offered simply to show a timeline for the morning and early afternoon. In addition, the State notes that the phone call from D.M. to E.A. is not a statement and, therefore, not hearsay.¹⁰ The Court agrees and will allow the evidence for purposes of a timeline, if the requisite foundation is laid.

B. Verbal Communications Between B.F. and D.M.

The State next contends that it intends to ask D.M. and B.F. at trial about statements they made to each other on November 13, 2022. It argues the testimony will likely replicate that provided by these witnesses at the grand jury proceeding. The State contends they are admissible under the present sense impression and/or excited utterance exceptions. Defendant does not directly address the argument.

To the extent D.M. and B.F. seek to testify about the content of the calls, texts and conversations about what they perceived during the 4:30 time frame, they could be potentially admissible under the exceptions cited by the State. However, the State must establish the foundational requirements for such proffered statements. The grand jury testimony does not appear to include any conversations between them after the 4:19 a.m. to 4:37 a.m. time frame, and the State has not pointed any out. Thus, to the extent they testify to oral conversations they had after they woke up the next morning, the Court will reserve ruling and consider any hearsay objections at that time.

¹⁰ The State does not address the content of that phone call; however, the Court finds it likely qualifies as a present sense impression. D.M. testified that she asked E.A. to come over and check the house because she was scared. She is describing her fear at the time she is experiencing it. Beyond that, the specifics of what was said regarding what D.M. saw hours prior will have to be analyzed at the time of trial.

C. 911 Call

The State contends that the entirety of the 911 call should be admitted because the statements therein are either non-hearsay, i.e., not admitted for the truth of the matter asserted, or they are excepted from the hearsay rule as present sense impressions and/or excited utterances. Defendant generally objects to its admission, but takes particular issue with three statements within the call. The Court finds Defendant's objection to these specific three statements well-placed, but will allow the balance of the call because the statements are either not assertions, not admitted for their truth and/or they are excepted from the rule, as set forth in Exhibit B hereto.¹¹

1. Initial statements

The 911 call begins with B.F. telling dispatch, "Something is happening. Something's happened in our house and we don't know what." This statement falls squarely within the present sense impression exception given that B.F. was experiencing concern that something was wrong with their roommates and H.J. had just instructed her to call 911 after walking through the house. Thereafter, B.F. attempts to provide dispatch with the address of the house before an unidentified female speaker takes the phone and provides the address and B.F.'s phone number. This exchange is not offered for the truth of the matter asserted and, therefore, not barred by the hearsay rule.

2. Female: "Um, one of our – one of the roommates who's passed out and she was drunk last night and she's not waking up."

The State argues this statement is a present sense impression because the female speaker is describing the scene around her. However, as Defendant points out, the roommate at issue in the statement is Xana. The only individuals who experienced/saw Xana unresponsive were D.M., B.F. and H.J. Thus, Defendant contends the exception does not apply because the female speaker never saw Xana unresponsive and thus lacks firsthand knowledge of the information contained in the statement.

The inquiry here turns on whether the event the female speaker is describing or explaining is that Xana is unresponsive, as Defendant contends, or whether it is more generally the scene unfolding at the house, i.e., that her friends saw Xana unresponsive. The female speaker did not personally perceive the former, but she did personally perceive the latter.

¹¹ Portions of the call may qualify under IRE 803(4), i.e., statements for purposes of medical treatment or diagnosis. Because the parties have not argued this exception applies, the Court will reserve ruling on it pending a foundation being laid and an opportunity to brief and argue its applicability.

When the words themselves are considered, it is clear the event being described is that Xana is unresponsive, not that the speaker's friends saw Xana unresponsive. In other words, she is relaying to 911 what her friends observed and relayed to her. Her statement is, therefore, outside her present sense impression and, thus, the exception. *See, e.g., Bemis*, 45 F.3d at 1373 (911 caller reporting that "there's a cop beating the shit out of the guy now" was not a present sense impression because he was reporting what others in his house were seeing and describing to him). Thus, the statement is not admissible under that exception.

3. Female: "Oh, and they saw some man in their house last night. Yeah."

The State argues this statement is both a present sense impression and an excited utterance because it is in response to finding Xana unresponsive. Defendant responds that the statement references an event D.M. saw eight hours prior to the 911 call, and therefore is not contemporaneous. Defendant also points out that the female speaker does not have personal knowledge and is simply repeating what she was told by others.

The Court agrees that the present sense impression exception does not apply to the statement because the speaker is recounting what someone else perceived. Additionally, there is no contemporaneity since she is describing an event that occurred hours earlier. The excited utterance exception does not apply either. Instructive here is *State v. Fox*, where the Idaho Supreme Court considered whether the excited utterance exception applied to a 911 call made by a man after he found a woman screaming for help for her friend whom she said had just been pistol-whipped by a man who fled the scene. 170 Idaho 846, 853, 517 P.3d 107, 114 (2022). The 911 caller had not seen what happened but relayed to dispatch what the victims told him about the incident. *Id.* The Court held that the district court erred by admitting the 911 caller's statements to dispatch as excited utterances because the caller's voice was calm and he had not experienced a startling event or condition. *Id.* at 866, 517 P.3d at 127.¹²

Here, likewise, the audio of the 911 call does not indicate that the speaker's normal reflective thought processes were rendered inoperative. Her voice sounds calm relative to B.F.'s and D.M.'s. Although a slight nervousness can be detected in her voice, she is not audibly crying

¹² By contrast, in *State v. Paoli*, the Idaho Court of Appeals found the exception applied to a 911 call made by the victim of a battery immediately after it happened, noting "the tone of her voice on the audio recording showed that she was still under the stress of excitement caused by the altercation. 2017 WL 361153, at *3 (Idaho Ct. App. Jan. 25, 2017).

or breathing heavily. In fact, the speaker took over speaking to dispatch because she was more composed than B.F., who initiated the call. Further, the speaker did not personally see Xana unresponsive nor did she see the man allegedly in the house. She is simply repeating what others told her, so the statement does not provide insight into her own thought processes. Consequently, the statement must be redacted.

4. D.M.'s attempts to explain events.

After the female speaker cedes the phone to D.M., D.M. identifies herself and asks if she can tell dispatch what happened. Dispatch responds by asking what is going on and if someone is passed out. This exchange will not be offered for the truth of the matter asserted and, therefore, is not hearsay.

However, D.M. then states: "I don't really know, but pretty much at 4:00 a.m. —" The State argues this statement is a present sense impression and/or an excited utterance because D.M. is trying to explain to the dispatcher what she saw while under the current excitement of realizing that her roommate is not waking up and something could be wrong in the house. Defendant disagrees, noting the event D.M. begins to describe what occurred eight hours prior. He further argues it is not an excited utterance because she and B.F. had several hours to reflect on what she had seen and experienced at 4:00 a.m.

Defendant is correct that the statement does not qualify as a present sense impression. While D.M. personally perceived the event she is beginning to describe, the contemporaneity aspect is missing. She is attempting to narrate an event she saw eight hours earlier. The excited utterance exception does not apply either. While D.M. is no doubt under the stress of excitement caused by realizing Xana is unresponsive, her reflexive thought processing appears intact. She is starting to draw connections between Xana being unresponsive and what she saw and heard eight hours prior—something she has had time to reflect upon. She does not launch spontaneously into what she saw at 4 a.m.; rather, she asks the dispatcher if she can explain what she saw. Based on this exchange, it is clear her "powers of reflection" are quite active, thus obviating the purpose behind the exception. The statement is, therefore, not admissible and must be redacted.

5. Statements regarding Xana

Dispatch then instructs D.M. to find out if someone is passed out. D.M. appears to make statements to bystanders that they have to "go check" if Xana is passed out. This is not offered by the State for the truth of the matter and, therefore, not hearsay.

D.M. then states that Xana is “not waking up.” H.J. is heard stating “Xana” in the background. These are squarely present sense impressions because they are describing what the speakers are seeing.¹³ D.M. then responds to dispatch’s inquiry about Xana’s age—again, not offered for the truth of the matter asserted—before H.J. takes the phone and confirms that Xana is not breathing. This is also a present sense impression, and also likely falls within IRE 803(4).

6. Statements after law enforcement arrived.

Around the time H.J. confirmed to dispatch that Xana was not breathing, law enforcement had arrived on scene. H.J. can be heard telling D.M. “I need you to talk to them. I can’t talk to them. I need you to talk to them.” The Court finds this admissible as either a present sense impression or excited utterance. H.J. had just discovered Xana’s body moments before. He is operating under the stress of his discovery and attempting to answer dispatch’s questions. His statements describe his inability to speak to law enforcement at that moment and, therefore, are admissible.

At that point, D.M. took the phone again and dispatch instructed her to get a defibrillator if one was available. D.M. asked dispatch to repeat the question and stated, “There’s a police here right now.” After dispatch repeated the question, D.M. indicated they did not have defibrillator and asked the responding officer if he did. The officer responded affirmatively, after which dispatch indicated she was going to let the officer take over and ended the call. To the extent the State seeks to admit the statements by D.M. for their truth, they qualify as present sense impressions, as D.M. is explaining the events as they are happening. They also are likely admissible under IRE 803(4) insofar as they regard the defibrillator. Finally, many of the “statements” are not assertions and, thus, not hearsay.

7. Crying/breathing/heaving is non-hearsay.

Apart from the statements, the State also moves for admission of the audible crying, breathing and heaving made by the 911 callers. Defendant does not address the argument, and the Court finds it well placed. While assertive conduct can qualify as hearsay, nonassertive conduct does not. 30B Jeffery Bellin, *Federal Practice & Procedure (Evidence)* (*Wright & Miller*) § 6715 (2024 ed) (person’s nonverbal emotional reaction does not normally qualify as an assertion under Rule 801(a) because it is not intended to communicate information.). There is no indication in the 911 call that the speakers are intending to make an assertion through their

¹³ In addition, the statement that Xana is “not waking up” is potentially admissible under IRE 803(4).

crying and heavy breathing; it is clearly an involuntary emotional response to the circumstances. Further, it is relevant to show the stress and emotional impact the girls are under, which puts the call into context. Thus, it is admissible.

D. A Transcript of the 911 Call Will be Allowed as Demonstrative Evidence.

The final issue is whether to allow the jury to view the official transcript of the 911 call while listening to the call. Defendant contends it would be cumulative and asks that either the call or the transcript be allowed, but not both.

The Court views this issue as essentially a request for use of the transcript as a demonstrative aid. A demonstrative exhibit is relevant if it “supplements the testimony of witnesses or assists the jury in obtaining a better understanding of facts in issue.” *Masters v. Dewey*, 109 Idaho 576, 579, 709 P.2d 149, 152 (Ct. App. 1985) (citing 29 AM.JUR.2d, *Evidence* § 771 (1976)). Transcripts are widely used as demonstrative aids to help the jury understand the contents of audio recordings. 31 Victor J. Gold, *Federal Practice & Procedure (Evidence) (“Wright & Miller”)* § 7167 (2d ed.) (April 2025 update). When used in this way, courts will typically instruct the jury that the transcript is not evidence independent of the audio recording, and if the jury determines that the transcript is incorrect, it should disregard it to that extent and rely on its own interpretation of the audio recording. *Id.* In addition, the transcript must be authenticated by showing that it fully and accurately complies with the audio recording.¹⁴ *Id.*

Against this background, the Court will permit a transcript of the 911 call to be used as a demonstrative aid, assuming the proper foundation for 911 call is established and the transcript is properly authenticated.¹⁵ To this end, the State is responsible for proposing an appropriate jury instruction. The transcript will not be admitted as substantive evidence and will not be available to the jury except when the 911 call is being played, including during deliberations. Because it is not going to be used as evidence, the Court does not find that the transcript is cumulative to the 911 audio or otherwise prejudicial to Defendant.

¹⁴ This may well require the transcriptionist to testify that he or she accurately transcribed the call.


¹⁵ Rather than passing out individual copies of the transcript to each juror, it may be best to time the audio with the text of the transcript and play that for the jury with the “closed captioning.” Otherwise, there is a concern the jury will read ahead or focus too much on one portion of the transcript and not another. However, the actual audio exhibit, without the captioning, is the one that will go back to the jury.

V. ORDER

Based on the foregoing, the State's Motion in Limine re: Text Messages and Testimony is GRANTED, in part, and RESERVED, in part. The State's Motion in Limine re: 911 Call is GRANTED, in part, and DENIED, in part, and RESERVED, in part.

IT IS SO ORDERED.

DATED this 24th day of April, 2025.


Steven Hippler
District Judge

Text Messages and Phone Activity – Exhibit A

Time (11/13/22)	Record	Ruling
2:10:29 a.m.	D.M. to Uber Driver inquiring if he was driving	Not Hearsay. Not an assertion and/or not offered for truth of matter asserted.
2:13:00 a.m.	Uber Driver to D.M. confirming he was driving	Not Hearsay. Not offered for truth of the matter asserted.
2:53 a.m.	Madison Mogen calls B.F.	Not Hearsay. Not an assertion.
3:51:03 a.m.	D.M. creates a new contact in her phone	Not Hearsay. Not an assertion.
4:19:07 a.m.	B.F. calls D.M. for 23 seconds	Not Hearsay. Not an assertion. ¹
4:20:00 a.m.	D.M. calls Xana Kernodle.	Not Hearsay. Not an assertion.
4:20:20 a.m.	D.M. calls Kaylee Goncalves	Not Hearsay. Not an assertion.
4:20:28 a.m.	D.M. calls B.F. for 41 seconds	Not Hearsay. Not an assertion. ²
4:21 a.m.	B.F. calls Xana.	Not Hearsay. Not an assertion.
4:21:50 a.m.	D.M. calls Madison	Not Hearsay. Not an assertion.
4:22 a.m.	B.F. calls Ethan Chapin.	Not Hearsay. Not an assertion.
4:22:08 a.m.	D.M. to B.F.: “No one is answering”	Present Sense Impression and/or Excited Utterance
4:22:11 a.m.	D.M. to B.F.: “I’m rilly confused rn.”	Present Sense Impression and/or Excited Utterance
4:22:42 a.m.	D.M. to Kaylee: “Kaylee”	Not Hearsay. Not an assertion.
4:22:43 a.m.	D.M. to Kaylee “What’s going on”	Not Hearsay. Not an assertion.
4:23 a.m.	BF outgoing message (Snapchat)	The record of the message itself is not hearsay since it is not an assertion. The content is not before the Court.
4:23:15 a.m.	B.F. to D.M. “Ya dude WTF”	Excited Utterance and/or Present Sense Impression
4:23:28 a.m.	B.F. to D.M. “Xana was wearing all black”	Excited Utterance and/or Present Sense Impression
4:23:33 a.m.	D.M. to B.F. “I’m freaking out rn”	Excited Utterance and/or Present Sense Impression
4:23:42 a.m.	D.M. to B.F. “No its like a ski mask almost”	Excited Utterance and/or Present Sense Impression
4:23:48 a.m.	B.F. to D.M. “Stfu”	Excited Utterance and/or Present Sense Impression
4:23:51 a.m.	B.F. to D.M. “Actually”	Excited Utterance and/or Present Sense Impression
4:23:52 a.m.	D.M. to B.F. “Like he had soemtbinf over is for head and little nd mouth”	Excited Utterance and/or Present Sense Impression

¹ To the extent B.F. or D.M. testifies at trial to what was said in this conversation, their statements are likely admissible as present sense impressions or excited utterances, but the State will have to establish foundation for the statements at trial.

² See, footnote 1, *supra*.

4:24:00 a.m.	D.M. to B.F. "Bethant I'm not kidding o am so freaked out"	Excited Utterance and/or Present Sense Impression
4:24:07 a.m.	B.F. to D.M. "So am I"	Excited Utterance and/or Present Sense Impression
4:24:11 a.m.	D.M. to B.F. "phone is going to die fuck"	Excited Utterance and/or Present Sense Impression
4:24:14 a.m.	B.F. to D.M. "Come to my room"	Not Hearsay. Not an assertion. Alternatively, excited utterance.
4:24:22 a.m.	B.F. to D.M. "Run"	Not Hearsay. Not an assertion. Alternatively, excited utterance.
4:24:27 a.m.	B.F. to D.M. "Down here"	Not Hearsay. Not an assertion. Alternatively, excited utterance.
4:24:39 a.m.	D.M. calls Ethan Chapin	Not Hearsay. Not an assertion.
4:24:58 a.m.	D.M. to B.F. "I'm scRwd tho"	Excited Utterance and/or Present Sense Impression
4:25:16. a.m.	B.F. to D.M. "Ya Ik but it's better than being alone."	Excited Utterance and/or Present Sense Impression
4:27:11 a.m.	D.M. outgoing call	Not Hearsay. Not an assertion.
4:27:30 a.m.	D.M. outgoing message (Snapchat)	The record of the message itself is not hearsay since it is not an assertion. The content is not before the Court.
4:27:40 a.m.	D.M. outgoing message (Snapchat)	The record of the message itself is not hearsay since it is not an assertion. The content is not before the Court.
4:27:47 a.m.	D.M. calls Kaylee	Not Hearsay. Not an assertion.
4:28:44 a.m.	D.M. calls Xana	Not Hearsay. Not an assertion.
4:29 a.m.	B.F. calls Madison	Not Hearsay. Not an assertion.
4:30 a.m.	B.F. calls Madison	Not Hearsay. Not an assertion.
4:30 a.m.	B.F. calls Kaylee	Not Hearsay. Not an assertion.
4:31 a.m.	B.F. calls Kaylee	Not Hearsay. Not an assertion.
4:32:57 a.m.	D.M. texts Kaylee "Pls answer"	Not Hearsay. Not an assertion. Alternatively, present sense impression and/or excited utterance.
4:34 a.m.	B.F. accessed Snapchat	Not Hearsay. Not an assertion.
4:37 a.m.	B.F. accessed Instagram	Not Hearsay. Not an assertion.
10:00 a.m. to 10:23:02 a.m.	D.M. accessed social media; messaged on Snapchat.	Not Hearsay. Not an assertion. The content of messages is not before the Court.

10:23:23 a.m.	D.M. to Madison “R u up”	Not Hearsay. Not an assertion and/or not offered for truth of matter asserted.
10:24 a.m. to 11:29 a.m.	D.M. accessed social media; messaged on Snapchat.	Not Hearsay. Not an assertion. The content of messages is not before the Court.
11:29:27 a.m.	D.M. to Kaylee “R u up?”	Not Hearsay. Not an assertion and/or not offered for truth of matter asserted.
11:29:41 a.m. to 11:37:36 a.m.	D.M. accessed social media; messaged on Snapchat.	Not Hearsay. Not an assertion. The content of messages is not before the Court.
11:39:09 to 11:40:14 a.m.	D.M. and dad exchange texts	Not Hearsay. Not offered for truth of matter asserted.
11:49 a.m.	B.F. phone call to J.M.	The record of the call itself is not hearsay since it is not an assertion. The content is not before the Court.
11:50:55 a.m.	J.M. to D.M. “bro”	Not Hearsay. Not an assertion.
11:50:58 a.m.	B.F. phone call to E.A. ³	Not Hearsay. Not an assertion.
11:51:01 a.m.	J.M. to D.M. “do u guys need me to come get u”	Not Hearsay. Not an assertion and/or not offered for truth of matter asserted.
1:04:01 p.m.	D.M. receives Vandal Alert: “Moscow PD investigating a homicide on King Rd. near campus. Suspect is not known at this time. Stay away from the area and shelter in place.”	Not Hearsay. Not offered for truth of matter asserted.

³ See, footnote 10 in accompanying Order.

911 Call – Exhibit B

Transcript Citation¹	Statement	Ruling
Page 3, Lines 4-5	911 OPERATOR: 911, location of your emergency.	Non-hearsay. Not an assertion. ²
Page 3, Lines 6-8	BF: Hi, something is happening. Something's happened in our house and we don't know what.	Present Sense Impression.
Page 3, Lines 9-10	911 OPERATOR: What is the address of the emergency?	Non-hearsay. Not an assertion.
Page 3, Line 11	BF: 1122...	Non-hearsay. Not offered for the truth of the matter asserted.
Page 3, Lines 12-13	911 OPERATOR: What is the rest of the address?	Non-hearsay. Not an assertion
Page 3, Line 14	BF: Oh, King Road.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 3, Lines 15-16	911 OPERATOR: Okay. And is that a house or an apartment?	Non-hearsay. Not as assertion.
Page 3, Line 17	BF: It's a house.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 3, Lines 18-19	911 OPERATOR: Can you repeat the address to make sure that I have it right?	Non-hearsay. Not an assertion.
Page 3, Lines 20-21	FEMALE SPEAKER: I'll talk to you as we're -- [inaudible], so we are next to them.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 3, Lines 22-23	911 OPERATOR: I need someone to repeat the address for verification.	Non-hearsay. Not offered for truth of the matter asserted.
Page 3, Lines, 24-25	FEMALE SPEAKER: So the address, 1122 King Road.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 4, Lines 1-2	911 OPERATOR: And what's the phone number that you're calling from?	Non-hearsay. Not an assertion.

¹ The transcript referenced herein is attached to the State's Reply to Defendant's Objection to State's Motion in Limine re: 911 call (March 24, 2025). It is entitled: "Transcription of Audio File Entitled 22-M09903 911 Call" and certified by the court reporter.

² For the statements by the 911 Operator that the Court has indicated herein are not assertions, to the extent they can be construed as assertions, they are not being offered for the truth of the matter asserted and, therefore, not hearsay.

Page 4, Line 3	FEMALE SPEAKER: What's your phone number?	Non-hearsay. Not an assertion.
Page 4, Line 4	BF: [redacted]	N/A
Page 4, Line 5	FEMALE SPEAKER: [redacted]	N/A
Page 4, Line 6	BF: [redacted]	N/A
Page 4, Line 7	FEMALE SPEAKER: [redacted]-- what's the rest?	Non-hearsay. Not an assertion.
Page 4, Line 8	BF: [redacted]	N/A
Page 4, Line 9	FEMALE SPEAKER: [redacted].	N/A
Page 4, Lines 10-11	911 Operator: Okay. And tell me exactly what's going on.	Non-hearsay. Not an assertion.
Page 4, Lines 12-14	FEMALE SPEAKER: One of our -- one of the roommates is passed out and she was drunk last night and she's not waking up.	Hearsay; does not qualify as present sense impression.
Page 4, Line 15	911 OPERATOR: Okay.	Non-hearsay. Not an assertion.
Page 4, Lines 16-17	FEMALE SPEAKER: Oh, and they saw some man in their house last night.	Hearsay; does not qualify as present sense impression or excited utterance.
Page 4, Line 18	911 OPERATOR: And are you with the patient?	Non-hearsay. Not an assertion.
Page 4, Line 19	DM: Hi, this is D.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 4, Lines 20-21	911 OPERATOR: Okay. I need someone to keep the phone, stop passing it around.	Non-hearsay. Not an assertion.
Page 4, Lines 22-23	DM: Can I just tell you what happened, pretty much?	Non-hearsay. Not an assertion.
Page 4, Lines 24-25	911 OPERATOR: What is going on, currently? Is someone passed out right now?	Non-hearsay. Not an assertion.

Page 5, Lines 1-2	DM: I don't really know, but pretty much at 4:00 a.m. --	Hearsay. Does not qualify as excited utterance or present sense impression.
Page 5, Lines 3-5	911 OPERATOR: Okay. I need to know what's going on right now, if someone is passed out. Can you find that out?	Non-hearsay. Not an assertion.
Page 5, Lines 6-8	DM: Yeah, I'll come -- come on, B. We got to go check. But we have to. Is she passed out? (Background noise.)	Non-hearsay. Not offered for the truth of the matter asserted.
Page 5, Lines 10-11	DM: [Inaudible] what's wrong? She's not waking up.	Present sense impression.
Page 5, Lines 12	HJ: Xana.	Present sense impression.
Page 6, Lines 13-14	911 OPERATOR: Okay. One moment. I'm getting help started that way.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 5, Lines 15-17	DM: Okay. Thank you. What's wrong? (Background noise.)	Non-hearsay. Not offered for the truth of the matter asserted.
Page 5, Line 18	HJ: [Inaudible].	Non-hearsay. Not an assertion.
Page 5, Line 19	911 OPERATOR: Okay. And how old is she?	Non-hearsay. Not an assertion
Page 5, Line 20	DM: She's 20.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 5, Line 21	911 OPERATOR: Twenty, you said?	Non-hearsay. Not offered for the truth of the matter asserted.
Page 5, Lines 22-23	DM: Yes, 20. Here, talk to them.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 5, Line 24	HJ: Hello? Hello?	Non-hearsay. Not an assertion.
Page 5, Line 25; Page 6, Lines 1-2	911 OPERATOR: Okay. I need someone to stop passing the phone around because I've talked to four different people.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 6, Lines 3-4	HJ: Okay. Sorry. They just gave me the phone.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 6, Line 5	911 OPERATOR: Is she breathing?	Non-hearsay. Not an assertion.

Page 6, Line 6	HJ: She's [inaudible]. Hello?	Non-hearsay. Not an assertion.
Page 6, Line 7	911 OPERATOR: Is she breathing?	Non-hearsay. Not an assertion.
Page 6, Line 8	HJ: No.	Present sense impression. Potentially IRE 803(4).
Page 6, Lines 9-10	911 OPERATOR: Okay. (Police radio.)	Non-hearsay. Not an assertion.
Page 6, Lines 11-13	HJ: That's [inaudible]. D, I need you to talk to them. I can't talk to them. I need you to talk to them.	Present sense impression and/or excited utterance.
Page 6, Line 14	DM: Okay. Hello?	Non-hearsay. Not an assertion.
Page 6, Line 15-16	911 OPERATOR: Okay. I have already sent the ambulance and law enforcement. Stay on the line.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 6, Line 17	DM: Okay.	Non-hearsay. Not an assertion.
Page 6, Lines 18-20.	911 OPERATOR: If there's a defibrillator available, send someone to get it now and tell me when you have it.	Non-hearsay. Not an assertion.
Page 6, Lines 21-22	DM: Say that again. There's a police here right now.	Non-hearsay. Not offered for the truth of the matter asserted. Alternatively, present sense impression.
Page 6, Lines 23-25	911 OPERATOR: Okay. If there's a defibrillator available, send someone to get it now and tell me when you have it.	Non-hearsay. Not an assertion.
Page 7, Lines 1-2	DM: We don't have one. Do you have a defibrillator?	Present sense impression; potentially IRE 803(4).
Page 7, Line 3	OFFICER NUNES: Yep.	Present sense impression.
Page 7, Line 4	DM: Yes, we have one.	Present sense impression.
Page 7, Lines 5-6	911 OPERATOR: Okay. Are you talking to the officer?	Non-hearsay. Not an assertion.
Page 7, Line 7	DM: Yes, he's right here.	Present sense impression.

Page 7, Lines 8-9	911 OPERATOR: Okay. I'm going to let you go since he's there with you and can help you.	Non-hearsay. Not offered for the truth of the matter asserted.
Page 7, Line 10	DM: Okay. Thank you. Bye	Non-hearsay. Not offered for the truth of the matter asserted.
Page 7, Lines 11-12	911 OPERATOR: Okay. (End of audio.)	Non-hearsay. Not offered for the truth of the matter asserted.

CERTIFICATE OF SERVICE

I hereby certify that on 4/24/2025, I served a true and correct copy of the **ORDER ON STATE'S MOTIONS IN LIMINE RE: TEXT MESSAGES AND 911 CALL AND ATTACHMENTS**

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TRENT TRIPPLE

Clerk of the Court

By: 

Deputy Clerk 4/24/2025 3:03:16 PM

CERTIFICATE OF SERVICE