No. 21-7427

IN THE
SUPREME COURT OF THE UNITED STATES

William Gregory Snow, Petitioner *Pro Se*

VS.

The State of Illinois, Respondent

FILED
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SUPREME COURT, U.S.

ORIGINAL

ON PETITION FOR A WRIT OF CERTIORARI TO

Third District Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The 12th Judicial Circuit Court of Illinois allowed the prosecutor to admit multiple hearsay statements both verbal and written given to the same person at different times and under different circumstances under the excited utterance exception to hearsay as codified in IRE 803(2) when text messages, the content of a two-hour phone conversation, and a photograph of a two-page statement purportedly rewritten more than 14 hours after the alleged events, were all admitted into evidence as excited utterances.

Petitioner was unable to find case law in Illinois or in any other jurisdictions where multiple hearsay statements made by a declarant, verbal and written, given to the same person at different times and under different circumstances qualified as excited utterances.

In Rule 803(2) of the Illinois Rules of Evidence which is substantively the same as Rule 803(2) of the Federal Rules of Evidence, the excited utterance exception to hearsay provides that a hearsay statement must be made spontaneously and provide a "circumstantial guarantee of trustworthiness" to qualify as an excited utterance.

The questions presented are:

I. Whether the Third District Appellate Court of Illinois' ruling unconstitutionally expanded the scope of the excited utterance exception to hearsay as codified in Illinois Rules of Evidence 803(2) when the multiple hearsay statements admitted at trial were made to the same person at different times and under different circumstances and when the statements did not meet the threshold requirement of spontaneity to qualify as excited utterances.

II. Whether petitioner was denied the constitutional right to due process under the law when the State repeatedly used multiple hearsay evidence as prior consistent statements to bolster the testimony of the uncorroborated and heavily impeached witness.

TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

William Snow respectfully petitions this court for a writ of certiorari to review the judgment of the Appellate Court of Illinois Third District.

JURISDICTION

The judgement from the Court of Appeals affirming petitioner's conviction was entered on December 4, 2020. Whereby the jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

OPINIONS BELOW

The opinion of the Illinois Third District Court of Appeals upholding the application of the excited utterance exception to hearsay and affirmed Mr. Snow's conviction on December 4, 2020, in the Supreme Court opinion filed under Rule 23 in People v. Snow, 2020 IL App (3d) 190051. App. A, p.1, ¶ 1. On September 29, 2021, the Illinois Supreme Court denied Mr. Snow's Petition for Leave to Appeal upon discretionary review. On December 16, 2021, the Illinois Supreme Court denied petitioner's Motion for Reconsideration of the order denying Petition for Leave to Appeal. People v. Snow, Case No. 127444 (2021). App. B

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Ill. R. Evid. 803(2)

> Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Federal 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.

Ill. R. Evid. 801(c)

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Ill. R. Evid. 802

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Supreme Court, or by statute as provided in Rule 101.

Illinois Rules of Evidence 613(c)

Evidence of Prior Consistent Statement of Witness. Except for a hearsay statement otherwise admissible under evidence rules, a prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement is offered to rebut an express or implied charge that:

(i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did not exist when the statement was made; or

(ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred.

Federal Rule of Evidence 801(d)(1)(B)

STATEMENTS THAT ARE NOT HEARSAY. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 12, 2015, the State charged petitioner, William Gregory Snow, with two counts of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(d) (West 2016)), and one count of battery (id. § 12-3(a)(2)), and on March 3, 2016, the State re-indicted Mr. Snow with two counts of criminal sexual assault (id. § 11-1.20(a)(2), (a)(4)), two counts of aggravated criminal sexual abuse, and one count of misdemeanor battery. Mr. Snow waived his right to a jury trial, and on September 22, 2016, the Honorable Daniel Kennedy found Mr. Snow not guilty of criminal sexual assault while finding him guilty of aggravated criminal sexual abuse and battery.

On December 19, 2016, Mr. Snow, through new counsel, filed a motion for a new trial alleging that his trial counsel was ineffective under both Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984).

On February 24, 2017, the trial court granted Mr. Snow a new trial holding that his trial counsel had been ineffective because trial counsel could not remember advising Mr. Snow regarding his right to testify, and in prior cases, trial counsel had proceeded to trial without discussing his clients' right to testify, which the court found "buttress[ed]" Mr. Snow's testimony.

On October 22, 2018, the matter proceeded to a jury trial with the Honorable Daniel Kennedy presiding wherein petitioner was found guilty on two counts of aggravated sexual abuse and misdemeanor battery.

On January 22, 2019, the trial court denied petitioner's amended motion for a new trial and sentenced him to six months incarceration, sex offender probation, and lifetime sex offender registration. On January 22, 2019, petitioner filed a timely notice of appeal.

On December 4, 2020, The Third District Appellate Court issued its order affirming petitioner's conviction from the Circuit Court of the 12th Judicial Circuit, Will County.

On December 24, 2021, Mr. Snow filed a petition for rehearing to Appellate Court of the State of Illinois Third Judicial District. On May 3, 2021, the petition for rehearing was denied. On July 30, 2021, Mr. Snow filed a petition for leave to appeal to the Illinois Supreme Court. On September 29, 2021, the Illinois Supreme Court denied the petition for leave to appeal. On November 8, 2021, petitioner filed a motion for reconsideration of petition for leave to appeal to the Illinois Supreme Court. On December 16, 2021, the Supreme Court of Illinois denied the petition for reconsideration. App. B

STATEMENT OF THE FACTS

The evidence at trial established that on Saturday May 17, 2014, at 7:00 p.m. petitioner, his wife, daughter, and 8 out of town family members who were lodging at the Snow residence, attended the graduation ceremony for petitioner's adopted son C.S. Sometime around 10:00 p.m. following the ceremony the Snow family returned to their home to prepare food for a graduation party they were hosting the following day. Petitioner's mother, mother-in-law, father-in-law, and grandmother-in-law retired for the evening in three of the four bedrooms upstairs. Meanwhile the four children, petitioner's niece, two nephews, and petitioner's 14-year-old daughter, A.S., were on the main floor socializing in the family room where they planned to sleep for the night. Whereas petitioner's wife, S.S. and sister-in-law, M.D. began preparing food in the adjoining kitchen. S.S. testified that around 10:30 p.m. she called E.M., a neighbor and close friend, to let her know she was ready for her to come over to help with the preparations. Sometime between 10:30 p.m. and 10:45 p.m. E.M. arrived with her 16-year-old daughter T.M.

Around midnight, petitioner helped the four children, rearrange the family room furniture to accommodate a queen-sized air mattress in the center of the room so the children could watch a movie. After moving the couch back and inflating the air mattress, petitioner's daughter and

youngest nephew laid on the air mattress facing the TV above the fireplace, his oldest nephew laid on the coach, while his niece laid on the floor. Petitioner starting a movie for the children and sat at the kitchen table where the women were preparing food.

T.M. testified that she left the Snow residence around "11:00, 11:30" to grab her phone charger and get something for the women. However, S.S. testified that she was certain she never asked T.M. to leave to get anything because she personally bought the groceries and had everything she needed. E.M. testified that she sent T.M. home to get something, but neither she nor T.M. could remember what she went home to get. T.M. testified that she sat down at the kitchen table with petitioner around midnight. However, upon cross-examination she admitted that she previously testified that she sat down with petitioner at 12:30, 12:45 p.m.

T.M. asserted that after sitting with petitioner at the kitchen table for about 15 minutes, she laid down behind the couch in the family room to charge her phone and unintentionally fell asleep at 1:15 a.m. Conversely, during the VSI which was played in open court, T.M. told the interviewer that she laid down behind the couch with her phone at about 1:30 because she was "really tired." S.S. and M.D. testified that the Snow family dogs, two Jack Russel's, were in their separate cages against the wall behind the couch; and that the couch was moved back when petitioner and the children rearranged the furniture to accommodate the air mattress, leaving no room for T.M. to lay behind it. E.M. and T.M. admitted that the dog cages were usually placed against the wall behind the couch, but they were not in the family room that evening. They didn't know where they were.

EM, S.S., and M.D. testified that they were finishing the food preparations between 1:00 a.m. and 1:15 a.m. and began bagging extra items which they planned to store in E.M.'s refrigerator six houses away. E.M., S.S., and M.D. testified that before the women left around 1:30 a.m., E.M.

yelled at T.M. to wake her, but she did not respond. A.S. testified that she heard E.M. yelling at T.M. Conversely, during VSI T.M. claimed:

> "I was sleeping and I like I woke up and like I didn't wake up for a while. I like I was like okay I knew my mom was trying to call me and I was just completely zoned out. I think she was telling me like where my car keys or something and I'm pretty sure I said there on the table and like I went back to sleep [citation omitted]."

The undisputed evidence shows that T.M. laid down contemporaneously with the women preparing to leave and based on her statements to the VSI interviewer she woke to her mother attempting to wake her.

The women testified that after E.M. unsuccessfully attempted to wake T.M., they decided to drop off the food and then E.M. would return to get T.M. Petitioner walked the women to the front door and offered to help carry the food to E.M.'s house, but the women declined his assistance. E.M. testified that all the lights on the main floor were on when the women left.

T.M. claimed that while asleep "behind the couch", a few feet away from the other children, she felt someone rubbing her "back down to [her] arm." T.M. asked the person to stop, but they continued. The person then put their hands down her sweatpants. Again, she told the person to stop. She realized defendant was the person touching her when he said, "[T]ell me to stop if I do anything you do not like." She told defendant to stop a third time. Defendant then "put his fingers under [her] underwear and went from the top of [her] butt all at [sic] way to the front of [her] vagina." In doing so, defendant "traced his fingers through *** [her] butt cheeks through the lips of [her] vagina into the top of [her] vagina." [citation omitted]. Id., 2020 IL App (3d) 190051, 2-3 (Ill. App. Ct. 2020). TM testified that she said stop to petitioner 5 or 6 times in a normal tone of voice. She further asserted that petitioner was straddled above her head kneeling on the floor and was leaned over her body during the entire ordeal. She testified that she shrugged petitioner off her, got up, grabbed her keys from the glass table, and ran frantically across the long hardwood

hallway while petitioner chased behind her. She exited the front door, ran to the end of the driveway, got in her car, locked her door, and drove home "less than a minute" away.

She claimed that while driving home she was frantic, sobbing, and tears were streaming from her eyes. Upon arriving home, she pulled into her garage, and went directly into her house through the garage entry. She stated that she intended to go upstairs when she unexpectedly encountered the three women sitting at the kitchen table. The three women testified that she walked in and sat at the kitchen island near where the women were sitting. T.M. stated that she was arm's length from the women. After T.M. sat down the women asked her what's was wrong. T.M. replied, "I am fine, I'm just tired." T.M. asserted that she did not tell her mom and S.S. about the alleged events because she didn't want them to know; she "didn't want to ruin a friendship."

Though E.M. testified that when T.M. entered, she looked like "a deer in the headlights", she did not describe her as emotionally excited or that she appeared to have been crying. S.S. and M.D. testified that T.M. was looking at her phone quietly and appeared cranky or tired as if she had just woken up or read something on social media that made her mad; she did not appear to have been recently sobbing, out of breath, or disheveled. S.S. testified that nothing about T.M.'s appearance caused her concern.

The three women testified that T.M. arrived shortly after 1:30 a.m. While A.S., petitioner's 14-year-old daughter testified that she was awake when she heard T.M. grab her keys from the glass table and leave the Snow residence approximately "10 minutes" after the women left. Even the prosecuted accepted the women's timeline when he stated during opening arguments that the evidence will show that T.M. walked in through the garage at "1:30, a little after." O.J.C. also testified that E.M. told him she left the Snow residence at 1:30am. Conversely, T.M. testified that she arrived home "a little after 2:30" and texted C.S. at "2:36." T.M. asserted that she texted C.S.

stating that she was scared and that his dad had touched her. Whereas C.S. testified that TM texted him at 2:36 asking him if he was awake and when he responded affirmatively, she said she was "scared." He did not remember TM texting him stating that his dad had touched her.

T.M. claimed that after she texted CS, he "kept" calling her, but she rejected his calls because if she would have answered "[the women] would have found out what would have happened." C.S. testified that when he tried calling, she texted him stating that she was not alone. T.M. claimed that she said goodnight to the women, went upstairs to her bedroom, accepted C.S.' call, and went into her closet so her parent couldn't hear her talking with him.

S.S. and M.D. testified that they had been gone from the Snow residence between 10-15 minutes and that T.M. walked in through the garage entry between 5-10 minutes after they left the Snow home. Further, S.S. and M.D. stated that they return to the Snow residence moments after T.M. said goodnight and went upstairs. S.S. testified that when she and M.D. returned to the Snow residence, they turned off the TV in the family room and the lights on the main floor and went upstairs to go to sleep. When they reached the top of the stairs, petitioner was asleep on an air mattress in the loft snoring.

Meanwhile, T.M. and C.S. both testified that they were on the phone for about "2 hours." T.M. asserted that during their call she repeated her story to C.S. a "couple of times" because he couldn't understand her; she was crying. Whereas during the VSI T.M. told the interviewer that C.S. asked her different questions in different ways to see if she changed her story.

At trial, the prosecutor asked T.M. about her tone of voice while on the phone with C.S. and she said she was whispering. Whereas C.S. testified that during the first 30 minutes of their call T.M. was hysterical and she had a loud tone of voice. C.S. testified that he calmed T.M. down before he told her to write everything while it was "fresh in her mind." Although C.S. testified that

he could hear T.M. sniffling in the background, both T.M. and C.S. testified there was silence between them while she was writing. C.S. testified that the call between them was mostly about T.M. writing the statement. Furthermore, he asserted that T.M. wrote the statement three times while they were on the phone because she said the first two were illegible.

According to C.S., T.M. gave the statement to him the following evening after his graduation party was over, and he never saw the two prior illegible statements. Whereas T.M. testified that she wrote the statement only once while on the phone with C.S. and she rewrote it after he and his girlfriend L.S. came to her house around 4:00 p.m. She testified that she handed C.S. the statement along with a graduation card, he looked at it, told her he was unable to read it, and told her to rewrite it. After C.S. and L.S. left, she "immediately" rewrote the statement without looking at the first one. T.M. testified that C.S. and his girlfriend returned later that evening after the graduation party was over and she gave him the rewritten statement [People's Exhibit 11A and 11B] App. C. Conversely, C.S. and his girlfriend denied that they ever went to T.M.'s house earlier that day; they only went to see her in the evening after the graduation party was over. Further, S.S. testified that C.S. didn't leave the party until the party was over sometime in the evening. Moreover, C.S. asserted that he had no trouble reading the statement she gave him. It should be noted that T.M. told the VSI interviewer that C.S. came to get the statement at "about 7:30, 8 o'clock" in the evening on his way home from the graduation party without ever mentioning that she rewrote the statement or that C.S. and his girlfriend came to her house earlier that day.

At trial, T.M. asserted that she did not remember what happened to the first statement and alleged that the rewritten statement had been "in the courts for a while" but she didn't remember who she gave it to. Moreover, the original rewritten letter was never produced by the State. Furthermore, T.M. stated that she took a picture of the statement right before she gave C.S. the

rewritten version sometime in the evening. Conversely, during the VSI, T.M. gave an entirely different account. Here, she told the interviewer that she took the picture of the statement at 8 o'clock in the morning just in case C.S. "lost it or something." After defense counsel play the VSI video during cross examination, T.M. confessed that she told the VSI interviewer that she took a picture of the statement at 8 o'clock in the morning. Whereas O.J.C., the investigating officer testified that T.M. told him that she took a picture of the statement at "roughly 2:00 in the afternoon."

T.M. testified that she went to school the next day and while in class she began crying so her teacher told her to go to the guidance counselor's office. Consequently, the counselor called O.J.C. to investigate the incident. O.J.C. testified that during the initial meeting, T.M. told him that she awoken with a finger inside her vagina. Conversely, she told the interviewer during the VSI that she was sure petitioner touched the outside of her vagina only. Furthermore, O.J.C. testified that he called T.M. nine months after the initial outcry to clarify her allegations because what she told him in the counselor's office was different than what she told the VSI interviewer. O.J.C. stated that during the follow up call T.M. provided a "different" version of events. She now claimed that a "finger went partially inside her vagina and remained there for a short period." C.S. testified that while on the phone with T.M. she told him his father tried to get into her pants and he asked her to turn her over to touch other things. There was no mention of his hands or fingers being on her skin or underneath her underwear.

T.M.'s ever-changing allegations continued in sworn documents she filed in a civil case against petitioner. App. D, p.8, ¶ 1. Now, T.M. claimed that she was digitally penetrated in her anus while sleeping on a couch in the Snow residence. At trial T.M. asserted that the allegation in the civil case was a mistake and was fixed with a corrected filing. This assertion was patently false

because the refiled case contained the same allegation found in her first complaint -- that she was digitally penetrated in her anus. App. E, p.8, ¶ 1.

Aside from her inconsistent allegations, O.J.C. testified that he told T.M. while in the counselor's office that he needed the written statement to conduct his investigation. However, he never received it. Whereas E.M. testified that she believed she gave the hard copy to O.J.F. while at her home, but she didn't remember when. O.J.C. testified that he received a picture of the statement via text from E.M. fifty-seven days after the initial outcry. O.J.C. also claimed that he was informed that T.M. "wrote three" different statements and People's Exhibit 11A and 11B was the last one she wrote.

Though E.M. and C.S. disagreed on when C.S. gave E.M. the hard copy, there's no dispute that C.S. gave E.M. the statement some time before the VSI. E.M. testified that after C.S. gave her the statement, she "put it away for safe keeping." E.M. asserted that she also took a picture of the written statement but wasn't sure if People's Exhibit 11A and 11B was a photocopy of the statement she took a picture of. Ironically, Ex. 11B shows a picture of a statement still attached to a notebook.

The following Tuesday S.S.'s mother passed away at the Snow residence. A memorial service was arranged for the following Saturday. A few days after the memorial service, S.S. and her brother drove their father to his home in Arizona to assist him with his personal affairs. S.S. returned on June 4th wherein she contacted E.M. for support wherein E.M. invited her over for a cup of coffee. During the visit, E.M. unexpectedly handed S.S. the written statement she received from C.S. S.S. testified that she read the statement and immediately left E.M.'s house. At trial, the prosecutor handed S.S. People's Exhibit 11A and 11B and after reading it she insisted that it was not the same statement she read at E.M.'s house. C.S. also testified that People's Exhibit 11A

and 11B was not the same statement T.M. gave to him. Moreover, E.M., S.S., and C.S. testified that the statement they were given was written on two separate pieces of paper. Whereas T.M. testified that the statement she wrote was written on one a piece of paper "double sided." Further, O.J.C. testified that he wasn't "100% sure" if People's Exhibit 11A and 11B were the same images of the statement he read on T.M.'s phone in the counselor's office.

To add to the confusion, during direct examination the prosecutor asked T.M. if People's Exhibit 11A and 11B was the second statement she wrote, to which she replied, "No, it was the first one." The prosecutor, seemingly surprised by T.M.'s response, asked her if People's Exhibit 11A and 11B were legible. T.M. agreed that it was legible and then asserted, "It could be the second note because it was summer, so the light was out longer. I don't exactly remember which one I took a picture of." The prosecutor glossed over her response and asked her the following:

> "And when you wrote -- we will call it the first note and the second note. Did you change details in the second note from the first note or would you say it was verbatim?"

T.M. then testified that she rewrote the statement verbatim and that it was completely the same. However, when asked by the prosecutor how she did that she admitted that she rewrote it without looking at the first one. After eliciting repeated testimony from T.M. to the same allegations, the State moved to publish People's Exhibit 11A and 11B and directed T.M. to read the statement aloud to the jury. Defense counsel objected on the grounds of best evidence and hearsay rules. The trial court excused the jury and heard arguments.

> Defense: It is hearsay. Her reading that statement to the jury at this time is hearsay. It's a prior consistent statement at this time. There is absolutely no reason for her to testify to and read this letter to the jury.

The State argued:

> Prosecutor: Your Honor, this is an excited utterance. It is -- it was written.
> The Court: It was originally written right afterwards.

Prosecutor: Yes.
The Court: It was rewritten I think her testimony was she rewrote it verbatim.
Prosecutor: Yes.

In response, defense counsel replied:

> Defense Counsel: She then goes to sleep for numerous hours, wakes up, and still has the wherewithal to ignore her parents. The parents come and go. She is still ignoring them. Curtis comes and she gets out of her room. She has a conversation with him about this letter. He leaves and then later in the day her father comes and tries talking to her. Curtis comes with Alexis. She gets out of her room at this point and gives it to him at the front door and they leave. How could this still be her being under the influence of something that occurred over [interrupted].

The trial court then allowed People's Exhibit 11A and 11B into evidence under the excited utterance exception to hearsay holding:

> I think it is still an excited utterance between 2:00 and 4:00 in the morning given as to what she testified as to her state of mind and beliefs.

In rendering its decision, the Trial Justice not only misstated the facts, but he overlooked the declarant's testimony wherein she stated that she rewrote the statement the following evening not "immediately after." Moreover, the claimant testified that she rewrote the statement without looking at the first one making it impossible to be a verbatim copy of the first statement.

Here, the court of appeals saw no abuse of discretion when the trial justice allowed People's Exhibit 11A and 11B into evidence and affirmed petitioner's conviction stating:

> "To facilitate better communication during their phone conversation, C.S. instructed T.M. to write a letter describing what happened and read it back to him. C.S. could hear T.M. sniffling as she wrote. T.M.'s hands were shaking so badly that her first letter was illegible. C.S. told her to rewrite the letter while they were still on the phone, and she did so immediately."

Id., 2020 Ill. App (3d) 190051, 3 (Ill. App. Ct. 2020).

> "The record established the elements of the charged offenses. The essential details of T.M.'s account of the incident remained consistent across both trials. T.M.

> testified in graphic detail that defendant touched her vagina, anus, and buttocks, and that his fingers penetrated the lips of her vagina. C.S. testified that, during their phone conversation, T.M. told him that defendant "touched" her. T.M.'s letter, which she wrote to help her describe the incident to C.S., corroborated her trial testimony, including that defendant "went into [her] sweatpants and grabbed [her] butt, then put [his] finger under [her] underwear starting from the top of [her] butt going all the way down." The jury found T.M.'s testimony sufficiently credible to convict defendant of all offenses charged. From our review of the record, this determination was not unreasonable. Therefore, we find that the evidence was sufficient to prove defendant's guilt of each of the charged offenses beyond a reasonable doubt.

Id., 2020 Ill. App (3d) 190051, 11 (Ill. App. Ct. 2020)

In the present case, the appellate court misstated the fact's in making its determination. T.M.'s testimony made it abundantly clear that she rewrote the statement the following evening Moreover, the court fabricated the narrative that "T.M.'s hands were shaking so badly that her first statement was illegible." Nowhere in the record does T.M. make this claim.

The "totality of the circumstances" surrounding the making of the hearsay statements in the texts, during the phone conversation with C.S., and the two-page written statement(s) raise serious concerns about the statement's reliability and trustworthiness. Indeed, the unrebutted evidence demonstrates that every action that the declarant undertook was deliberate, reflective, and planned where she concealed any signs that she had been crying, she lied to the women to keep the alleged assault a secret, and she had the courtesy to see if C.S. was awake before any of the statements were made. Moreover, the notion that all these hearsay statements given to the same person at different times and under different circumstances can qualify as excited utterances strains the boundaries of the excited utterance exception to hearsay beyond recognition. Indeed, the circumstances here pose highly unusual evidentiary questions for this Court to resolve.

REASONS FOR GRANTING THE PETITION

The opinion by the Appellate Court severely departed from the accepted and usual course of judicial proceedings when it overlooked determinative facts pertaining to the excited utterance exception to hearsay and affirmed petitioner's conviction that this Honorable Court should intervene. The Court of Appeals erred in holding that T.M.'s multiple hearsay statements given to the same person at different times under different circumstances qualified as excited utterances. Based on the Court's opinion that the court relied on its own view that the declarant was credible rather than a totality of the circumstances analysis which is required. Moreover, the Appellate Court seriously misapprehended the totality of the circumstances surrounding the declarant's hearsay statements given to the same person at different times and under different circumstances and it applied erroneous standards in arriving at its conclusion.

The Advisory Committee on Proposed Federal Rules noted "The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore §1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes." [Paragraph Omitted] "Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred." Fed. R. Evid. 803 (eff. Dec. 1, 2017.)

In its decision the Appellate Court here concluded, "[citation omitted], the circuit court did not abuse its discretion by admitting T.M.'s statements into evidence under the excited utterance hearsay exception. Supra ¶¶ 17-21. Because the court admitted the statements defendant contests as substantive evidence via a widely recognized hearsay exception, it does not matter that they

were consistent with T.M.'s trial testimony. See Stull, 2014 Ill. App (4th) 120704, ¶ 100. Id., 2020 Ill. App (3d) 190051, 8 (Ill. App. Ct. 2020)

Under Illinois Rules of Evidence, prior consistent statements are generally inadmissible unless they are "otherwise admissible under evidence rules." Ill. R. Evid. 613(c) (eff. Sept. 17, 2019); see People v. Ruback, 2013 IL App (3d) 110256, ¶ 26 ("Such statements are inadmissible hearsay and may not be used to bolster a witness's testimony."). Id., 2020 Ill. App (3d) 190051, 8 (Ill. App. Ct. 2020)

Hearsay is an out-of-court written or verbal statement "offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Oct. 15, 2015). Hearsay evidence is inadmissible unless it falls under a recognized exception, such as the excited utterance hearsay exception. Ill. R. Evid. 802 (eff. Jan. 1, 2011); Ill. R. Evid. 803(2) (eff. Sept. 28, 2018).

"For a statement to be admissible under the excited utterance exception there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate a statement, and a statement relating to the circumstances of the occurrence. Ill. R. Evid. 803(2) (eff. Sept. 28, 2011); People v. Busch, 2020 IL App (2d) 180229. Whether a statement is admissible as an excited utterance depends upon the totality of the circumstances. People v. Williams, 193 Ill.2d 306, 352 (2000). Such an analysis encompasses several factors, including the amount of time that has passed since the incident, the mental and physical condition of the declarant, the nature of the event, and the presence or absence of self-interest. People v. Sutton, 233 Ill. 2d 89, 107 (2009). The key inquiry, however, is "whether the statement was made while the excitement of the event predominated." [Internal quotation omitted]. Id. People v. Andrade, 2-19-0797, at *1 (Ill. App. Ct. Aug. 16, 2021) Courts have noted that the lapse of time between the event and the statement does not control whether the statement is

admissible, but rather the inquiry is whether the statement was spontaneous in light of the surrounding circumstances. (People v. Brown (1988), 170 Ill. App.3d 273, 281; People v. Parisie (1972), 5 Ill. App.3d 1009, 1028.) The Parisie court stated that factors to be taken into consideration include length of time, condition of the declarant, influence of intervening occurrences, presence or absence of self-interest, and the nature and circumstances of the statement. Parisie, 5 Ill. App.3d at 1029-30; see also People v. Van Scyoc (1982), 108 Ill. App. 3d 339, 341. People v. Sommerville, 193 Ill. App. 3d 161, 174 (Ill. App. 1990)

Even assuming *arguendo*, that T.M. suffered a sufficiently startling event, the hearsay statements in question were made after reflective thought and after a period where T.M. had ample time to think and fabricate a story. See, Williams, Alan G., Abolishing the Excited Utterance Exception to the Rule Against Hearsay, Kansas Law Review Vol. 63 p. 739 (stating that excited utterance exception allows for the complete fabrication of not only the hearsay statement admitted as an excited utterance, but also of the circumstances that prove a startling event even occurred, thus, fulfilling the first requirement—"a startling event"—of the excited utterance exception; such is the ultimate example of boot-strapping).

"It is well established that the excited utterance exception to hearsay as codified in IRE 803 (2) is widely accepted by Illinois courts when the circumstances surrounding the out-of-court statement [internal quotes omitted] demonstrate sufficient guarantees of reliability or trustworthiness despite the inability of an opponent to cross-examine the declarant before the trier of fact." (See, e.g., People v. Clark (1972), 52 Ill.2d 374, 389.) People v. White, 198 Ill. App. 3d 641, 651 (Ill. App. Ct. 1990)

This Court in Pelzer v. United States concluded that "[t]here is a difference between the stress or excitement caused by the original event and that caused by the trauma of having to retell

what happened after initially calming down. Only [a statement made in] the former [circumstance] is admissible as an excited utterance." (quoting In re L.L., 974 A.2d 859, 864 (D.C. 2009))); see also Odemns, 901 A.2d at 777 (explaining that this "hearsay exception was ... intended to apply to situations in which the declarant was so excited by the precipitating event that he or she was still under the spell of its effect" (quotation omitted)). Id., 166 A.3d 956, 963 n.15 (D.C. 2017).

The court's analysis in the present case was deeply flawed when it relied on its own view that the declarant was consistent across both trials therefore truthful and credible rather than the threshold finding of reliability based on the totality of the circumstances which was required to determine the statements' admissibility under as an excited utterance. The manifest purpose of this requirement was defeated when the court overlooked the circumstances that belied the trustworthiness and reliability of the multiple hearsay statements made by the claimant; a claimant who was heavily impeached and one who's testimony was inconsistent with that of nearly every other witness. The court in State v. Dixon, noted, "The reliability and probable truthfulness of excited utterances distinguish them from ordinary hearsay. State v. Whyde, 30 Wn. App. 162, 632 P.2d 913 (1981); United States v. Knife, 592 F.2d 472 (8th Cir. 1979); Annot., 48 A.L.R. Fed. 451 (1980); 5A K. Tegland, Wash. Prac. § 361 (2d ed. 1982); E. Cleary, McCormick on Evidence § 297 (2d ed. 1972); 6 J. Wigmore, Evidence § 1749 (rev. 1976), where the author states:

> This circumstantial guarantee here consists in the consideration, already noted (§ 1747 supra), that in the stress of nervous excitement the reflective faculties may be stilled, and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance, it is commonly said, must be "spontaneous," "natural," "impulsive," "instinctive," "generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate."

Id., 37 Wn. App. 867, 872 (Wash. Ct. App. 1984)

The reasoning of the appellate court in the present case fails the test of common-law hearsay principles. The circumstances surrounding the hearsay statement illustrate that the statements were not "generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate." Id.

Simply because a court finds a witness's testimony credible, does not change the required analysis. For all hearsay exceptions, a court's role must be limited to assessing the factual prerequisites for application of the hearsay exception. In other words, the hearsay statements must provide sufficient "indicia of reliability' and "circumstantial guarantee of trustworthiness." The key to this analysis is the statement must have been produced spontaneously and without reflective thought while the declarant was overcome by the excitement of the event.

Not only was the court's decision in direct conflict with the intended scope of the excited utterance exception as established by well-established law and legal precedence, but when it applied erroneous standards in its analysis it derided petitioner's right to due process and equal protection under the law as defined in Amendment V and XIV of the US Constitution. The questions here are squarely presented and the outcome-determinative, making this case ideal for this Court's review. This case thus meets all the Court's criteria for further review therefore Mr. Snow's petition for certiorari should be granted.

The court in United States v. Young noted, "In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal trial into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." Johnson v. United States, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring). It is simply not possible for an appellate court to assess the seriousness of the claimed error by any

other means. As the Court stated in United States v. Socony-Vacuum Oil Co., 310 U.S., at 240, "each case necessarily turns on its own facts." Id., 470 U.S. 1, 16 (1985)

However, here the court went further and imposed statements that the record did not support. Assuming *arguendo* that T.M. indeed rewrote the statement immediately after writing the first one while on the phone with C.S., the analysis would still be the same. In other words, if T.M. rewrote the statement immediately after writing the first one as the trial justice and the appellate court erroneously asserted, People's Exhibit 11A and 11B would still not qualify as an excited utterance because T.M. already demonstrated deliberation and reflective thought. See State v. Davis "The rationale underlying the excited utterance exception is that "the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." Id, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006).

Incontrovertibly, the declarant's statements via text to C.S. were made after she already effectively concealed any signs of emotional distress, after she purportedly lied to keep the alleged assault a "secret", and after she had the courtesy to text C.S. asking him if he was awake. These circumstances reveal that the subsequent hearsay statements were made while her reflective abilities were fully intact before ever telling C.S. via text that his dad had touched her.

In State v. Warner the court held, "The key determination is whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. , No. 44722-3-II, at *1 (Wash. Ct. App. Feb. 3, 2015)." In the present case, before the declarant went upstairs to speak with C.S. on the phone, she rejected his calls and told him not to call because his mother was there. In fact, she testified that she did not answer his calls because she did not want the women to find out "what would have happened" which is clear indication that she was

exercising her reflective abilities and judgement. Indeed, every action and decision T.M. made leading to the hearsay statements were an attempt to keep the purported assault a "secret" because she "didn't want to ruin a friendship."

The court in People v. Poland held that "A startling event is one which "* * * `stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock." Id., (1961), 22 Ill.2d 175, 181, 174 N.E.2d 804, citing 6 Wigmore, Evidence sec. 1747 (3d ed. 1976).)

Moreover, before T.M. ever wrote the first statement she hid in her closet to avoid being overheard by her parents and was on the phone with C.S. for 30 minutes wherein, she repeated her story and answered a series of questions posed by C.S. in different ways to determine if she changed the story.

In People v. Sommerville, the circumstances were very similar to the present case, when the court rejected statements made by the victim to her fiancé as spontaneous exclamations. The Sommerville court concluded, "A review of the testimony in the case at bar leads us to the conclusion that the statements were not spontaneous declarations. [Paragraph omitted] It is our opinion that the detailed repetition of answers to the successive questions asked removed the spontaneity and immediacy required for spontaneous declarations. See In re C.K.M. (1985), 135 Ill. App.3d 145, 149 (complaint must be spontaneous and not made as a result of a series of questions and answers); People v. Davis (1984), 130 Ill. App.3d 41, 56 (repetitious statements made in response to questioning not spontaneous declarations); People v. Witte (1983), 115 Ill. App.3d 20, 28 (victim's complaint admissible as spontaneous declaration because it was not a

recital of an event "elicited from questions propounded to her")." Id., 193 Ill. App. 3d 161, 175 (Ill. App. Ct. 1990)

The court in People v. Taylor rejected the victim's statements to a fireman as an excited utterance noting, "[Quotation omitted] The fireman asked if he could help her. She said she wanted to use the phone. Even in answer to his second question as to whether anything was wrong she still indicated nothing that could be deemed an uncontrolled and spontaneous utterance of outraged feelings as required by Damen. It was only after she had gone to the telephone and the fireman had persisted in his inquiry as to whether he could help that she told him she had been raped. We find that under these circumstances her statement was not admissible within the meaning of the exception to the hearsay rule either as a spontaneous declaration or for its corroborative value. It is our opinion that had the questions not been asked the statement would not have been made and that, therefore, it was error to admit said statement in evidence. Id., 48 Ill. 2d 91, 97 (Ill. 1971)

In the case before this Court, T.M. testified that the women asked her what was wrong and she said, "nothing, I'm just tired." She claimed they asked her a couple of times, but she wasn't paying attention to them because she was texting C.S. Following the reasoning of the Taylor court everything to follow would not qualify as an excited utterance. Indeed, T.M. already demonstrated that her reflective abilities were fully intact and like in the Taylor case, if C.S. didn't ask her the questions or tell her to write the statement none of the statements would have been made.

Whether T.M. wrote the second statement immediately after writing the first one as the appellate court incorrectly asseverated, bears no relevance to the totality of the circumstance analysis since the circumstances leading to the making of the first statement cannot exclude the possibility that C.S.'s questions to T.M. were leading in nature or that he couched her or that T.M. wasn't perfecting a contrived narrative through repetition, premeditation, reflection, or design.

Aside from these facts, the written statement admitted at trial was a lengthy two-page narrative of past events that included details prior to and following the alleged events and it was signed by the declarant. In People v. Dixon the court noted, "[Internal quotation omitted] that the trial court went too far in admitting this detailed 4-page statement as an excited utterance. Care must be exercised in this area because in those cases where it is the victim's word against that of the defendant, the State, when a statement in complete detail is admitted as an excited utterance, gets the victim's version before the jury twice — once through the direct testimony of the victim and a second time through admission of the written statement [Internal quotes omitted]. Id. 37 Wn. App.867, 874 (Wash. Ct. App. 1984)

Moreover, T.M. wrote the first statement over a two-hour period which must have require the claimant to reflect and organize her thoughts. The Dixon court also concluded that "A declarant who is able to give a detailed and complete description of an event is giving a "narrative of a past, completed affair" which Beck v. Dye, supra at 9, did not permit. Beck also required the statement to 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 . . .". 200 Wn. at 9-10. [quotation omitted] Other than being described as "upset", there is nothing to indicate that her ability to reason, reflect, and recall pertinent details was in any way impeded. [quotation omitted] Under these circumstances, we have no basis for finding a guaranty of trustworthiness, which is the ultimate basic ingredient which must be present in order to qualify a statement as an excited utterance. Id. 37 Wn. App. 867, 874 (Wash. Ct. App. 1984)

Similarly, the court in Moon v. State noted, ("[internal quotes omitted] a statement that is a mere narrative of a past event does not qualify as an excited utterance, even if it is made immediately following the event. [citation omitted] The circumstances must show that it was the

event speaking through the person and not the person speaking about the event.") Id, 44 S.W.3d 589 (Tex. App. 2001)

In State v. Conigliaro the Supreme Court rejected the victim's written statement as an excited utterance noting, "[citation omitted] [b]ecause a writing is more suspect as a spontaneous exclamation than is an oral statement, the circumstances of the writing would have to include indicia of reliability even more persuasive than those required for an oral statement before we could conclude that the writing qualified as a spontaneous exclamation. [quotation omitted] [T]he very nature of the reflective process involved in preparing a narrative written statement suggests that its admission would be the exception, rather than the rule." Id., 356 N.J. Super. 54, 69 (App. Div. 2002)

"Other courts have held that lengthy, narrative statements are not admissible as excited utterances. For example, in West Valley City v. Hutto, 5 P.3d 1, 4 (Utah Ct. App. 2000), the Utah Court of Appeals distinguished between an excited utterance and the ongoing discourse of an excited individual, holding that it was error to allow a police officer to recount her entire 30 to 45 minute interview with the alleged domestic abuse victim, rather than limiting admission of the officer's testimony to particularized utterances of the victim. In reaching this conclusion, that court noted that the excited utterance exception is limited to "truly spontaneous outbursts." Id. at 4. In another domestic dispute case, State v. Hansen, 133 Idaho 323, 986 P.2d 346, 349 (Idaho Ct. App. 1999), the Idaho Court of Appeals found that the trial court had erred in admitting a victim's statements to a police officer which "were not an exclamation or burst of words in sudden reaction to a startling occurrence[,] but a lengthy recitation of the circumstances surrounding the fight [with her boyfriend] and a request to press charges." We concur with the reasoning of these courts." State v. Machado, 109 Haw. 445, 451-52 (Haw. 2006)

See State v. Hansen, 986 P.2d 346, 350 (Idaho Ct. App. 1999) (holding that reversible error occurred when prosecution allowed to admit written statement because the very fact that it is in writing suggests time and opportunity for reflective thought in its composition).

Here, the appellate court and the trial court rested its decision on the declarant's state of mind and beliefs and their perceived credibility of the declarant rather than a reasoned analysis to determine whether the totality of the circumstances supported a finding that the statements were produced spontaneously and without reflective thought.

The Court's determination was clearly erroneous as the standard for assessing whether a statement is firmly rooted in the excited utterance exception to hearsay as set forth by legal precedence, the court must consider the "totality of the circumstances" surrounding the statement and not base its decision in isolation upon the declarant's self-proclaimed "state of mind and beliefs." Furthermore, the court simply misapprehended the facts surrounding the claimant's hearsay statements which gave way for the court's erroneous decision.

Moreover, the declarant's uncorroborated timeline suggests that she did not text C.S. immediately when she arrived home after sitting quietly at the kitchen island and telling the women that she was fine and just tired. Rather, the unrebutted testimony given by the three women indicate that T.M. arrived home shortly after 1:30 a.m. Whereas, T.M., C.S., and O.J.C. all testified that she first texted C.S. at 2:36 a.m. Though time is not dispositive and only one factor to consider while considering the totality of the circumstance, here the declarant showed no signs of emotional distress and purportedly lied to the women approximately one hour earlier. Under these circumstances there's no guarantee that during this period T.M. didn't contemplate what she was going to say to C.S. and whether the statements were fabricated. Indeed, the declarant changed

her story every time she retold it. In fact, the prosecutor knew this was a significant hurdle to overcome as evidenced by her remarks during rebuttal closing arguments:

> Sometimes, you know, our wife will tell us to go to the store and get bread and milk and we thought she said eggs and milk. You'd swear that's what they said. Maybe somebody made a mistake. You know, it happens. Unfortunately for [T.M.] every time she has to keep retelling the story over and over again her words are getting misconstrued. [quotation omitted]
>
> When [OJC] took down my name in the report he got it wrong. Sometimes people make mistakes, and sometimes in the retelling of a story you'll hear it and you'll think you understand what's someone is saying, and then you realize, oops, I didn't -- I got that wrong.

As previously noted, there were two trials in petitioner's case. Here the prosecutors were the same across both trials and surely knew that T.M. was not misunderstood by O.J.C. In fact, the declarant admitted at the first trial that she indeed told O.J.C. in the counselor's office that she awoke with petitioner's finger inside her vagina. Further, she admitted at both trials that she told the VSI interviewer that petitioner only touched the outside of her vagina. However, during the second trial T.M. denied telling O.J.C. that she awoke with a finger inside her vagina. Further, O.J.C. testified during the first trial that the declarant indeed told him that she awoke with petitioner's finger inside her vagina. However, during the second trial he claimed that he made a mistake in his report. Moreover, O.J.C. asserted at both trials that he called T.M. nine months after the initial outcry to "clarify" her story because she had given two "different answers." When O.J.C. spoke with T.M. in February 2015, she gave "a different version of events"; she now claimed that the petitioner's "finger went partially into her vagina and remained there for a short period." Further, C.S. testified that T.M. never told him anything about a finger inside, outside, or partially in her vagina. Rather, T.M. told him that his father tried to put his hands in her pants and asked her to "turn her over to touch her boobs."

Of course, these facts are not germane to the excited utterance analysis, however they demonstrate T.M.'s ability to contrive multiple contradictory narratives. It also demonstrates that the appellate court misapprehended the facts when it declared that "The essential details of T.M.'s account of the incident remained consistent across both trials. Id., 2020 IL App (3d) 190051, 11 (Ill. App. Ct. 2020).

In the present case, the totality of the circumstances do not support a finding that any of the statements T.M. made were spontaneous and unreflecting. Here we have multiple intervening events that show that her decisions, words, and behaviors illustrate that she was indeed in control of her reflective faculties which is the antithesis of the excited utterance theory. "The basis for the "excited utterance" exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy, and that cross-examination would be superfluous. See, e.g., 6 Wigmore, supra, §§ 1745- 1764; 4 J. Weinstein M. Berger, Weinstein's Evidence ¶ 803(2)[01] (1988); Advisory Committee's Note on Fed. Rule Evid. 803(2), 28 U.S.C. App., p. 778. Idaho v. Wright, 497 U.S. 805, 820 (1990)

Prior Consistent Statements

Illinois Rules of Evidence 613(c) (which is substantially similar the Federal Rule of Evidence 801(d)(1)(B)) states, "Evidence of Prior Consistent Statement of Witness. Except for a hearsay statement otherwise admissible under evidence rules, a prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement

is offered to rebut an express or implied charge of fabrication [quotation omitted]" Ill. R. Evid. 613(c), eff. September 17, 2019.

The court in People v. Emerson explained that "Our cases have consistently held that evidence of statements made prior to trial for the purpose of corroborating testimony at trial is inadmissible. [citation omitted]" Id., 97 Ill. 2d 487, 501 (Ill. 1983)

The court in People v. Watt addressed prior consistent statement admitted at trial noting, "The general rule is that a witness cannot be corroborated on direct examination by admission of a prior statement that is consistent with his or her trial testimony. People v. Ruback, 2013 IL App (3d) 110256, ¶ 26, 370 Ill. Dec. 547, 988 N.E.2d 745. Such a statement is inadmissible hearsay and cannot be used to bolster a witness's credibility. Ruback, 2013 IL App (3d) 110256, ¶ 26, 370 Ill. Dec. 547, 988 N.E.2d 745. [Citation omitted] Prior consistent statements are admitted solely for rehabilitative purposes, not as substantive evidence. Ruback,2013 IL App (3d) 110256, ¶ 34, 370 Ill. Dec. 547, 988 N.E.2d 745. Id., 1 N.E.3d 1145, 1157 (Ill. App. Ct. 2013)

Prior consistent statements are generally inadmissible as hearsay. Ill. R. Evid. 613(c) (eff. Oct. 15, 2015). Despite the general rule, prior consistent statements are admissible to rebut a suggestion that a witness recently fabricated testimony or has a motive to testify falsely and the prior statement was made before the motive arose. People v. Henderson, 142 Ill. 2d 258, 310 (1990). However, prior consistent statements are not substantive evidence and are admissible solely for rehabilitative purposes. People v. Ruback, 2013 IL App (3d) 110256, ¶ 34. As such, prior consistent statements may not be used on direct examination to enhance the credibility of a witness's testimony. People v. Dupree, 2014 IL App (1st) 111872, ¶ 42.

It is undisputable that the State repeated T.M.'s inconsistent and heavily impeached testimony. Indeed, her written statement was admitted as substantive evidence and T.M. read it in

its entirety to the jury during her direct examination. People v. Denis, 2018 IL App (1st) 151892, ¶¶ 79-80 (holding that the testimony of the victim's mother was error and could not have been used to rebut recent fabrication because it was admitted during direct examination). Moreover, it was admitted and published before T.M. was impeached by her inconsistent and ever-changing allegation.

Petitioner's case is controlled to People v. Park, 245 Ill. App. 3d 994 (2nd Dist. 1993) and People v. Gray, 209 Ill. App 3d 407 (1st Dist. 1991). In Park, the appellate court reversed the defendant's conviction for criminal sexual assault against his daughter based upon numerous plain errors committed by both trial counsel and the trial judge. Id. at 1001. Among the errors the Park Court found to be reversible error occurred when the victim's story was repeated by the State's witness and when the State introduced a letter written by the accuser, which detailed the sexual assault. The Park court held that when the only evidence against a defendant was the accusation of the victim, "a danger" existed that the verdict was "the result of hearing the victim's version more than once." Id. at 1003. The Court noted that in cases where the evidence was closely balanced it was "essential to avoid or prevent the introduction of any evidence that even appeared to corroborate [the victim's] story." Id. at 1003.

The Park Court also held that the admission of the letter written by the accuser as substantive evidence was reversible error because it was "identified, offered, admitted, and published to the jury during direct examination of the State witnesses." Park, 245 Ill. App. 3d at 1003. Indeed, Park held that the "letter was self-serving, cumulative" and "inadmissible as a prior consistent statement" because it improperly bolstered the victim's story by allowing the jury to hear it multiple times. Id. at 1004-05. Moreover, the Park Court held that the error was "heightened" when the trial court allowed the 14-year-old complaining witness to read the letter

into the record. Id. at 1005. In so holding, the Park Court found that "the prejudicial effect of the letter itself outweighed any need for its admission into evidence, and even more particularly any need for its publication to the jury." Id. at 1005.

In People v. Gray, the appellate court concluded that "It is plain error to bolster the complainant's by repeating her story which has a single source, the complainant. (See People v. Russell (1988),177 Ill. App.3d 40, 46, 531 N.E.2d 1099; People v. Brown (1988), 170 Ill. App.3d 273, 283, 524 N.E.2d 742; People v. Smith (1985), 139 Ill. App.3d 21, 32-34, 486 N.E.2d 1347; People v. Sanders (1978), 59 Ill. App.3d 650, 654, 375 N.E.2d 921.) Improperly bolstering a witness' credibility "has been deemed plain error because corroboration by repetition `preys on the human failing of placing belief in that which is most often repeated .'" (People v. Smith (1985), 139 Ill. App.3d 21, 32, 486 N.E.2d 1347, quoting People v. Hudson (1980), 86 Ill. App.3d 335, 340, 408 N.E.2d 325.), Id., 209 Ill. App. 3d 407, 418 (Ill. App. Ct. 1991)

In the case at bar, there were no eyewitnesses, no forensic evidence, and like the situations in Park and Gray, the State's evidence against Mr. Snow had a single source, which consisted solely of the allegations made by T.M. Moreover, the State used the hearsays as prior consistent statements to improperly bolster her uncorroborated and heavily impeached testimony. Furthermore, the State improperly repeated her testimony during her direct examination, and it had T.M. read her purported letter to the jury. Even more egregious, the State reread People's Exhibit 11A and 11B in its entirety to the jury during rebuttal closing arguments and argued that it was the truth. All this evidence was presented by the State solely to prey upon the jury's weakness to believe the accuser's testimony because it was "most often repeated." Gray, 209 Ill. App. 3d at 418. Here, the error by the State was even more egregious than the plain error found by Park and Gray.

The State's motivation to repeat and bolster T.M.'s testimony by repetition was clear from the record – her testimony was repeatedly impeached based upon her ever-changing story, it was uncorroborated and self-serving, and wholly inconsistent with the testimony of the other witnesses including the State's own witnesses. For example, her allegation in the written statement read by C.S. and S.S. and the allegation she told C.S. over the phone was that Mr. Snow purportedly rubbed her back and buttocks over her pants. O.J.C. wrote in his initial report that T.M. told him that she was awoken with Mr. Snow's finger inside her vagina without mentioning the existence of a letter or an image of a letter that he saw on her phone. However, a few days later at the VSI, T.M. changed her allegation and now claimed that petitioner's hand was only touched the outside of her vagina. The change was so significant that O.J.C. needed to speak with T.M. to "clarify" her new allegation because it was inconsistent with the initial allegation she made at the counselor's office. However, O.J.C. testified that instead of clarification, T.M. provided a new account about what allegedly transpired, which was different than her initial allegation and the allegation that she made at the VSI. T.M.'s ever-changing allegation continued in sworn documents she filed in her civil case. Now, T.M. claimed that she was digitally penetrated in her anus while sleeping on a couch in the Snow residence. Furthermore, her claim that the allegation in the civil case was a mistake and was fixed with a corrected filing was patently false because the refiled case contains the same allegation found in her first complaint -- that she was digitally penetrated in her anus. Indeed, every time that T.M. spoke about the alleged assault she significantly changed her story. In fact, the allegations are so inconsistent that they are irreconcilable.

Aside from the allegations that are irreconcilably different, T.M.'s timeframe on when the alleged assault occurred was wholly inconsistent with the testimony of the other witnesses including her mother's. By everyone's account, the women had finished the food preparation

sometime between 1:00 a.m. and 1:15 a.m. and that the women left carrying the food to E.M.'s basement refrigerator no later than 1:30 a.m. However, T.M.'s testimony was that she fell asleep at 1:15 a.m. and during the VSI she told the interviewer that she fell asleep at 1:30 a.m. which would have been contemporaneous with the women finishing up the food preparation. Adding to the inconsistency, was T.M.'s claim that after the supposed assault, she was sitting near her kitchen table, where S.S., M.D., and E.M. were sitting, texting Curtis at 2:36 a.m. However, Sheryl, Michelle, and even E.M. testified that Sheryl and Michelle had left E.M.'s home well before 2:00 a.m.

T.M. and E.M. also gave testimony at trial that was fundamentally different than their initial statements to O.J.C. E.M. initially told O.J.C. that she went to her house by herself to drop off the extra food and that on her way back to get T.M. who had been sleeping, she saw T.M. walking home while crying. Likewise, T.M. initially told O.J.C. that she had walked home from the Snow house while crying. Crucially, O.J.C. never wrote in his report that S.S. and M.D. were at E.M.'s house when T.M. came home and he didn't mention that T.M. had an image of the written statement on her cell phone while in the counselor's office. All this evidence was wholly inconsistent and irreconcilable with the testimony of the other State's witnesses. Thus, allowing the State to bolster T.M.'s testimony with her prior consistent statements and by repeating her allegation was highly prejudicial and reversible error.

It is unquestionable that the evidence against Mr. Snow was closely balanced consisting solely of the testimony of the incredible and inconsistent accuser. As such, the repetition of T.M.'s testimony and especially the introduction of the rewritten statement was highly prejudicial and outweighed any need for its admission. Moreover, the prejudicial effect was heightened when the State published People's Exhibit 11A and 11B by having T.M. read the letter to the jury. Park. 245

Ill. App. 3d at 1005. In fact, even O.J.C. testified that he could not authenticate People's Exhibit 11A and 11B as the image of the letter he had received from E.M. via text.

Mr. Snow's case is reversible error because the State repeated T.M.'s testimony and when it used hearsay as prior consistent statements to improperly bolster T.M.'s testimony simply by repeating it over and over to the jury. Indeed, the error was so prevalent and prejudicial that it infected the entire trial to the extent that even if the hearsays admitted by the State were excited utterances, that fact would be immaterial because they were used by the State to bolster the T.M.'s uncorroborated testimony. However, the hearsays admitted by the State were unquestionably not excited utterance because T.M. demonstrated that the content of the texts to C.S., the two-hour phone conversation, the creation of the first written statement, and the creation of the second written statement were not spontaneous outburst. Indeed, all the hearsay statements admitted at trial were made after deliberation and reflective thought when she composed her demeanor beyond detection, lied to the women, and had the courtesy to ask C.S. if he was awake before any of the statements alleging that petitioner assaulted her were made. Moreover, there is no legal precedence wherein multiple hearsay statement given to the same person at different times under difference circumstance qualified as excited utterances. Even if this Court determined that the texts T.M. sent to C.S. stating that his dad had touched her qualifies as an excited utterance, reason suggests this claim alone would not be enough for the trier of fact to find petitioner guilty beyond a reasonable doubt because this case is closely balanced where there is no corroborating evidence, and the claimant changed her story every time she retold it.

The abundance of caselaw presented here illustrates that the Appellate Court's ruling stretched the boundaries of the common law principles of the excited utterance exception to hearsay when it affirmed the trial court's conviction.

Moreover, based upon both Park and Gray admitting prior consistent statements to bolster an accuser is plain error when the evidence against the accused is based solely upon the uncorroborated allegation of the accuser. Thus, even under a plain error analysis, which is not required here, the State's introduction of prior consistent statements would be reversible error. As a result, William Snow was wrongly convicted.

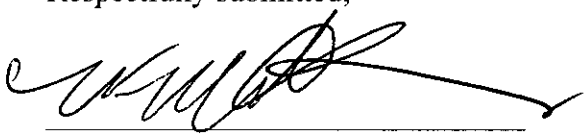
This Court should grant Mr. Snow's petition for writ of certiorari as his case merits a new trial and fair application of the Illinois rules of Evidence and the Federal Rules of Evidence to preserve the fairness, integrity, and public reputation of judicial proceedings and dissuade any future prosecutors from using the excited utterance exception as a back door attempt to introduce inadmissible hearsay.

Conclusion

For the foregoing reasons, Mr. Snow respectfully requests that this Court grant a writ of certiorari to review the judgment of the Illinois Court of Appeals.

Dated this 16th day of March 2022.

Respectfully submitted,



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