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COUNTY OF STANISLAUS

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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF STANISLAUS

10 THE PEOPLE OF THE STATE OF )  
11 CALIFORNIA, )  
12 Plaintiff, )  
13 vs. )  
14 GEORGIA DEFILIPPO, )  
15 Defendant. )

CASE NO.: 1490969  
MOTION TO STRIKE HEARSAY  
TESTIMONY OF INVESTIGATOR BUNCH  
Date:  
Time:  
Dept.:

16 Defendant Georgia Defilippo hereby moves through counsel to strike the testimony of  
17 investigator Bunch at preliminary hearing regarding the hearsay declaration of Korey Kauffman  
18 to Kimberly Stout on March 28<sup>th</sup>, 2012.

19 STATEMENT OF FACTS

20 On March 11<sup>th</sup>, 2014, Detective Evers and Investigator Bunch interviewed Kimberly  
21 Stout, a lifelong friend of Korey Kauffman. According to the Proposition 115 testimony of  
22 investigator Bunch at preliminary hearing, during the interview, Kimberly Stout reported to the  
23 investigators that on March 28<sup>th</sup>, 2012, she was walking in the area of South Johnson street and  
24 saw a black BMW. Sometime after the BMW left the area, Ms. Stout made contact with  
25 Kauffman. (PX 4184: 17-24)

1 After this description by witness Bunch of Kimberly's statement to him, the prosecutor  
2 asked witness Bunch what Kimberly Stout said that Kauffman had told her on March 28<sup>th</sup>, 2012.  
3 (Id. at 25-26) This question called for multiple levels of hearsay. The defense made a timely  
4 objection. (Id. at 27) The prosecutor's response was that the statement of Kauffman to Kimberly  
5 Stout was an excited utterance. (PX 4185:1-4) The court requested that the prosecutor lay a  
6 foundation for the proposition that Kauffman's statement to Kimberly Stout was an excited  
7 utterance. The following is the prosecutor's attempt to do so:

8 MS. FERREIRA: Q. Did she describe what Korey's demeanor was when she  
9 talked to him?

10 A. **He wasn't upset**, but –

11 THE COURT: The answer to the question is either yes or no.

12 THE WITNESS: Yes.

13 MS. FERREIRA: Q. What did she tell you about his demeanor?

14 A. **He wasn't upset**, but he took it like it was a threat that was made to him.

15 ...

16 MS. FERREIRA: Q. What did Ms. Stout tell you was the nature of the  
17 conversation at that point? What did Mr. Kauffman say to her?

18 ...

19 THE COURT: ... **You still haven't laid the foundation for excited**  
20 **utterance** or spontaneous declaration, however you want to call it.

21 MS. FERREIRA: Okay.

22 Q. Was the contact between Kimberly Stout and Mr. Kauffman immediately after the  
23 car left?

24 ...

25 THE WITNESS: Yes, ma'am.

26 THE COURT: Lay a foundation as to how he knows that.

27 ...

1 MS. FERREIRA: Q. Did Ms. Stout tell you that?

2 A. Yes, ma'am.

3 Q. Okay. So during this interview with Ms. Stout, did she tell you that she made  
4 contact with Korey Kauffman immediately after the black car left?

5 A. Yes, ma'am.

6 Q. And did she also tell you that Mr. Kauffman was upset about a threat that was  
7 made to him?

8 ...

9 MS. FERREIRA: Q. Did she tell you what was said to Mr. Kauffman?

10 A. Yes, ma'am.

11 Q. Did she tell you whether or not that involved a threat?

12 ...

13 THE COURT: **You still haven't laid the foundation, ma'am, for an excited**  
14 **utterance.**

15 ...

16 MS. FERREIRA: Q. Did Ms. Stout tell you whether or not Mr. Kauffman was  
17 describing the incident that just occurred with the black car?

18 ...

19 THE WITNESS: Yes, ma'am.

20 MS. FERREIRA: Q. And did Mr. – did Ms. Stout tell you whether or not Korey  
21 was telling her this while he was going through that incident in his head and talking to her about  
22 his perception of that incident?

23 A. Yes, ma'am.

24 Q. And did that incident occur directly after the time that car left?

25 A. Yes, ma'am.

26 Q. What did Mr. Kauffman say to Ms. Stout?

27 ...

1 ...  
2 THE WITNESS: Said the guys from Pop-N-Cork threatened to kill him.

3 (PX 4185:5 - 4188:8, **emphasis added**)

4 Subsequent hearsay objections by the defense to the admission of the alleged threat and  
5 its contents were overruled, subject to a motion to strike. (PX 4200:4-6)

6 DISCUSSION

7 1. **The Statement of Korey Kauffman to Kimberly Stout on March 28, 2012 Was Not**  
8 **an Excited Utterance**

9 California Evidence Code § 1240 allows an out of court statement to come into evidence  
10 as an excited utterance only where "...the statement: (a) Purports to narrate, describe, or explain  
11 an act, condition, or event perceived by the declarant; **and** (b) Was made spontaneously while the  
12 declarant was **under the stress of excitement** caused by such perception." (**Emphasis added**)

13 The test of whether a statement comes in under the excited utterance exception turns on "whether  
14 or not the statement is made under such circumstances of physical shock or nervous excitement  
15 as preclude the likelihood of reflection and fabrication." People v. Gonzales, 269 Cal. App. 2d  
16 586, 590, 75 Cal. Rptr. 267, 270 (Ct. App. 1969)

17 Here, the evidence demonstrated clearly that the declarant, Kauffman, was not under the  
18 requisite 'stress of excitement'. Witness Bunch repeated twice that the declarant was not upset at  
19 the time. (PX 4185:7 and 13). We know that the declarant was not nervous or in shock. In  
20 Kimberly Stout's March 11<sup>th</sup>, 2014 interview with investigator Bunch and Detective Evers, Stout  
21 told them in no uncertain terms that Kauffman was not worried about his interaction with the  
22 BMW and its occupants. He just took what was said as an 'idle threat from somebody.'"

23 (Transcript of Interview with Kimberly Stout 3/11/14, marked as Exhibit JT88 for identification  
24 on January 5<sup>th</sup>, 2016, heretofore "JT88", 16:1-3) Additionally, witness Bunch spoke with a  
25 neighbor of Kauffman, Mr. Paden, who told Bunch that he had observed the black BMW on  
26 March 28<sup>th</sup>, 2012 stop by Kauffman and one of it's occupants say "your ass is grass", to which  
27 Kauffman responded by raising his middle finger. (PX 4216:11) Afterwards, according to Mr.

1 Paden, Kauffman simply returned to working on his vehicle for forty-five minutes. (PX 4299:6-  
2 11) No evidence came from any witness which would indicate that the declarant was under  
3 stress or ever upset by the alleged "idle threat" made by the BMW occupant.

4 Factors the court may examine which indicate whether a declarant was under stress or  
5 shock causing him to make an excited utterance "...include the passage of time between the  
6 startling event and the statement, whether the declarant blurted out the statement or made it in  
7 response to questioning, the declarant's emotional state and physical condition at the time of  
8 making the statement, and whether the content of the statement suggested an opportunity for  
9 reflection and fabrication." People v. Merriman, 60 Cal. 4th 1, 64, 332 P.3d 1187, 1237 (2014)  
10 As discussed below, each of these factors in the present case weigh against finding that the  
11 declaration by Kauffman to Ms. Stout was an excited utterance.

12 a) **Passage of Time**

13 As to the passage of time between the event (the interaction with the BMW and  
14 Kauffman) and the statement (by Kauffman to Kimberly Stout), it is important to note that the  
15 neighbor Mr. Paden, who was only ten to fifteen feet from the declarant at the time of the alleged  
16 threat, told officers that he observed Kauffman interact with the BMW and then return  
17 immediately to work on his vehicle for forty-five (45) minutes afterwards. (PX 4299:6-11) Mr.  
18 Paden never saw Ms. Stout on South Johnson after the incident with Kauffman and the BMW.  
19 (PX 4220:6 - 17)

20 This suggests that Ms. Stout did not meet up with Kauffman until well after the alleged  
21 interaction. In fact, during her interview with detective Bunch, Ms. Stout admitted that she was  
22 not there when the threat was allegedly made, that she was "still walking up that way" when it  
23 happened. (JT88, 16:17) Ms. Stout further admitted to the officers that it was "about three  
24 minutes" passed between the time that she saw the black BMW drive past her and when she  
25 talked with Kauffman. (JT88, 27:11)

1 **b) Response to Questioning**

2 In regards to the declarant blurting out the statement as opposed to responding to  
3 questioning, the court has been shown that the statement was made as response to questioning.  
4 In her interview with detective Bunch, Ms. Stout admitted that Kauffman made the statement as  
5 an answer to her inquiry about what was wrong, then Kauffman "just started telling [her]. Then  
6 just starting going off about D and them." (JT88, 14:27 -15:3)

7 **c) Declarant's Emotional State and Physical Condition**

8 The declarant's emotional state and physical condition at the time of the statement are  
9 addressed above. In response to the direct question by detective Bunch: "Was he scared? Was  
10 he worried about it?" Kimberly Stout says: "No. He wasn't worried about it" (JT88, 3/11/2014,  
11 15:26 - 16:2) Furthermore, Kauffman's physical demeanor immediately after the incident (raising  
12 his middle finger and returning to work) demonstrates that he was not stressed or excited.

13 **d) Content of the Statement**

14 Finally, this court may look at the content of the statement itself to determine whether it  
15 suggests an opportunity for reflection and fabrication." People v. Merriman, supra, at 64. What  
16 Ms. Stout said that Kauffman told her varies greatly from what objective witness Mr. Paden,  
17 Kauffman's neighbor, actually observed. Mr. Paden had no motive to fabricate his statement to  
18 the police. According to detective Bunch Mr. Paden wasn't scared or intimidated by anyone and  
19 wanted to make sure that his statement was accurate. Mr. Paden heard someone say, simply,  
20 "your ass is grass".

21 Conversely, Ms. Stout alleged that Kauffman told her of a detailed, conditional threat to  
22 his life based as a consequence for specific thefts. Thus, the content of his statement to her  
23 conveys a great amount of information connecting Kauffman to the theft and establishing a  
24 possible motive for his murder, etc.. Especially in the context of what Paden said actually  
25 happened, Kaufman's statement to Stout suggests that he had ample opportunity to reflect on the  
26 interaction and fabricate the statement for his own benefit.

1 2. **THE TESTIMONY OF INVESTIGATOR BUNCH REGARDING THE**  
2 **STATEMENT OF KOREY KAUFFMAN TO KIMBERLY STOUT ON MARCH**  
3 **28<sup>TH</sup>, 2012 IS HEARSAY AND MUST BE STRICKEN**

4 While, pursuant to Proposition 115, investigator Bunch may be permitted to testify as to  
5 the out-of-court statements of Kimberly Stout which were made to investigator Bunch during her  
6 March 11<sup>th</sup>, 2014 interview, the investigator's testimony regarding out-of-court statements by  
7 Corey Kauffman to Kimberly Stout represents multiple levels of hearsay in violation of Evidence  
8 Code §1201 which cannot be admitted into evidence absent a separate, valid exception. Further  
9 more, the alleged statement by Kauffman to Stout in turn contains the alleged statements of the  
10 occupants of the BMW which adds even another level of hearsay. The Supreme Court of  
11 California has acknowledged that the "the probative value of hearsay evidence decreases with  
12 each level of hearsay" People v. Zapien (1993) 4 Cal.4th 929,956. Nonetheless, the statement of  
13 Corey Kauffman to Kimberly Stout is, by itself, a second level of hearsay to which Proposition  
14 115 does not provide an exception.

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1 The only possible exception to the hearsay rule allowing for the admission of investigator  
2 Bunch's testimony regarding Kauffman's statement is as an excited or spontaneous utterance  
3 under Evidence Code §1240. At preliminary hearing on January 4<sup>th</sup>, 2016, the prosecutor lead  
4 witness Bunch into testifying that Kauffman made the statement "while he was going through the  
5 incident in his head." (PX 4187:24-25). Even if true, this alone does not make the statement a  
6 spontaneous utterance. Rather, because significant time had lapsed between the incident being  
7 described and the description/declaration, because Kauffman was not upset or excited by the  
8 event, and because the content of the declaration is suspect, the declaration itself is untrustworthy  
9 hearsay that should not be admitted as an excited utterance or under any other exception. The  
10 testimony must, therefore, be stricken.

11  
12 Dated: July 15, 2016

Respectfully submitted,

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16 JESSE J. GARCIA  
17 Attorney for GEORGIA DEFILIPPO  
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1 **PROOF OF SERVICE**

2 I declare under penalty of perjury that:

3 I am a citizen of the United States and am employed in the County of Stanislaus. I am  
4 over the age of eighteen years and not a party to the within action. My business address is as  
5 follows: 811 15<sup>th</sup> Street, Modesto, CA 95354.

6 On the date set forth below, I caused the attached **MOTION TO STRIKE HEARSAY**  
7 **TESTIMONY OF INVESTIGATOR BUNCH** to be served on the parties to this action as  
8 follows:

9  BY MAIL-

10 I placed a true copy thereof, enclosed in a sealed envelope with postage thereon fully  
11 prepaid, in the United States mail at Modesto, California, addressed to the parties as set  
12 forth on the attached service list. C.C.P. §§1013 (a), 2015.5.

13  BY FEDERAL EXPRESS-

14 I retained Federal Express to personally serve a true copy thereof on \_\_\_\_\_ on the parties  
15 as set forth on the attached service list. C.C.P. §§1013 (c), 2015.5.

16  BY FACSIMILE TRANSMISSION-EMAIL

17 I am readily familiar with this law firm's business practices for collection and processing  
18 of documents by way of facsimile and email. I telefaxed/scanned a true copy thereof at  
19 said facsimile number (s)/email addresses as set forth on the attached service list. C.C.P.  
20 §§1013 (e), 2015.5 and C.R.C. §2008.

21  BY PERSONAL SERVICE-

22 I personally served a true copy thereof on the parties as set forth on the attached service  
23 list. C.C.P. §§1011, 2015.5.

24 Executed on July 15, 2016 at Modesto, California.

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1 **Re: People of the State of California v. Georgia DeFilippo**, STANISLAUS County Superior  
Court Case No.: 1490969

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