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COUNTY OF STANISLAUS

BY Ana Valencia

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

FRANK CLIFFORD CARSON,
BALJIT ATWAL,
DALJIT ATWAL,
WALTER WESTLEY WELLS,
GEORGIA DEFILIPPO,
CHRISTINA DEFILIPPO,
EDUARDO QUINTANAR AND
SCOTT MCFARLANE,

Defendants.

CASE NO.: 1490969

OPPOSITION TO DEFENDANT'S
MOTION TO STRIKE TESTIMONY
OF INV. BUNCH REGARDING
STATEMENTS MADE BY
KIMBERLY STOUT AS
INADMISSIBLE HEARSAY

Date: TBD
Time: 9:30 a.m.
Dept. 26

The Honorable Barbara Zúñiga

Comes now the People of the State of California, by and through their attorney, BIRGIT FLADAGER, Stanislaus County District Attorney, MARLISA A. FERREIRA, Chief Deputy District Attorney, and respectfully submits the following opposition in response to Defendant Georgia DeFilippo's motion to strike Investigator Kirk Bunch's testimony regarding Kimberly Stout as inadmissible hearsay.

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1 **STATEMENT OF RELEVANT FACTS**

2 On January 4, 2016, Investigator Kirk Bunch testified before this court in regards to
3 statements made to him by Kimberly Stout in the course of his investigation. Investigator Bunch
4 contacted Ms. Stout on March 11, 2014. (PXT 4181: 1-7.) Ms. Stout stated that she has been friends
5 with Kevin Pickett for many years and has known Korey Kauffman his entire life (PXT 4181:19-
6 22). Ms. Stout believes that Korey Kauffman went missing on March 30, 2012 (PXT 4182:10-21).
7 Ms. Stout was aware of multiple thefts occurring at 838 Ninth Street in Turlock (PXT 4183:4-7).

8 On March 28, 2012, Ms. Stout was walking on South Linwood and Johnson Road (PXT
9 4183:26- 4183:1-5). A black BMW passed by her as she walked down the street (PXT 4257:15-
10 16). She saw the black BMW stop in front of Korey Kauffman's house (PXT 4184: 17-19). Ms.
11 Stout knew Robert Woody (PXT 4190:28) and identified Robert Woody as the front passenger in
12 the BMW (PXT 4184: 11-12). Ms. Stout is a customer of the Pop-N-Cork and recognized the BMW
13 as belonging to Daljit Atwal (PXT 4204: 16-19, 25-28; 4290:2). She had seen the BMW at the store
14 (PXT 4205:1-3). Ms. Stout told Investigator Bunch that she was "a hundred percent positive" that
15 the driver of BMW was a relative of Daljit Atwal (PXT 4204:16-4205:1-20).

16 After the BMW drove away, Ms. Stout immediately made contact with Korey Kauffman in
17 the road area (PXT 4184:21-24; 4186:11-16, 20-23). Ms. Stout stated that Korey Kauffman was not
18 upset, but he interpreted what was said to him as a threat (PXT 4185: 11-14). Korey Kauffman told
19 Ms. Stout what had happened directly after the car left, while he was going through the incident in
20 his head and talking to her about his perception of the incident (PXT 4187:23- 4188:1).

21 Korey Kauffman told Ms. Stout that the guys from Pop-N-Cork threatened to kill him (PXT
22 4188:7-8). Mr. Kauffman also stated that they had threatened to kill him in association with thefts
23 at 838 Ninth Street, related to antiques and cargo containers (PXT 4200:15-17). Mr. Kauffman
24 admitted to Ms. Stout that he had taken two rear-ends located on the property (PXT 4270: 12-15).
25 When asked why she had not come forward with this information, Ms. Stout stated, "I have to live
26 here." (PXT 4288:1-3).

27 At the time that the BMW pulled up to Korey Kauffman, Ms. Stout observed Korey
28 Kauffman's neighbor, John Paden, standing outside (PXT 4211:17- 4212:1-2). She did not speak

1 with the neighbor (PXT 4219:7-8). John Paden corroborates Ms. Stout's statements. Mr. Paden
2 witnessed a black BMW stop briefly in front of the house while one of the male occupants yelled
3 out, "Your ass is grass." (PXT 4214:23- 4215:1-26). Mr. Paden observed that Korey Kauffman was
4 in close proximity to the vehicle when it stopped and when Mr. Kauffman flipped the bird to the
5 vehicle (PXT 4216: 3-11).

6 **LAW AND ARGUMENT**

7 **I.**

8 **FOUNDATION WAS ESTABLISHED**

9 The defense cites a lack of foundation, but the Court ruled that foundation had been laid to
10 admit the testimony as a spontaneous statement, subject to a motion to strike:

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

12 MR. FORKNER: Judge, could I make an offer of proof on the excited utterance very
13 briefly?

14 THE COURT: No. Let her do her research. Let her do -- she is doing some research there.
15 Let her do that, sir.

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

18 MS. CARLTON-MAGAÑA: Objection. Calls for hearsay.

19 THE COURT: Overruled.

20 THE WITNESS: Yes, ma'am.

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

24 A. Yes, ma'am.

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

26 A. Yes, ma'am.

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

28 MS. CARLTON-MAGAÑA: Objection.

1 MR. RIEN: Lack of foundation.

2 THE COURT: Overruled.

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

4 (PXT 4187:10- 4188:1-8).

5 Defense counsel again objected on grounds of foundation for an excited utterance, but the
6 Court again overruled their objections:

7 MR. MARTINEZ: Objection, Your Honor. I'm going to object, Your Honor, as no
8 foundation, because there was conversations specifically with Ms. Stout where Mr. Kauffman was
9 not worried about it and he just took it as an idle threat from somebody. It wasn't an excited
10 utterance.

11 THE COURT: Just a reminder, folks, if I've already ruled, you don't get to argue with me
12 because you don't like the ruling. Objection is overruled.

13 MS. CARLTON-MAGAÑA: Objection. No foundation as to guys from Pop-N-Cork and
14 Korey Kauffman.

15 THE COURT: Overruled. (PXT 4188: 9-19).

16 II.

17 SPONTANEOUS STATEMENT

18 Evidence Code §1240 states that evidence of a statement is not made inadmissible by the
19 hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event
20 perceived by the declarant; and (b) Was made spontaneously while the declarant was under the
21 stress of excitement caused by such perception.

22 **The Event was Described by Mr. Kauffman and Explained the Perceived Threat**

23 Korey Kauffman was standing in his front yard when a car drove up to him, threatened to
24 kill him, then drove away (PXT 4286:12-16). He was able to hear the threat, because he reacted to
25 it by raising his middle finger in response (PXT 4297:17). John Paden's statements corroborate the
26 events perceived by Mr. Kauffman (PXT 4214:23-4215:1-26). These events are also corroborated
27 by Robert Woody, who admitted that he was in Daljit Atwal's BMW and confronted Korey
28 Kauffman on South Johnson Street, threatening that his "ass was grass" (PXT 4527:26- 4528:1-3).

1 **Mr. Kauffman Made the Statement While Under Excitement of the Event**

2 The test for a spontaneous declaration is not how long a period has elapsed since the event
3 occurred but whether it is reasonable to suppose the excitement of the event still dominates the
4 declarant's reflective powers so the statement is likely to be the unreflecting and sincere expression
5 of one's actual impressions and belief. (*People v. Riva* (2003) 112 Cal.App.4th 981, 996 5
6 Cal.Rptr.3d 649, 661 review denied, denial of habeas corpus affirmed.)

7 The defense argues that Ms. Stout was not present when the threat was made and was
8 "walking that way" when the threat occurred, citing an interview transcript admitted into evidence
9 as JT88 (Defense Motion, P 5, lines 20-23). However, this does not negate the statements made in
10 court at the preliminary hearing. Ms. Stout was walking towards Mr. Kauffman's street when she
11 observed the black BMW pass her and stop briefly in front of Mr. Kauffman's house before driving
12 away. (PXT 4183:26-4183:1-5; 4184:17-19; 4257:15-16). Mr. Paden's statements corroborate these
13 events (PXT 4214:23-4216:3-11). Ms. Stout continued walking towards Mr. Kauffman and met up
14 with him in the road (PXT 4282:22-4285:1-9). Ms. Stout contacted Mr. Kauffman immediately
15 after the car left. (PXT 4186: 11-16) Mr. Kauffman told her that the guys from the Pop-N-Cork
16 threatened to kill him (PXT 4188: 7-8).

17 Because Ms. Stout approached Mr. Kauffman only moments after the threat occurred, the
18 excitement of the event continued to dominate Mr. Kauffman's mind and his statement to Ms. Stout
19 was a sincere expression of his belief that he had just been threatened.

20 **Factors to Consider Under *Merriman***

21 In *People v. Merriman* (2014) 60 Cal. 4th 1, 332 P. 3d 1187, 117 Cal. Rptr, 3d 1, the Court
22 listed several factors to consider in determining whether a statement was made while still under the
23 excitement of the event. These factors "include the passage of time between the startling event and
24 the statement, whether the declarant blurted out the statement or made it in response to questioning,
25 the declarant's emotional state and physical condition at the time of making the statement, and
26 whether the content of the statement suggested an opportunity for reflection and fabrication." (*Id.*
27 at p. 41, citing *People v. Clark* (2011) 52 Cal.4th at p. 925, 131 Cal.Rptr.3d 225, 261 P.3d 243,
28 *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1525, 50 Cal.Rptr.3d 110.)

1 **A. Passage of Time--3 Minutes Still within Excitement of Event**

2 In *People v. Poggi* (1988) 45 Cal.3d 206 at p. 319, 246 Cal.Rptr. 886, 753 P.2d 1082, the
3 victim's identification of her attacker in response to questioning by a police officer 30 minutes after
4 the incident was held to be spontaneous. The Court found that she was still under its influence and
5 remained excited as she made the statements, even though she had become calm enough to speak
6 coherently.

7 Here, the statement was made by Mr. Kauffman merely three minutes after he was
8 threatened. At the preliminary hearing, the Court found that a time passage of three minutes was
9 brief enough to render the statement spontaneous:

10 THE COURT: Now, granted, if it was, like, two hours later, it would be of concern to the
11 Court. But three minutes doesn't make any difference. The issue is that there hasn't been any time
12 to reflect. There hasn't been any questioning done, even though there are cases that say, even though
13 there is questioning, it can still come in as a spontaneous declaration. (PXT 4197:24-4198:1-2,)

14 Additionally, Ms. Stout and Mr. Kauffman were both outside and both perceived the event,
15 although Ms. Stout was not close enough at the time to hear what was said. It was fresh in both of
16 their minds as they then met in the roadway and Mr. Kauffman relayed that his life was threatened.

17 **B. Any Questioning was Simple and Nonsuggestive**

18 The defense states that Mr. Kauffman blurted out the statement in response to Ms. Stout
19 asking what was wrong (Defense Motion p 6, citing JT 88, 14:27-15:3).

20 Under the spontaneous statement exception to the hearsay rule, "neither lapse of time
21 between the event and the declarations nor the fact that the declarations were elicited by questioning
22 deprives the statements of spontaneity if it nevertheless appears that they were made under the stress
23 of excitement and while the reflective powers were still in abeyance." (*People v. Thomas* (2011)
24 121 Cal.Rptr.3d 521, 51 Cal.4th 449, 495-496, 247 P.3d 886, 920 certiorari denied 132 S.Ct. 136,
25 181 L.Ed.2d 56.) In *People v. Poggi, supra*, 45 Cal. 3d 306 at 319-320, the Court held that the fact
26 that statements were delivered in response to questioning does not render them nonspontaneous,
27 within the meaning of the exception to the hearsay rule, if the questions are simple and
28 nonsuggestive.

1 Here, there was no questioning by law enforcement. If Mr. Kauffman was responding to a
2 question initiated by Ms. Stout, it was simple and nonsuggestive in nature. Ms. Stout is a concerned
3 friend, who witnessed a car briefly stop in front of Mr. Kauffman before driving away. Similar to a
4 statement of benevolence following a car accident, Ms. Stout was inquiring if he was alright. She
5 is not a member of law enforcement seeking to elicit information. Further, the fact that she is asking
6 what is wrong demonstrates that he is visibly upset by the event that just occurred. Thus, he is still
7 under the stress and excitement of being threatened.

8 **C. Specific Demeanor Not Required**

9 The defense argues that Korey Kauffman's emotional state was not stressed or excited,
10 because Ms. Stout stated that he did not appear scared. Evidence Code §1240 does not require a
11 demonstration of fear or any specified demeanor. The Court addressed this issue:

12 THE COURT: Just a minute. Okay. The statement that he allegedly made to this woman,
13 that they threatened to kill him, is a spontaneous declaration. The fact that he's not scared, it comes
14 close in time, there is not any questioning... So the portion where he says they threatened to kill him
15 that happened right after, that comes in as a spontaneous declaration. (PXT 4195:20- 4196:1).

16 In *People v. Worthington*, (1974) 38 Cal. App. 3d 359, 366, 113 Cal Rptr. 322, 326 1974,
17 the defendant objected to the admission of the testimony of a witness who testified that two days
18 before the murders he had heard victim's mother in a state of indignation order defendant out of her
19 daughter's bedroom because, in her words, 'He's trying to go down on my daughter.' (*Id.* at 366).
20 The Court held that the statement was hearsay, but it was clearly admissible under the spontaneous
21 declaration rule established by section 1240, subdivision (b), of the Evidence Code. Further, it was
22 material to establish defendant's motive on the night of the murder, two days later, in entering the
23 victims' house (*Id.* at 367).

24 Similar to *Worthington*, Korey Kauffman was threatened two days before he was murdered.
25 The statements that he made to Ms. Stout about being threatened in regards to stealing property are
26 highly relevant to connect him to the thefts and establish the motive for his murder.

27 The fact that a declarant has become calm enough to speak coherently is not inconsistent
28 with the spontaneous statement exception. In *People v. Francis* (1982) 129 Cal.App.3d 241, 254,

1 180 Cal.Rptr. 873, the trial court did not abuse its discretion in admitting as spontaneous
2 declarations statements made to a passing motorist by a victim within approximately 20 minutes of
3 the stabbing; the fact that the declarations were made in a calm manner did not necessarily indicate
4 a lack of spontaneity.

5 Finally, an excited utterance declarant need not suffer any injury, let alone a serious one.
6 Only an "exciting," not injurious, event is necessary. (*People v. Anthony O.* (1992) 5 Cal. App. 4th
7 428, 434, 6 Cal. Rptr. 2d 794.)

8 Although Korey Kauffman did not display fear or cowardice, he was undoubtedly under the
9 stress and excitement of the event, because it was a threat upon his life. If he were not upset by
10 what was said to him, he would not have "flipped the bird" in response. Further, keeping busy with
11 his car does not mean that he is not ruminating over what happened in his mind. He cannot very
12 well go to the police to lodge a complaint, as he would have to explain that the threats were made
13 in response to him stealing.

14 **D. Content Does Not Indicate Time for Reflection**

15 The defense argues that Mr. Paden is a more credible witness than Ms. Stout and that Mr.
16 Paden did not see Ms. Stout, implying a longer passage of time and reflection occurred before she
17 spoke with Korey Kauffman (Defense Motion P 6, lines 15-18). This does not contradict the
18 testimony heard in court. Ms. Stout indicates that she saw the BMW from a different perspective
19 than Mr. Paden. Ms. Stout was walking at the corner of Linwood and Johnson when she saw the
20 car drive past her and stop briefly in front of the Kauffman residence. Mr. Paden was in his yard
21 tending to his rosebushes (PXT 4219:13-14). Mr. Paden observed the car in close proximity of
22 Korey Kauffman and heard someone yell, "Your ass is grass!" (PXT 4215:15-4216:1-5).

23 Ms. Stout was able to see everything, but was not close enough to hear the threat. At the
24 time that the BMW pulled up to Korey Kauffman, Ms. Stout observed Mr. Paden standing outside,
25 but she did not speak to him (PXT 4211:17- 4212:1-2; 4219:7-8). Detective Bunch did not recall
26 asking Mr. Paden whether he saw Ms. Stout (PXT 4218:28-4219:1-3). It is perfectly plausible that
27 Mr. Paden did not see Ms. Stout from his vantage point. Regardless, Mr. Kauffman walked
28 southbound and met with Ms. Stout, who was walking northbound, and relayed the threat that had

1 just occurred (PXT 4284:5-9).

2 **III.**

3 **STATE OF MIND**

4 Statements of the declarant's then-existing state of mind, emotion, or physical sensation are
5 not inadmissible hearsay if offered to prove the declarant's state of mind, emotion, or physical
6 sensation at any other time when that is an issue in the action. (Evid. Code, § 1250(a)(1).)

7 Korey Kauffman raised his middle finger in response to his life being threatened. In *People*
8 *v. Meyer* (2014) 174 Cal.Rptr.3d 447, 227 Cal.App.4th 1219, the Court held that even if a robbery
9 victim's act of raising his hands in response to defendant's gesture as if he had a gun was hearsay,
10 evidence that the victim raised his hands was admissible as a spontaneous statement and as a
11 statement of the declarant's existing state of mind, emotion, or physical sensation (*Id.* at 454).

12 Korey Kauffman interpreted the words shouted at him, "Your ass is grass," to be a threat
13 upon his life and responded with a rude gesture. In his mind, he was threatened. He reacted by
14 flipping off the people in the car, a reasonable response to being threatened. A demonstration of
15 fear is not required for a threat to be valid. The threat turned out to be credible, as Mr. Kauffman
16 went missing two days later.

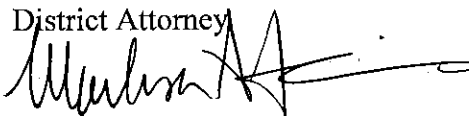
17 **CONCLUSION**

18 For the foregoing reasons the People respectfully request the Court find that Investigator
19 Bunch's testimony regarding the statements made by Kimberly Stout was properly admitted and
20 deny Defendant Georgia DeFilippo's motion to strike the testimony.

21 Dated this 21st day of July 2016, at Modesto, California.

22 Respectfully submitted,

23 BIRGIT FLADAGER
24 District Attorney

25 
26 Marlisa A. Ferreira
27 Chief Deputy District Attorney

28 MAF:KDG

PROOF OF SERVICE BY ELECTRONIC MAIL

STATE OF CALIFORNIA)

COUNTY OF STANISLAUS)

I, the undersigned, declare as follows:

That I am over the age of 18 years and am not a party to this action and I am employed by the Stanislaus County District Attorney’s Office, 832 12th Street, Suite 300, Modesto, California.

That I served a copy of the **Opposition to Defendant Georgia DeFilippo’s Motion to Strike Testimony of Investigator Bunch Regarding Statements Made by Kimberly Stout** on July 22, 2016 pursuant to Cal. Civ. Proc. Code § 1010.6(a)(6) by electronically sending a copy thereof to the offices of:

- Jesse Garcia at JesseJGARCIA@aol.com,
- Timothy Rien at rienlaw@sbcglobal.net,
- Martha Carlton-Magana at carltnm@hotmail.com,
- Preciliano Martinez at attymartinezp@yahoo.com,
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- Robert Lee Forkner at RLFCrimLaw@aol.com,
- Bruce Perry at brucerperry@msn.com and
- Stephanie Mitchell at stephanie.mitchell@stanct.org.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 day of July 2016, at Modesto, California.



Declarant

Case No. 1490969
People v. Carson et al.