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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, V. BRYAN C. KOHBERGER, Defendant.	Case No. CR01-24-31665 ~~SEALED~~ **REDACTED** STATE'S MOTION IN LIMINE RE: TEXT MESSAGES AND TESTIMONY

COMES NOW the State of Idaho, by and through the Latah County Prosecuting Attorney, and respectfully moves the Court for an order in limine allowing the State to admit the text messages of D.M. on November 13, 2022, and the testimony from D.M. and B.F. regarding their conversations with each other on November 13, 2022. The phone records were discovered on the hard drive (D.M. iPhone extraction) provided on April 5, 2023, and State's Exhibit 18 from the Grand Jury record (State's Exhibit S-1

attached). The testimony of D.M. and B.F. was provided to the defense as part of the Grand Jury record (State's Exhibit S-2 and State's Exhibit S-3 attached).

STANDARD OF ADMISSIBILITY

In general, testimony that is hearsay is excludable at trial. I.R.E. 802. However, there are exceptions to this rule. Two firmly rooted exceptions are:

> Idaho Rule of Evidence 803(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
>
> Idaho 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.

The requirements of the federal version of the present sense impression and exited utterance are best stated in *U.S. v. Mitchell*:

> There are three principal requirements which must be met before hearsay evidence may be admitted as a present sense impression: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration and the event described must be contemporaneous.
>
> ...
>
> The requirements for a hearsay statement to constitute an excited utterance are: (1) a startling occasion, (2) a statement relating to the circumstances of the startling occasion, (3) a declarant who appears to have had opportunity to observe personally the events, and (4) a statement made before there has been time to reflect and fabricate.

145 F. 3d 572 (3d Cir. 1998). Both exceptions require that the declarant personally perceives the event or condition about which the statement is made. In addition, both have temporal limitations which limit admissibility. *Id.* Under the present sense impression exception, the declaration must be substantially contemporaneous with the event in question. The fundamental premise underlying the present sense impression

exception is "that substantial contemporaneity of event and statement minimizes unreliability due to [the declarant's] defective recollection or conscious fabrication." *United States v. Green*, 541 F.3d 176, 180 (3d Cir. 2008). Courts have given broader temporal limitations for excited utterances. In *U.S. v Napier*, the U.S. Court of Appeals held that "although in most cases the 'startling' events which prompt 'spontaneous exclamations' are accidents, assaults, and the like…there is no reason to restrict the exception to those situations." (Victim's statement's "he killed me, he killed me" after being shown a photograph approximately eight weeks after attack held admissible). 519 F.3d 316 (9th Cir. 1975) Following *Napier*, some courts have admitted excited utterances "made well after the event when the declarant was suddenly subjected to rekindled excitement" because "[e]vents may so deeply traumatize a person that long after stress has subsided a chance reminder may have enormous psychological impact, causing renewed stress and excitement and educing utterances relating to the original trauma." *Matter of Troy P.*, 114 N.M. 525, 842 P.2d 742 (New Mexico Ct. App. 1992)

There is no requirement within the language of I.R.E. 803(1) that the declarant be excited or emotionally affected by the event or condition in order to fall within the present sense exception; but if so, then the statement can overlap with the excited utterance exception. *U.S. v. Jones,* 299 F.3d 103 (Ct. App. 2d Cir. 2002) (holding that statements were admissible under present sense impression and exited utterance exceptions to the hearsay rule).

ARGUMENT

A. **D.M. 's phone records (contained in Exhibit S-1) for November 13, 2022, and B.F. 's testimony (contained in Exhibit S-2) as to what D.M. told her should be allowed at trial.**

In the case at bar, starting on November 13, 2022, at 2:10:29 D.M. sends a text message to E.G. (Uber Driver) to inquire if he is driving. The State submits this text message exchange is not hearsay because it will not be offered for the truth of the matter asserted (i.e. E.G. 's driving status). Instead, it would be offered to show a timeline for the night (i.e. D.M. was awake and texting at 2:10:29). From 4:19:07 to 4:21:50, D.M. attempts to call B.F. , Xana Kernodle, Kaylee Goncalves, and Madison Mogen (all calls unanswered). The records of these calls are not hearsay as they each do not meet the definition of a statement: "oral assertion, written assertion, or nonverbal conduct intended as an assertion" under I.R.E. 801(a).

From 4:22:08 to 4:24:27, D.M. and B.F. send the following text messages:

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

All of the above declarations are present sense impressions and excited utterances. This is supported by D.M. 's grand jury testimony where she indicates she just witnessed a startling event (i.e. heard noises in residence and saw an unknown male in the residence); the declarations indicate both B.F. and D.M. are trying to make sense of the startling event contemporaneously or immediately following the startling event (i.e. no time for reflection or fabrication). See D.M. 's Grand Jury testimony attached as Exhibit S-3.

At 4:24:39 D.M. calls Ethan Chapin (call unanswered). This phone record, like the other records of calls, is not a statement pursuant to I.R.E. 801(a). D.M. and B.F. continue to text. At 4:24:58 D.M. texts B.F. "lm scRwd tho" and B.F. responds at 4:25:16 "Ya IK but it's better than being alone." Again, both statements are admissible as present sense impressions and excited utterances as they are describing an event or their state of mind and are spontaneous reactions to that event rather than the result of reflective thought.

At 4:27:47 D.M. calls Goncalves (call unanswered), and at 4:28:44 D.M. calls Kernodle (call unanswered). These are not "statements" pursuant to I.R.E. 801(a).

At 4:32:57 D.M. sends a text messages to Goncalves stating "Pls answer". This statement is a present sense impression (shows D.M. 's perception of events) and an excited utterance (spontaneous reaction to that event rather than the result of reflective thought).

The next morning, D.M. sends the following text messages starting at 10:23:23:

D.M. to Goncalves: "Pls answer"
D.M. to Mogen: "R u up"
D.M. to Goncalves: "R u up??"

These text messages are not hearsay because they will not be introduced for the truth of the matter asserted. Even if deemed hearsay, they are allowable as present sense impressions as they reflect a consistency and continuation of D.M. 's text messages from the night prior and

reflect her then perception of what was then occurring (i.e. waking up and realizing that she had not heard from her roommates).

At 11:39:09 D.M. has a text exchange with her father B.M. . These statements are not hearsay as they will not be introduced for the truth of the matter asserted but instead to show a timeline for the morning. At 11:50:55, D.M. receives a text message from J stating "bro." This text message will not be introduced for the truth of the matter asserted. At 11:50:58 D.M. calls E.A. . This phone record is not a statement pursuant to I.R.E. 801(a). D.M. receives a text message from " J " at 11:51:01 and a Vandal Alert at 1:04:01; these texts are not hearsay because they will not be introduced for the truth of the matter asserted but instead to show a timeline for the morning.

B. **D.M. and B.F. testimony (contained in State's Exhibit S-2 and State's Exhibit S-3)**

The State anticipates that both D.M. and B.F. will testify at trial. The State intends to ask each witness about statements made to them on November 13, 2022. This testimony should substantively replicate the testimony they provided at the grand jury proceedings. The State submits the statements from both D.M. and B.F. to each other are allowable hearsay because they are present sense impressions and/or excited utterances.

C. **Previous Adjudication**

Judge John Judge has previously ruled that the text messages and statements of D.M. to B.F. are "present sense impressions" and "excited utterances" holding "both the text messages and the testimony of B.F. as to what D.M. told her were admissible as exceptions to the hearsay rule." "Sealed Order Denying Motion to Dismiss

Indictment on Grounds of Biased Grand Jury, Inadmissible Evidence, Lack of Sufficient Evidence, and Prosecutorial Misconduct", Pages 20, Filed 12/15/2023.

D.M. 's phone records (contained in Exhibit S-1) for November 13, 2022 and B.F. 's Testimony (contained in Exhibit S-2) are allowable at trial under *Crawford*

Under I.R.E. 803, present sense impressions and excited utterances are admissible whether or not the declarant is available as a witness. I.R.E. 803(1) and (2).

Any statement found outside of the above exceptions to hearsay are non-testimonial for purposes of a *Crawford* analysis. Further, even if somehow deemed testimonial, the Confrontation Clause of the Sixth Amendment does not bar their admission:

> Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. See *California v. Green,* 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). It is therefore irrelevant that the reliability of some out-of-court statements " 'cannot be replicated, even if the declarant testifies to the same matters in court.' " *Post,* at 1377 (quoting *United States v. Inadi,* 475 U.S. 387, 395, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 1369 (2004). The State submits if any of the declarations made are deemed testimonial, both D.M. and B.F. will testify at trial anyway.

CONCLUSION

Based on above cited authority, the State respectfully request the court's approval in limine of the admission of text messages from D.M. on November 13, 2022 and the testimony from B.F. regarding what D.M. told her on November 13, 2022.

RESPECTFULLY SUBMITTED this 24th day of February 2025.

Ashley S. Jennings
Sr. Deputy Prosecuting Attorney

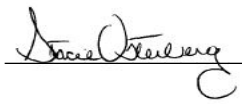
CERTIFICATE OF DELIVERY

I hereby certify that true and correct copies of the STATE'S MOTION IN LIMINE RE: TEXT MESSAGES AND TESTIMONY were served on the following in the manner indicated below:

Anne Taylor
Attorney at Law
PO Box 2347
Coeur D Alene, ID 83816

☐ Mailed
☒ E-filed & Served / E-mailed
☐ Faxed
☐ Hand Delivered

Dated this 24th day of February 2025.



EXHIBITS REDACTED AND SEALED