NO. 30397-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY J. HERNANDEZ, JR.,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes two assignments of error they can be summarized as follows;

1. The State failed to include "true threat" as an element of the crime charged.
2. There was insufficient evidence to support the firearm enhancement.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. This issue was decided in State v. Allen, 294 P.3d 679 (Wash. 2013).
2. There was sufficient evidence to support the firearm enhancement.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

RESPONSE TO ASSIGNMENTS OF ERROR ONE – TRUE THREAT.

The first issue raised by Mr. Hernandez was recently decided in State v. Allen, 294 P.3d 679 (Wash. 2013). The Washington State Supreme Court in Allen determined that:

We have never held the true threat requirement to be an essential element of a harassment statute. In State v. Johnston, 156 Wash.2d 355, 127 P.3d 707 (2006), we found that Washington's bomb threat statute, RCW 9.61.160, reached a substantial amount of protected speech. We therefore construed the statute to avoid an overbreadth problem by limiting it to true threats. We held the trial court erred by giving an instruction that defined " true threat" in terms of the reasonable listener-based standard, rather than the reasonable speaker-based standard we adopted in Kilburn. Johnston, 156 Wash.2d at 364, 127 P.3d 707. By so holding, we implied a proper jury instruction defining "true threat" would have been constitutionally sufficient.

...

...since after Johnston the Washington Pattern Instructions Committee amended the pattern instruction defining threat so that it matched the definition of "true threat." We said that "[c]ases employing the new instruction defining 'threat' will therefore incorporate the constitutional mens rea as to the result." Schaler, 169 Wash.2d at 288 n. 5, 236 P.3d 858. That instruction was used in this case.

...

Moreover, the Court of Appeals has repeatedly held the true threat requirement is not an essential element of harassment statutes. In State v. Tellez, 141 Wash.App. 479, 170 P.3d 75 (2007), the defendant, charged with felony telephone harassment based on a threat to kill, claimed the information and to-convict instruction were deficient because they lacked the requirement of a true threat, an essential element of the crime. The Court of Appeals agreed with the State that "the constitutional concept of 'true threat' merely defines and limits the scope of the essential threat element in the felony telephone harassment statute and is not itself an essential element of the crime." Tellez, 141 Wash.App. at 484, 170 P.3d 75

...

In this case, Allen argued the First Amendment for the first time on appeal. Under the circumstances, no manifest error affecting a constitutional right occurred. The jury was instructed as to the true threat requirement and Allen's First Amendment rights were protected. Based on Johnston, Schaler, Tellez, and Atkins, we hold failure to include the true threat requirement in the information and to-convict instruction was not error.

This issue has been decided by the Washington State Supreme Court therefore this court does not have to take further action regarding this issue; it need merely follow the precedent set in Allen.

RESPONSE TO ASSIGNMENTS OF ERROR TWO – WEAPONS ENHANCEMENT.

The defendant in this case was a police officer with the Yakima Tribal Police Department. The crime occurred in the city of Toppenish, Washington. (RP 500-1, 503) The only person to testify that Appellant Hernandez was on duty at the time he came to the home of his estranged wife was Appellant. There was no corroboration or confirmation that the officer was officially on duty at the time he committed this crime. There was also no testimony to explain why if this officer was "on duty" at the time of this crime was away from his jurisdiction and doing personal matters such as feeding his dog and checking his mail.

It must be noted that this was not the first time that Appellant's wife had contact with another male during the marriage. This obviously was information in the Appellant's mind as he threatened to kick in his estranged wife's bedroom door. There would appear to have been several instances that indicated to Hernandez that his wife was being unfaithful and yet he stated in his testimony that each time that the found out about these that it did not bother him and that he joked about it with his wife.

This testimony came from the Appellant himself. (RP 482-85, 509-13, 515)

At the time of the commission of this crime Appellant and his wife were separated and living apart. (RP 516-17) Appellant testified that the routine was that he would come to the house at about 8 AM to feed the dogs. That he had a key and he would enter the house through front door and go to the back pantry to get the dog food. (RP 520-22) Mrs. Hernandez had testified that she actually had been feeding the dogs for two weeks prior to this incident. (RP 519-20) Appellant's wife had told him that he needed to come to the house the night before the incident to pick up some bills. (RP 523)

Appellant's jurisdiction was on the Yakima Indian Reservation or "Indian country." (RP 498-99, 526) There was no testimony from any supervisor of Appellant that he was actually on duty on the morning of this crime. The only testimony that was before that court that he was working came from Appellant himself. (RP 526-29)

It note worthy that the Appellant said that he went to the bedroom door of his estranged wife while she was apparently still asleep and instead of knocking he checked the door handle to see if it was locked, it was. (RP 530) When he knocked his wife told him just a minute and then told him to meet her in the kitchen (RP 531) It was after what Appellant

states was a negative response to the question "are you OK" that Appellant literally kicked in the bedroom door.

Appellant pointed his gun at Mr. Perez and handcuffed him on the floor of the bathroom. Then shortly thereafter, Appellant without further explanation as to why this perceived threat, this stranger, this naked man in his shower, was no loner a threat, Hernandez testified that he just uncuffed Perez and told him to put on his clothes and leave. Appellant also testified that he told Perez that "I said you got 3 minutes to get the fuck out of there otherwise you're gonna come with me and I'm gonna drop your ass off at Mount Adams." (RP 540) Corroborating at least a portion of the threat testified to by Mr. Perez and Ms. Hernandez that Appellant had threatened to bury him on Mt Adams. It is also very important that this trained officer who only did what he did because if this perceived threat by this strange naked man never once contacted his dispatch for backup. (RP 598)

Even Appellant's companion, Ms. Bohon, stated that after she was dropped at work by the Appellant she did not know where he was. (RP 421, 425-6, 430)

Once again there is nothing that was testified to on the record that would corroborate that Mr. Hernandez was on shift working. Further, there is nothing on the record that would indicate that anything that he was

doing had anything to do with his employment, he was driving his female companion to her job, he was also texting her, he was texting some person in the dispatch, he was feeding his dog and getting his mail from his house, none of which is any part of acting in the capacity of a commissioned law enforcement officer.

Without lawful authority was defined in jury instructions 8, 9 and 12. This is an essential definition when addressing the issue raise regarding special verdict regarding Appellant's possession of a weapon at the time of the crime. Instruction 12 reads as follows:

> A person acts without lawful authority or legal authority when that person's acts are not authorized by law.
>
> A public officer, when acting in that capacity, is legally authorized to use some degree of physical coercion or threat thereof in order to effectuate and arrest or investigatory detention.

This Court must also take into account the fact that the trial court submitted instructions 17 and 18 to the jury which set forth a legal basis for an officer to be justified in taking the actions Appellant took. They allow the jury to acquit if they found the facts supported the claim that his actions were lawful. (RP 643, CP 146, 147)

Even if there had been sufficient evidence to support the claim that Appellant was on duty at the time of this offense, the evidence presented would clearly allow the jury to find that the Appellant clearly acting

outside the definition and scope of that job so that his possession of the weapon was not allowed or justified by law.

State v. Hernandez, 172 Wn.App. 537,290 P.3d 1052, 1055, (2012);

> When reviewing a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Williams, 137 Wash.App. 736, 743, 154 P.3d 322 (2007). We draw all reasonable inferences from the evidence in the State's favor and interpret the evidence "'most strongly against the defendant.' "State v. Joy, 121 Wash.2d 333, 339, 851 P.2d 654 (1993) (quoting State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992)). We consider both circumstantial and direct evidence as equally reliable and defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wash.2d 821, 874-75, 83 P.3d 970 (2004).

This issue was not raised in the trial court and Appellant does not address how it can be raised for the first time on appeal. In the totality of the trial court record there is no briefing by any party regarding this new allegation. RAP 2.5:

> (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

This very Court recently addressed, at length, this issue in State v. Naillieux, 158 Wn.App. 630, 638-9, 241 P.3d 1280 (Wash.App. Div. 3 2010);

> We sit as a court of review which, of course, means that we do not preside over trial proceedings de novo. Our function is to review the validity of claimed errors by a trial judge who presided over a trial. That function assumes that counsel preserve the error by objecting to something the trial judge did or did not do. We do not, and should not, be in the business of retrying these cases. It is a wasteful use of judicial resources. *Id*. at 344, 835 P.2d 251; State v. Bashaw, 169 Wash.2d 133, 146, 234 P.3d 195 (2010*);* State v. Labanowski, 117 Wash.2d 405, 420, 816 P.2d 26 (1991). And it encourages skilled counsel to save claims of constitutional error for appeal so a defendant can get a new trial and second chance at a not guilty verdict if the first trial does not end in his favor. Lynn, 67 Wash.App. at 343, 835 P.2d 251. Most errors in a criminal case can be characterized as constitutional. Id. at 342-43, 835 P.2d 251.

The fact that the defendant is an officer does not change the facts, he was armed and nothing in State v. Easterlin, 159 Wn.2d 203, 149 P.3d 366 (Wash. 2006) would allow for this officer to commit a crime while in possession of a weapon and, not receive punishment because he was on duty. There is nothing in this record before this court which would even remotely indicate that the Appellant was required to carry this firearm at the time of the crime. Just as the Washington State Supreme Court ruled in State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002) that while the defendant's right to bear arms in his home was constitutionally

protected, "that right ceases when the purpose of bearing arms is to further the commission of a crime." Schelin, 147 Wn.2d at 575 so too here, the officers legal right, obligation, requirement to legally carry a weapon ended when he went from being an officer determining what was going on in his estranged wife's home to an angry husband threatening to kill Mr. Perez.

There is no doubt that a police officer carries a gun as part of his duties. There is also no doubt that a police officer does not have a separate right based on that those duties to threaten to kill the man who happens to be sleeping with his wife. Once again there is nothing in this record that would indicate that Mr. Hernandez needed to carry his service weapon to go feed his dogs and get his mail at his own residence. There is nothing about the actions of the Appellant that relate to his job.

Appellant argues citing State v. Johnson, 94 Wn.App. 882, 896, 974 P.2d 855 (1999) that the circumstances of this crime are "inconsistent with the application of the rationale that supports the weapons enhancement. The State would completely disagree. There can be few instances where the possession of a weapon by any criminal would more completely fit the rationale for this enhanced punishment than in a situation were the criminal is an "officer of the law" who has sworn an oath to preserve and protect and while on duty he uses his position of

authority, his training and in this instance his duty weapon to threaten to kill a citizen he has sworn to protect with this life. It would appear that Appellant wants this court to say there is an exception to the weapons enhancement for officers. There is no "officer exception" to the crime of harassment nor to the inclusion of a weapons enhancement, nor does Appellant indicate to the court where in the law such an exception is found. This would beg the question, if a person has a valid concealed weapons permit and they too go to the home of a estranged spouse and they participate in an identical fact scenario, would that person also have the right to argue that they had a legal right to possess that weapon and did so as they often do so therefore they too are not armed?"

Facts sufficient to meet the requirements set forth in O'Neal were presented to the jury. There is no dispute that Mr. Hernandez was in possession at the time of the crime. As was stated in State v. O'Neal, 159 Wn.2d 500, 503-4, 150 P.3d 1121 (2007);

> "A defendant is 'armed' when he or she is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes and when a nexus is established between the defendant, the weapon, and the crime." State v. Schelin, 147 Wash.2d 562, 575-76, 55 P.3d 632 (2002). Since the defendants did not challenge the jury instructions at trial, we limit our inquiry to whether there was sufficient evidence for any rational trier of fact to find beyond a reasonable doubt that one or more of the defendants were armed State v. DeVries, 149 Wash.2d 842,

> 849, 742 P.3d 748 (2003); State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).
>
> See also, State v. Hernandez, 290 P.3d 1052 (2012):
>
> We have previously held that the "nexus" requirement is not applicable to firearm enhancements when there is actual, not constructive, possession of a firearm. State v. Easterlin, 126 Wash.App. 170, 173, 107 P.3d 773 (2005), review granted & aff'd on other grounds by 159 Wash.2d 203, 149 P.3d 366 (2006) (our Supreme Court has affirmed this concept); see Easterlin, 159 Wash.2d at 209, 149 P.3d 366 (concluding that in actual possession cases, it will rarely be necessary to go beyond the commonly used " readily accessible and easily available" instruction). So even if we were considering a firearm enhancement, a " nexus" finding is not required because the possession was actual, not constructive.

In this instances the crime alleged and proven by the specific facts of this case necessitate the use of that weapon, the one that Appellant now alleges he was required to legally carry at the time the crime was committed. State v. Ague-Masters, 138 Wn.App. 86, 102-3156 P.3d 265 (2007);

> Whether a person is armed is a mixed question of law and fact, which we review de novo. State v. Schelin, 147 Wash.2d 562, 565-66, 55 P.3d 632 (2002). "'A person is "armed" if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes,' " and there is a connection or nexus between the defendant, the weapon, and the crime. State v. Easterlin, 159 Wash.2d 203, 208-09, 149 P.3d 366 (2006) (quoting State v. Valdobinos, 122 Wash.2d 270, 282, 858 P.2d 199 (1993)); also compare Valdobinos, 122 Wash.2d at 273-74, 282, 858 P.2d 199 (defendant not armed where police arrested him then searched house, finding cocaine under a

> bed and a rifle under a bed) and State v. Call, 75 Wash.App. 866, 867-69, 880 P.2d 571 (1994) (defendant not armed where he walked into bedroom to get identification and police later found two unloaded guns and a loaded gun in a toolbox in the bedroom) with Schelin, 147 Wash.2d at 564, 574-75, 55 P.3d 632 (defendant armed where police found him at the bottom of stairs six to ten feet away from loaded revolver in a holster hanging on a nail). "'[M]ere constructive possession [of a deadly weapon] is insufficient to prove a defendant is "armed" with a deadly weapon during the commission of a crime.' "State v. Gurske, 155 Wash.2d 134, 138, 118 P.3d 333 (2005) (quoting Schelin, 147 Wash.2d at 567, 55 P.3d 632) (internal quotation marks omitted).

While there are a dearth of cases involving an officer committing a criminal act while armed and on duty the State, for analogy, would cite this court to State v. Bright, 129 Wn.2d 257, 916 P.2d 922 (1996). In Bright an officer while on duty and armed raped an inmate whom he was transporting. The question raised on appeal was whether the officer was armed such that the State had proven that necessary elements of Rape in the First Degree.

The Court in Bright found

> There is no dispute that a police officer wears a weapon to indicate the officer's intent to use it to assure compliance with an order. The officer need not expressly threaten the targeted person with the weapon. Both the target and the officer know the threat to use the weapon is implied and inherent in the authority of the police. Generally, we consider as benign a police officer's implied threat to use a weapon. That implied threat remains, and even increases, when a police officer wears weapons during commission of a crime.

> By his knowing decision to remain armed while he assaulted and raped Ms. L., Respondent Bright communicated to his victim his intent to use his weapon if she resisted. From the record in this case we can conclude that Respondent Bright deliberately contrived the factors of the guns, his nonregulation transport of a woman prisoner, his choice of a remote locale, and his use of force--all with the intent to create a situation threatening enough to reduce Ms. L. to helplessness.
> (Bright at 272, footnote omitted)

Here, as was the case in Bright, Mr. Hernandez chose to go to his estranged wife's house to feed his dog and check on his mail, he chose to do that while allegedly on duty and obviously armed, he chose to determine if the bedroom door was locked, he chose to kick the door in rather than wait as Ms. Hernandez told him to, he chose to not call for backup in a situation where he felt was urgent enough to pull his duty weapon, he suddenly and without explanation released this naked intruder and he chose to threaten the naked intruder with death all the while having in his mind the numerous previous instances of infidelity committed by his wife.

IV. CONCLUSION

The first allegation by Mr. Hernandez has been decided in State v. Allen.

The second allegation is whether there was sufficient evidence presented to support the enhanced sentence based on Mr. Hernandez's

being in possession of a firearm at the time he committed this crime. The evidence was sufficient. Further, it was sufficient to prove beyond a reasonable doubt that even if the jury believed that Hernandez was working as a fully commissioned law enforcement officer, that by the time the threats were made and Mr. Perez's life threatened that Mr. Hernandez was no longer acting within the scope of his employment and therefore the possession of his duty weapon was not merely incidental to the commission of there crime.

Respectfully submitted this 1st day of August 2013

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DECLARATION OF SERVICE

I, David B. Trefry, state that on August 1, 2013, be agreement of the parties, I emailed a copy of the Respondent's Brief to: Janet Gemberling, C/O Robert Canwell at admin@gemberlaw.com and by United States mail to, Anthony J. Hernandez, Jr. 910 Madison, Toppenish, WA 98948

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of August, 2013 at Spokane, Washington.

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