NO. 93388-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN MCEVOY,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 46795-0-II
Kitsap County Superior Court No. 14-1-00674-6

ANSWER TO PETITION FOR REVIEW

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SERVICE	John Henry Browne 108 S Washington St Ste 200 Seattle, Wa 98104-3414 Email: johnhenry@jhblawyer.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED August 15, 2016, Port Orchard, WA _____ **Original e-filed at the Supreme Court; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney RANDALL A. SUTTON.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the unpublished decision of the Court of Appeals in *State v. McEvoy*, No. 46795-0-II (June 14, 2016), a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

The question presented is thus whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, and specifically:

1. Whether McEvoy is barred from seeking review of his claim that admission of certain receipts was a constitution violation where that claim was not raised in the Court of Appeals?

2. Whether McEvoy fails to show that the receipts were testimonial, the predicate issue for whether there was a Sixth Amendment confrontation violation?

4. Whether McEvoy fails to show a basis for modifying this Court's rules regarding the giving of instructions in lesser offenses?

5. Whether McEvoy's remaining contentions were correctly decided below?

IV. STATEMENT OF THE CASE

The Court of Appeals summarized the facts and its holding in the introduction to its opinion:

> Brian McEvoy appeals his convictions for second degree and fourth degree assault, two counts of felony harassment, unlawful imprisonment, interfering with reporting domestic violence, third degree malicious mischief, two counts of violation of a no contact order, felony stalking, attempting to elude a pursuing police vehicle, and second degree unlawful possession of a firearm.
>
> McEvoy argues that the trial court erred when it (1) admitted law enforcement testimony about their search efforts and opinion testimony about McEvoy's dangerousness or guilt; (2) admitted hotel, rental car, and airline ticket receipts found in his vehicle as adoptive admissions; (3) denied his request for a jury instruction on misdemeanor harassment as a lesser included offense to his felony harassment charge; and (4) sentenced him without merging the felony stalking conviction with the two convictions for violation of a no contact order. He also makes several claims in his statement of additional grounds (SAG).
>
> We hold that the trial court did not abuse its discretion in admitting the testimony about law enforcement search efforts, but do find it abused its discretion in admitting the officers' opinion testimony that amounted to characterizing McEvoy as a dangerous or guilty individual. Nonetheless, we find those errors harmless beyond a reasonable doubt because of overwhelming untainted evidence of guilt. We further hold that if admission of the receipts was erroneous, the error was harmless; that the trial court did not abuse its discretion in denying the misdemeanor harassment jury instruction;

> that the sentencing court erred by not merging the no contact order convictions; and that all SAG claims fail.
>
> Accordingly, we vacate McEvoy's two convictions for violation of a no contact order and remand for resentencing reflecting that. We affirm McEvoy's other convictions.

State v. McEvoy, Op. at 1-2 (June 14, 2016). The State otherwise relies upon the record, the remainder of the court's opinion, and its statement of the case presented below.

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE NONE OF THE ISSUES ACTUALLY PRESENTED TO THE COURT OF APPEALS WAS INCORRECTLY DECIDED.

1. None of the considerations governing acceptance of review set forth in RAP 13.4(b) supports acceptance of review.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Although McEvoy references these considerations, none of the considerations supports acceptance of review.

2. McEvoy may not seek review of his claim that admission of certain receipts was a constitutional violation where that claim was not raised in the Court of Appeals.

A claim not presented to the Court of Appeals cannot be raised for the first time in a motion for discretionary review. *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993). McEvoy nevertheless asserts review is warranted because the Court of Appeals failed to apply the constitutional harmless error standard to his claim that the trial court erred in admitting the travel receipts found in McEvoy's car. McEvoy never raised this issue in the Court of Appeals. Instead he argued only that there was evidentiary error. Brief of Appellant at 31-35. Nor did he ever claim that the constitutional harmless error applied. Indeed, although he argued that the error was not harmless, he cited no standard whatsoever in his argument. *Id.*, at 35-36.

3. McEvoy fails to show that the receipts were testimonial.

Moreover, even if the purported Confrontation Clause issue had been presented below, it would be without merit. Under *Crawford*, the Sixth Amendment comes into play only in the case of *testimonial* hearsay. These records were clearly not testimonial, as the *Crawford* Court noted: certain statements "by their nature [are] not testimonial—for example, business records." *Crawford v. Washington*, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The United States Supreme Court reaffirmed this principle in *Melendez–Diaz*:

> Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—*having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial* .

Melendez–Diaz v. Massachusetts, 557 U.S. 305, 310-11, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (emphasis added); *see also Howard v. State*, 2016 Ark. App. 69, 482 S.W.3d 741, 745 (2016) (pawn ticket and the game shop receipts were not testimonial statements); *State v. Jennings*, 125 Conn. App. 801, 9 A.3d 446, 457 (2011) (store receipt is not testimonial statement).

Although the receipts were admitted as adoptive admissions rather than business records in this case,[1] McEvoy fails to even offer a plausible explanation for how they should be deemed testimonial such that a Sixth Amendment issue is presented. As such, even if the claim had been raised in the Court of Appeals, McEvoy would fail to demonstrate an appropriate basis for review.

4. McEvoy fails to show a basis for modifying this Court's rules regarding the giving of instructions in lesser offenses.

McEvoy also urges this Court to consider an issue for which he provided inadequate briefing below. He faults the Court of Appeals for

[1] The Court of Appeals did not address the propriety of this trial ruling. Op. at 20. The State maintains the trial court acted within its discretion, as set forth in its brief below. Brief of Respondent at 22-27.

not considering his contention that that court should abandon the well-settled rule that to be entitled to a lesser-offense instruction, there must be evidence from which the jury could conclude that the lesser offense was committed to the exclusion of the greater. *See State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Fernandez–Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015).

In his brief, McEvoy essentially cited only to the *dissent* in *Henderson*, which had been decided less than a month before McEvoy filed his amended brief. Brief of Appellant at 45-47. The Court of Appeals properly declined to entertain this inadequate challenge. Moreover, it is not apparent that that court had the authority to alter this Court's long-standing precedent. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006) (Court of Appeals is bound by Supreme Court precedent).

Further, McEvoy asserts a conflict between the long-standing precedent of this court and RCW 9A.04.100, which addresses not instructing on lesser offenses but the State's burden of proof. He fails to show any conflict between this Court's precedent and the statutes that actually govern lesser-included and lesser-degree offenses, RCW 10.61.003, RCW 10.61.006, and RCW 10.61.010.

McEvoy also fails to directly address why this admittedly long-standing precedent is incorrect and clearly harmful, both of which this Court requires before abandoning stare decisis. *See State v. Otton*, ___ Wn.2d ___, 374 P.3d 1108, 1110-11 (2016). Nor has McEvoy shown that "the legal underpinnings of [the Court's] precedent have changed or disappeared altogether." *Id.* (*quoting W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)) (editing added). As such McEvoy does not present a compelling case for review.

5. McEvoy's remaining contentions were correctly decided below.

The remainder of McEvoy's contentions are indistinguishable from the claims he presented below. Suffice it to say that the holdings of the Court of Appeals and the State's briefing below refute his contentions. He fails to demonstrate that the court below committed any error justifying further review in this Court.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny McEvoy's petition for review.

DATED August 15, 2016.

Respectfully submitted,

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