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SUPREME COURT
STATE OF WASHINGTON
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No. 97860-3

IN SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN LAURICELLA,
Appellant.

MOTION ON THE MERITS

WASHINGTON STATE COURT APPEALS,
Division III No. 36128-4-III

ON APPEAL FROM THE SUPERIOR COURT OF
STEVENS COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00316-1

ANSWER TO MOTION ON THE MERITS

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A. ISSUES PRESENTED

1. Should review be granted for a decision on the motion of the merits when the issue of "true threat" is raised for the first time in the Supreme Court?

2. Was the threat made by the defendant directed at Officer Matthew Konkle a "true threat"?

B. STATEMENT OF THE CASE

The substantive and procedural facts remain the same as presented in the States Answer to Petition for Review.

C. ARGUMENT

1. <u>The issue of whether or not the defendant made a "true threat" should not be reviewed by the Supreme Court when it is raised for the first time in a motion on the merits, filed after a petition for review.</u>

The first question to be answered is if the Supreme Court should accept review to decide on an issue that was not raised in either the trial court or appellate court.

RAP 2.5(a) addresses issues raised for the first time on review. The court may choose to refuse to review any claim of error not previously raised; however, a party may raise a manifest error affecting a constitutional right for the first time under RAP 2.5(a)(2).

The next question to address is whether or not a question of a "true threat" meets the requirements of RAP 13.4(b). Under RAP 13.4(b), review should only be accepted by the Supreme Court if: 1) the decision of the Court of Appeals is in conflict with a published opinion of the Supreme Court; 2) the decision of the Court of Appeals is in conflict with a published

decision of the Court of Appeals; 3) if a significant question of law under the Constitution of the State of Washington or 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.

This issue in itself cannot meet either (1) or (2), as it was not raised with Division III, so there is no decision that could be in conflict with either the Supreme Court or a published Court of Appeals opinion. The issue the appellant raises is based solely on the holding in *State v. Dawley*, 77982-6-I, COA Div 1, _____ P.3d. ______ (December 30, 2019), which is an issue of free speech. It should be noted that *State v. Dawley* is in direct conflict with *State v. Stephenson*, 89 Wash. App. 794, 950 P.2d 38 (1998). *State v. Stephenson* holds that the statue is not unconstitititutionally overbroad, where *State v. Dawley* contradicts that and adds a requirement to jury instructions to include a definition for true threat.

If the Supreme court wanted to accept review, the issue would need to be sufficiently developed to fairly consider this issue. Here, there was no discussion regarding any argument of a true threat, and no objection to any jury instructions. In reality, the true question here is not actually a question of the constitutional right to free speech, the appellant is arguing that his statements were not a true threat, and therefore not a threat at all.

This appears to be more like a sufficiency of the evidence of whether a threat was made. There is substantial evidence and testimony presented at trial regarding the threats that were made. This is the same argument that the defendant made in his opening brief. The defendant argued that his threats were nothing more than generalized anger at the circumstances. The appellant initially argued that his threats weren't threats meant to influence any decision; now he argues they aren't threats at all. It's the same premise.

2. The threats made against Officer Konkle by the defendant were "true threats."

The appellant argues that this was simply an emotional rant that did not amount to a "true threat." The evidence presented at trial would contradict that. This is really a question of whether or not there was sufficient evidence to support that a "true threat" was made.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the jury's verdict, any rational jury could find the essential elements of a crime beyond a reasonable doubt." *State v. McCreven,* 284 P.3d 793, 809, 170 Wn.App.444 (2012) (emphasis added) (citing *State v. Johnson*, 159 Wn.App. 766, 744, 247 P.3d 11(2011) (internal citations omitted).

A sufficiency review is a limited inquiry which addresses whether "the governement's case was so lacking that it should not have even been submitted to the jury." *Burks v. United States*, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed 2d 1(1978). A narrow sufficiency review does not override the jury's role concerning how the jury weighs the evidence or what inferences they draw from evidence. *Musacchio v. United States*, 577 U.S. ______, 136 S. Ct. 709, 193 L.Ed.2d 639 (2016). The Supreme Court outlines that a reviewing court on a sufficiency of the evidence review has a narrow role, where they make a "*limited* inquiry tailored to ensure that a defendant receives the minimum that due process requires: a 'meaningful opportunity to defend' against the charge against him and a jury finding of guilt 'beyond a reasonable doubt; and that a "sufficieny challenge is for the court to make a 'legal' determination whether the evidence was strong enough to reach a jury at all" *Id.* (emphasis added) (quoting *Jackson v. Virginia*, 443 U.S. 307, 314-319, 99 S.Ct.2781, 61 L.Ed. 2d 560 (1979)).

Washington case law follows suit. *State v. Green*, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980) explains that the job of the court when conducting

a sufficiency review is not to "reweigh the evidence and substitute judgment" but rather "because [the jury] observed the witnesses testify first hand, we defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given to the evidence."

All reasonable inferences that could be made from the evidence "must be drawn in favor or the verdict and interpreted strongly against the defendant." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The "jury is the sole and exclusive judge of the evidence." *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

When conducting a sufficiency of the evidence review, the only question should be if there was enough evidence to send to the jury; it is not the job of the reviewing court to make determinations on the evidence. See *State v. McCreven*, 170 Wn.App.444, 284 P.3d 793(2012); *State v. Johnson*, 159 Wn.App. 766, 247 P.3d 11(2011); *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Bencivenga*, 137 Wn.2d 703, 974 P.2d 832 (1999); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Walton*, 64 Wn.App.410, 824 P.2d 533 (1992); *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979).

The appellant argues that his statements were just "emotional rants" with no actual threat being made.

It is clear from the evidence that real threats were made. The first real threat that was made is when he tells his son to "get the gun out and load up." (Plaintiff's Exhibit 3). This isn't an emotional rant. This is a very clear threat to Officer Konkle, when he is attempting to handcuff the defendant, and in response, the defendant threatens his life. He continues on, over and over with threats of violence. The most telling piece of evidence to demonstrate that this is a true threat is in a statement that is made to his son when Officer Konkle had stepped back to his truck. The

defendant, very calmly told his son "I got my 9 on me, I'm not letting him get close to me" (Plaintiff's Exhibit 3, Video 1 at 12:50). The defendant further made statements, and Officer Konkle specifically asked him what he meant by one of his statements, and the defendant answered "it's a threat, for protection." (Plaintiff's Exhibit 3, Video 2 at 9:50).

The fact of the matter is that the defendant repeatedly threatened the life of Officer Konkle, and he did so while armed with a loaded firearm. This wasn't hyperbolie, or "emotional rants" – the defendant was fully aware of the fact that he was armed and indicated he would use force if he deemed necessary.

Further, Officer Konkle testified that he was fearful of the defendant (VRP 72), wanted to try to de-escalate the situation (VRP 71), and felt that he was going to have to use deadly force (VRP 72).

D. CONCLUSION

Based on the analysis, the State respectfully requests that the motion on the merits be denied. This is not a constitutional issue. Extensive evidence was presented at trial that showed the defendnat was not just making emotional rants, these were true threats against Officer Konkle, and Officer Konkle believed his life could be in danger.

Respectfully submitted this 24th day of January, 2020.

STEVENS COUNTY
PROSECUTING ATTORNEY

ERIKA GEORGE
WSBA NO. 43871
Deputy Prosecuting Attorney

Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Answer to Motion on the Merits to the Supreme Court, and mailed a true and correct copy to John Lauricella, DOC #408516, Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 on January 23, 2020.

Michele Lembcke, Legal Assistant
for Erika George

STEVENS COUNTY PROSECUTOR'S OFFICE

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