No. 97860-3

IN SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOHN LAURICELLA,
Appellant.

PETITION FOR DISCRETIONARY REVIEW

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 PETITION FOR REVIEW

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A. ISSUES PRESENTED

1. Did Division III unreasonably apply the law to the facts of this case?

2. Should review be granted for a sufficiency of the evidence claim for the firearm enhancement that has been raised for the first time in the petition for review?

3. Should review be granted to determine if the statements made by the defendant were erroneously admitted under CrR 3.5 and *Miranda v. Arizona* when this issue has been raised for the first time in the petition for review?

4. Is there a significant question of law under the Fourth Amendment in the United States Consitiution regarding the detention of the defendant?

5. Should review be granted to determine if the video that the defendant's son recorded at the time of the encounter was fruit of the poisonous tree when this issue has been raised for the first time in the petition for review?

6. Should review be granted to examine the claim that the counsel was ineffective?

B. STATEMENT OF THE CASE

1. FACTS

On October 21, 2017, WDFW Officer Matthew Konkle was patrolling the Pend Oreille Wildlife Refuge on US Fish & Wildlife land when he made contact with John Lauricella due to suspicious driving activity. (VRP 65 – 67). Officer Konkle made contact with the driver, later identified as John Lauricella, after the defendant had stopped his vehicle on his own and exited the vehicle. During the contact, Officer Konkle observed a shotgun. Officer Konkle asked the passenger if the shotgun was loaded, and the passenger said no, and showed an empty chamber. When Officer Konkle asked to see the

shotgun to see if there were shells in the tube, Lauricella became increasingly agitated. (VRP 67 – 69). Officer Konkle attempted to place Lauricella in handcuffs. (VRP 71). When Officer Konkle had one cuff on Lauricella, Lauricella told his passenger to "get the gun out and load up." (Plaintiffs Exhibit 3). As Officer Konkle was alone, he decided to attempt to de-escalate the situation and decided to un-cuff Lauricella. (VRP 72). Over the course of approximately an hour, Officer Konkle attempted to talk with Lauricella. (VRP 73).

During the course of that hour Lauricella continued to be out of control. Lauricella indicated throughout the confrontation that he would use force if necessary agaist Officer Konkle. (Plaintiff's Exhibit 3). He specifically stated that "next time cuffs come out, f-ing guns out." (Plaintiff's Exhibit 3, Video 1 at 11:30). He indicated that it was unconstitutional to cuff people. At one point during the contact, Lauricella indicated that he might have another person hiding in the back seat of the truck with a gun. At another point, Lauricella indicated that his son was carrying a gun, and motioned to the passenger's waistband; and also indicated that he was carrying a gun. (Plaintiff's Exhibit 3). At one point, while Officer Konkle was at his truck, Lauricella 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). Lauricella began to get even more agitated when he was told he was going to get an infraction. (Plaintiff's Exhibit 3, Video 2). When Officer Konkle returned to his vehicle to write the infraction, Lauricella began threatening that he would shoot any officer that came near him. (Plaintiff's Exhibit 3, Video 2 at 6:08). Lauricella then told his passenger to stand in front of him and repeatedly said "women and children in front". He said that he could shoot it, "or be nice like you should and not write a ticket." (Plaintiff's Exhibit 3, Video 2 at 6:47). Lauricella continued to repeat "women and children in front;" and when Officer Konkle

asked what that meant, Lauricella said "It's a threat, for protection." (Plaintiff's Exhibit 3, Video 2 at 9:50).

While discussing whether Officer Konkle was going to write a ticket or not, Lauricella commented "you want to escalate shit tough guy? Write a ticket." (Plaintiff's Exhibit 3, Video 2 at 7:32). He continued on to say that if Officer Konkle wrote him a ticket he would "wipe my ass with it right on your f-ing face." (Plaintiff's Exhibit 3, Video 2 at 9:20). He continued on, stating "write a ticket . . if you want to escalate . . if you want a shoot out." (Plaintiff's Exhibit 3, Video 2 at 17:42). Lauricella made it clear that he was armed and would use force when he stated "we're all packing. We're getting out of here." (Plaintiff's Exhibit 3, Video 2 at 7:52).

Lauricella continued throughout the conversations to indicate that he was a free trapper and that nobody had the right to stop him; and that Officer Konkle needed to let him go, without a ticket. He indicated that it was unconstitutional to cuff somebody, and that he shouldn't even be stopped. (Plaintiffs Exhibit 3). When asked if he wanted a criminal ticket or a citation, he replied "why can't we just be men, shake hands and go . . you're wasting my time . . . I'll wipe my ass with it right in front of you." (Plaintiff's Exhibit 3, Video 2 at 2:04). He continued his threats that if he did leave, and any other cop tried to stop him that he would use violence: "Next time a cop comes around me, I know what I'm going to do . . . you or the next person who pulls me over, we're going to rock, stop, and drop." (Plaintiff's Exhibit 3, Video 2 at 22:00).

Once back up finally arrived, Lauricella was taken into custody. During a search incident into arrest, a loaded 9 mm handgun was located in the front pocket of his sweatshirt. (VRP 75). After the arrest of Lauricella, it was discovered that the passenger had been recording the incident on his cell phone. (VRP 85). The cell phone was seized. Once a warrant to search the phone was obtained, the video was located. (VRP 89).

A CrR 3.5 hearing was held on February 20, 2018. (VRP 4). At that hearing, Offier Konkle testified to the specific nature of the reason for his contact with Lauricella. (VRP 7). Officer Konkle testifated that he did not initiate any sort of stop with the defendant. Rather, Officer Konkle observed the defendant driving, and the defendant had some odd driving behavior, including turning around after the defendant saw Officer Konkle, and the defendant exiting the roadway when Officer Konkle made a circle and was following him. Then the defendant exited his own vehicle after it had come to stop. (VRP 7). Officer Konkle further testified about the remote surroundings (VRP 16). Officer Konkle testified that he did not initiate a stop of the vehicle, but that the defendant stopped on his own and exited the vehicle. (VRP 16 – 17). Officer Konkle testified that at this time he made contact with the defendant, as he was already outside his vehicle. (VRP 17). Officer Konkle further testified that he asked the defendant if he was hunting, to which the defendant replied he was "looking for coyotes." (VRP 18). Officer Konkle further asked questions about firearms. (VRP 18). At that point, Officer Konkle attempted to detain the defendant for unlawful hunting, but was unable to successfully place the defendant in handcuffs. (VRP 21 – 22). Officer Konkle decided to attempt to deescalate the situation, and the defendant was able to freely walk around during that time period. (VRP 22 – 23). Officer Konkle further testified that during that period of time that he was waiting for back up to arrive, he was having conversations in an attempt to de-escalate the situation, not asking guilt seeking questions.

The court ruled on CrR 3.5. The court ruled that the defendant was detained, so not free to leave, but that his movements were not restrained to that of a formal arrest. (VRP 46). The court also ruled that the defendant was not being interrogated during that time. (VRP 46).

The case proceeded to jury trial. (VRP 51-327). Officer Konkle of the Department of Fish and Wildlife testified. (VRP 63 – 226). Officer King

of the Department of Fish and Wildlife testified. (VRP 226 – 247). The video footage from the cellphone recordings were played. (VRP 93 – 154). It should be noted that the second video was stopped at 23 minutes, as the remainder of the recording was only that of the passenger sitting in the back of a patrol vehicle. The defendant testified. (VRP 247 – 271). The defendant admitted that he meant that he would draw his gun if the officer tried to place him in handcuffs again. (VRP 270). The defendant admitted that he ddin't want to be cited. (VRP 271).

During closing, the State argued that the defendant was threatening Officer Konkle specifically to influence a decision or other official action by use of threat. The State specifically referenced the initial threat in which Lauricella told his son to "load up" when Officer Konkle attempted to physically detain him. (VRP 289). The State also referenced the specific threat that if Officer Konkle tried to place him in cuffs again, he would bring out his weapon. The state pointed to the statement by the defendant regarding the fact that if any other Officer approached him, he would use force. (VRP 290). The State went on to reference that the defendant attempted to influence the decision of Officer Konkle to write a ticket; pointing to the threats that were made by the defendant in response to this possibility. (VRP 291).

The defense offered in closing that the defendant was not attempting to influene any decisions by Officer Konkle. (VRP 298). The defense also offered during closing that to answer "yes" to the firearm enhancement, the firearm has "to be readily available for offensive and defensive use," (VRP 309.) Jury Instruction No. 9 contained the same instruction on the law.

The defendant was convicted of Intimidating a Public Servant as charged in Count 1, and returned a yes to the firearm enhancement. The defendant was convicted of Obstructing a Law Enforcement Officer as charged in Count 2. The defendant was found not guilty of the crime of

Unlawful Hunting of Wild Animals in the Second Degree as charged in Count 3. (VRP 319-320).

Sentencing was held on June 5, 2018. (VRP 328). The Court sentenced the defendant to 39 months of confinement for Count 1, a 90 day standard range sentence plus 36 months for the firearm enhancement. The court imposed 12 months of community custody. (VRP 345 – 346).

2. PROCEDURE

The defendant timely filed his appeal in Division III.

The appellant brief filed on 11/15/2018 listed the assignments of error to be "The state failed to prove the essential element of intimidating a peace officer by failing to present evidence that Lauricella made threats in an attempt to influence the peace officer in his official duties."

The state filed a brief of respondent on March 1, 2019.

The Court of Appeals, Division III, filed its unpublished opinion on November 5, 2019, affirming the conviction. Division III specifically found that the defendant's conduct was intended to influence the arresting officer's official actions. (36128-4-III, 4). Division III further distinguishes from *State v. Montano*, 169 Wn.2d 872, 239 P.3d 360 (2010) and *State v. Burke*, 132 Wn. App. 415, 132 P. 3d 1095 (2006).

The defendant filed this petition for review pro se, as appellate counsel was withdrawn after motion.

C. ARGUMENT

1. Division III did not unreasably apply the appropriate analysis of sufficiency of the evidence to the facts of this case.

The appellant argues that Division III "correctly identifies the applicable Supreme Court precedent and the standards in that precedent, but

applies them unreasonably to the facts of the case." There is no basis for review to be granted on this argument.

Under RAP 13.4(b), the decision of the Court of appeals is not in conflict with either a decision of the Supreme Court or a published decision of the Court of Appeals.

The Court of Appeals discusses at length the holdings in *State v. Montano* and *State v. Burke.*

Regarding *Montano, Division* III specifically points out that *Montano* requires that "[t]here must be some evidence suggesting an attempt to influence, aside from the threats themselves or the defendant's generalized anger at the circumstances." 36128-4-III 5 – 6 citing *Montano* at 877. They discuss that the *Montano* court holds that there was no link between the threats made in that case and the officers' actions he wished to influence.

Regarding *Burke*, Division III "noted an absence of evidence that Burke intended to influence the officer's official actions and noted that neither anger nor assaultive behavior implies an intent to influence." 36128-4-III, at 6-7.

Then Division III held:

> The link, missing in *Montano* and *Burke*, is present here. Lauricella repeatedly asked Officer Konkle not to write a ticket. He then made both implied and explicit threats that he would shoot Officer Konkle if he tried to give him a ticket. We conclude that the State presented sufficient evidence for a jury to find beyond a reasonable doubt that Lauricella attempted to influence Officer Konkle to not give him a ticket. 36128-4-III at 7.

It is clear that the Court did not "unreasonably apply" the law. This decision is not in conflict with either *Montano* or *Burke*, and review should not be granted on this basis. This issue also is not a significant question of law under either the Washington State Constittuion or the US Constitution;

nor is it an issue of substantial public interest.

2. The issue of the sufficiency of the evidence of the firearm enhancement should not be reviewed by the Supreme Court when it is raised for the first time in the petition for review; however, there is sufficient evidence to support the firearm enhancement.

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 sufficiency of the evidence may be raised for the first time on review under RAP 2.5(a)(2).

The next question to address is whether or not a sufficiency of the evidence question on the firearm enhancement meets the requirements of RAP 13.4(b). 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. It is not a significant question of law under either the US Constitution or the Washington Constitution. Lastly, this is not an issue of substantial public interest. This issue should not be reviewed by the Supreme Court.

If the Supreme court wanted to accept review, the issue is sufficiently developed to fairly consider this issue. The sufficiency of the evidence test remains the same as that which was used in the appeal for the charge of Intimidating a Public Servant, as cited to by Division III:

> When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* Furthermore, "[a] claim of

> insufficiency admits the truth of the State's evidence an all inferences that reasonably can be drawn therefrom." *Id.* In a challenge to the sufficiency of the evidence, circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). 36128-4-III at 5.

Here, the appellant misstates the law for a firearm enhancement when he argues that "there is no evidence that [appellant], threatened anyone with a weapon." The question is not if he threatened anyone with a weapon, but rather the question asked of the jury is "Was the defendant armed with a firearm at the time of the commission of the crime." WPIC 190.02.

Further, the definition of armed with a firearm is:

> A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon. WPIC 2.10.01

Here, there is sufficient evidence to show that the defendant was armed with a firearm. First and foremost, Plaintiff's Exhibit 3, the three videos recorded by the appellant's son, clearly show the bulge in the front pocket of the defendant during the altercation.

There is ample evidence presented that show that the firearm is easily accessibly and readily available for use, as it is located in his front pocket. This is also shows that the is a connection between the firearm and the defendant.

Further, there is significant evidence that there is a connection

between the firearm and the crime. Officer Konkle testified that the firearm was loaded, with a round in the chamber. (VRP 83). Officer Konkle further testified that the gun was operational based on the dry fire test he did. (VRP 84). Finally, during the altercation when Officer Konkle was at his truck, Lauricella 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). That statement alone proves that the firearm is easily accessible, there is a connection between the defendant and the firearm, and there is a connection between the firearm and the crime.

Finally, the defendant argued this point at trial. In closing, the defense argued that the defendant didn't use the firearm to intimidate. The gist of the argument was that there was no connection of the firearm to the crime. (VRP 309). The jury disagreed. When conducting a sufficiency of the evidence review, the court should not "reweigh the evidence and substitute judgment." *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

It is clear that the state presented sufficient evidence to support the firearm enhancement.

3. The issue raised regarding the admissibility of statements was erroneous under CrR 3.5 or *Miranda v. Arizona* should not be heard when it is raised for the first time in the petition for review; however, there was no violation of either CrR 3.5 or *Miranda v. Arizona*.

Again, the first question raised is if this issue should be heard for the first time in this petition for review. RAP 2.5(a) remains the governing authority. Arguably, this court could hear this issue raised for the first time under RAP 2.5(a)(3), a manifest error affecting a constitutional right.

There is no doubt that the right against self incrimination is a constitutional one; however, there is nothing to show that this is a manifest error. "Manifest" error is error that resulted in actual prejudice. *State v.*

O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *State v. Kirkman,* 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial. *O'Hara,* 167 Wn.2d at 99. To distinguish this analysis from that of harmless error, "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." *O'Hara,* 167 Wn.2d at 99–100. This error isn't obvious from the record; in fact, it is clear that the trial Court made the correct ruling.

Again, if the court chooses, there is a sufficiently developed record for the court to review, as a CrR 3.5 hearing was held. During that hearing, Officer Konkle testified multiple times that he attempted to arrest the defendant by placing him in handcuffs, and the situation started to escalate, so he backed off and removed the cuffs. (VRP 9-10, 21). After he removed the handcuffs, it was clear from the testimony that the defendant was detained, but not under arrest. Officer Konkle specifically testified that he wasn't under arrest because he "was able to walk around." (VRP 23).

Officer Konkle testified at length at the CrR 3.5 hearing that the purpose of the conversations, that were recorded by the defendant's son, was to de-escalate the situation. (VRP 23 – 24). He also testified that he wasn't asking questions about hunting at that point. (VRP 26, 29).

Miranda warnings are required whenever a person who has been placed in custody tantamount to arrest is questioned by police. *State v. Willis*, 64 Wn. App. 634, 636, 825 P.2d 357 (1992) (citing *State v. Sargent*, 111 Wash.2d 641, 647-48, 762 P.2d 1127 (1988)). A defendant is in custody if his or her freedom of movement is restricted to "the degree associated with a formal arrest." *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172, amended by 118 Wn.2d 596, 837 P.2d 599 (1992) (citations omitted). "Interrogation" involves express questioning, as well as all words or actions on the part of the police, other than those attendant to arrest and

custody that are likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980); *State v. Johnson*, 48 Wn. App. 681, 739 P.2d 1209 (1987).

"In custody" and "seizure" or "seized" (not free to leave) are not the same. "Seizure" means "not free to leave." A *Terry* detention is a seizure, but not an arrest. A person who is only subjected to a *Terry* routine investigative stop need not be given *Miranda* warnings prior to questioning. *State v. Phu v. Huynh*, 49 Wn. App. 192, 201, 742 P.2d 160 (1987). Even the fact that a suspect is not "free to leave" during the course of a *Terry* or investigative stop does not make the encounter comparable to a formal arrest for *Miranda* purposes. *State v. Walton*, 67 Wn. App. 127, 130, 834 P.2d 624 (1992). This is because an investigative encounter, unlike a formal arrest, is not inherently coercive since the detention is presumptively temporary and brief, relatively less "police dominated," and does not lend itself to deceptive interrogation tactics. *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003); *Walton*, 67 Wn. App. At 130. Not every encounter between a citizen and a police officer rises to the stature of a seizure. A police officer does not seize a person by simply striking up a conversation or asking questions. *Florida v. Bostick,* 501 U.S. 429, 115 L. Ed.2d 389, 111 S. Ct. 2382, 2386 (1991); *State v. Mennegar,* 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). Nor is there a seizure where the conversation between citizen and officer is freely and voluntarily conducted. *Mennegar, supra.*

Here, as the trial Court ruled after the 3.5 hearing, the defendant was not in custody for purposes of *Miranda*. There is no question that the defendant was detained pursuant to an *Terry* investigation; but his movements were not restricted to a degree associated with a formal arrest. The defendant was free to walk around, have conversations with his son, and even left to talk amongst themselves on occasions when Officer Konkle

went back to his truck.

The second requirement of *Miranda* is also not met. This is not an interrogation. Officer Konkle is not engaging in asking guilt seeking questions. His intent is to de-escalate the situation that is taking place in a remote area, where Officer Konkle is outnumbered, and the defendant has access to firearms.

No statements were admitted in violation of CrR 3.5 or *Miranda v. Arizona.*

4. The issue raised regarding unlawful seizure should not be heard when it is raised for the first time in the petition for review; however, the defendant was not unlawfully seized under the Fourth Amendment of the United States Constitution or Article 1, Section 7 of the Washington Constitution.

Again, the first question raised is if this issue should be heard for the first time in this petition for review. RAP 2.5(a) remains the governing authority. Arguably, this court could hear this issue raised for the first time under RAP 2.5(a)(3), a manifest error affecting a constitutional right.

Again, there is no doubt that the right to unlawful search and seizure is a constitutional right; however, again, there is no evidence to show that there is a manifest error.

If the Supreme Court chooses to accept review, while the issue wasn't raised at any time, there is a sufficient record of the circumstances that led to the detainment of the defendant for the Supreme Court to review; however, that record will show that there was no unlawful seizure.

Article 1, Section 7 of the Washington Constitution provides "No person shall be disturbed in his private affairs, or his home invaded, without authoritiy of the law." *Davis v. Mississippi*, 394 US 721, 89 S. Ct. 1394, 22 L.Ed. 2d 676 (1969) holds that the Fourth Amendment of the United States

Constitution applies to involuntary detention at the investigative stage. Further, *Terry v. Ohio*, 392 US 1, 21, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) holds that an Officer needs to have "specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant that intrustion."

Here, Officer Konkle observed suspicious driving patterns. (VRP 66). However, the defendant pulled his vehicle to the side of the road on his own, and exited his vehicle on his own. Officer Konkle did not initiate a stop of the vehicle by any means. Officer Konkle did not order the defendant out of his vehicle. (VRP 67). Rather, the defendant did these on his own accord. Officer Konkle did not involuntarily detain the defendant at this point.

Officer Konkle did make contact with the defendant when he was already outside of his vehicle. (VRP 67) At that time, Officer Konkle did ask the defendant if he was hunting for deer. The defendant responded that he was "looking for coyotes." (VRP 67). At that point, Officer Konkle walked towards the front of the vehicle, observing a male passenger with a shotgun in the vehicle. (VRP 68). Officer Konkle asked if the shotgun was loaded, to which the passenger indicated it wasn't; however, when Officer Konkle asked to see the rifle to check to make sure, the defendant got "irate and angry." (VRP 68). Officer Konkle further inquired about a hunting license, to which the defendant indicated that he didn't have one. (VRP 69). Officer Konkle noted that the defendant was wearing camoflauge. (VRP 69 – 70). Officer Konkle further testified that the definition of hunting per the Department of Fish and Wildlife is to "kill, harass or chase wildlife." Based on the observations of Officer Konkle and the information gathered from the statements of the defendant, Officer Konkle had specific and articulable facts that led him to believe the defendant was actually hunting without a license.

Once he has developed that reasonable suspicion, Officer Konkle has the right to detain the defendant for further investigation. It is at that point that Officer Konkle attempts to detain the defendant with handcuffs, and the situation escalates from there. From that point on, he is detained for further investigation, but it is not unreasonable or unlawful.

The fact that the defendant was found not guilty of the offense of unlawful hunting of wild animals in the second degree has no bearing on the fact that there was a reasonable suspicion. A conviction requires a burden of beyond a reasonable doubt, a much higher burden than that of reasonable suspcicion.

5. The issue raised regarding evidence being wrongfully admitted when it is "fruit of the poisonous tree" should not be heard when it is raised for the first time in the petition for review; however, the admission of the video was not improper.

Again, the first question raised is if this issue should be heard for the first time in this petition for review. RAP 2.5(a) remains the governing authority. Evidence issues are neither a jurisdictional issue or a sufficiency of the evidence issue. Further, an evidence issue is not really an issue affecting a constitutional right; although, the appellant argues that a constitutional right was violated and that is the basis for the argument that it is fruit of the poisonous tree. The state disagrees that this creates a constitutional issue, as it is a decision based on admission of evidence.

If the Supreme Court chooses to accept review, there is an adequate record of how the video was obtained, but no record on any evidentiary ruling by the court. There is reference to the video in the 3.5 hearing, but only in regards to statements that are on it. The video was again referenced during motions in limine the day of trial, in which there was no discussion of admissibility, and no objection by the defense. During trial, the proper foundation was laid pertaining to the video. Officer Konkle testified to the

seizure of the phone, the search warrant, the chain of custody of the phone, how he received the video off the phone, reviewing that video, and that the video being played in court was a true and accurate copy of the video that was retrieved by the search. There would not be an adequate record on the court's reasoning for admission.

A trial court's decision whether to admit or exclude evidence is reviewed for abuse of discretion. *State v. Iverson,* 126 Wn.App. 329, 336, 108 P.3d 799 (2005). An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons. *State v. Dye*, 178 Wash.2d 541, 548, 309 P.3d 1192 (2013). A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *Id.* A decision is manifestly unreasonable if it falls outside the range of acceptable choices, given the facts and the applicable legal standard. *Id.*

It is true that when police obtain physical evidence or a defendant's confession as the direct result of an unlawful seizure, the evidence is "tainted" by the illegality and must be excluded. However, there was no unlawful seizure under the consitution or violation of *Miranda*; therefore, there is no fruit of the poisoinous tree.

There was no abuse of discretion in admitting the evidence. There was no challenge to the evidence, so admitting it could not be based on untenable grounds or made for untenable reasons. The reason there was no challenge either by trial counsel or appellant counsel is because the motions would have been baseless.

6. The issue raised regarding ineffective assistance of counsel should not be heard when it is raised for the first time in the petition for review; however, there is no ineffective assistance of counsel.

The first question remains to be if this issue should be heard for the first time in this petition for review. RAP 2.5(a) remains the governing authority. Arguably, this court could hear this issue raised for the first time under RAP 2.5(a)(3), a manifest error affecting a constitutional right.

Again, there is no doubt that the right to effective counsel is a constitutional right; however, again, there is no evidence to show that there is a manifest error.

If the Supreme Court chooses to accept review, while the issue wasn't raised at any time, there is a sufficient record of the case for the Supreme Court to review to examine a question of ineffective assistance of counsel; however, that record will show that both trial and appellate counsel were effective.

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that there was deficient performance, as well as the deficient performance prejudiced the defendant. *State v. Cienfuegos*, 144 Wn. 2d 222, 226, 25 P.3d 1011 (2011). The defendant must show that "but for the counsels deficient performance, there is a 'reasonable probability' that the outcome would have been different." *Strickland v. Washington,* 466 US 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish that performance was deficient, a defendant must show "that the representation fell below an objective standard of reasonableness under professional norms." *State v. Townsend*, 142 Wn.2d 838, 843-844, 15 P. 3d 145 (2001).

Trial strategy and tactical decisions cannot serve as the only basis for a claim of ineffective assistance of counsel. *State v. Grier*, 171 Wn. 2d 17, 33, 246 P. 3d 1260 (2011); *State v. Hendrickson*, 129 Wn.2d 61, 77-78,

917 P.2d 563 (1996).

Here, trial counsel was clearly effective during trial, both in cross-examining the state's witnesses and in closing argument. Appellant counsel also filed an opening brief on issues that were reasonable under the law, given the cases of *Montano* and *Burke*. The State argued, and the Court of Appeals agreed, that this case is distinguishable for a number of reasons.

The defendant, pro se in this petition, argues that his counsel was ineffective because they didn't file the motions he deems to be reasonable, in his misstatements of the law.

RPC 3.1 bars an attorney from bringing frivolous motions. A 3.5 hearing was held in which all issues regarding *Miranda* were addressed. The arguments regarding seizure and *Miranda* were ruled on by the court. The law is settled on the issue of a proper *Terry* seizure. It is obvious that Officer Konkle did not initiate stopping the vehicle, he made contact with the defendant only once he exited his vehicle on his own. From there, sufficient probable cause for hunting violations were established, and the detention for further investigation was allowable under the law. The facts are clear that the defendant was not in custody or being interrogated for purposes of *Miranda*.

The appellant misstates the law and a skewed understanding of the law. His beliefs on the constitution are clear throughout the interaction with Officer Konkle and his statements that he is a "free trapper" and that he doesn't need a license to hunt and trap animals. The appellant misapplies the law regarding a firearm enhancement. The appellant misapplies the law on *Miranda* when the argument is made that the defendant did not feel free to leave, that isn't the proper analysis when applying *Miranda*. The proper analysis is if the defendant's movements were curtailed to the same extent as a formal arrest – which they clearly weren't. The brief also misapplies to the law to a *Terry* detention. Officer Konkle didn't seize the defendant

initially, the defendant pulled over and exited his vehicle voluntarily. Officer Konkle didn't even attempt to detain him for further investigation of hunting violations until probable cause was developed. The standard of probable cause and beyond a reasonable doubt are significantly different, and the proper standard is not applied to probable cause when the appellant argues that because he was aquitted there was no probable cause.

The law is clear on the issues that the defendant raised, and it was proper for counsel to not raise such frivolous issues, especially when there could not have been a good faith argument made on these issues. Counsel must apply the law, not the skewed version of what the appellant believes the law should be. There is no showing that either trial counsel or appellate counsel was deficient and that the deficient performance prejudiced the defendant.

D. CONCLUSION

Based on the analysis, the State respectfully requestes that the petition to review be denied. There are no issues raised that satisfy acceptance under RAP 13.4(b).

Respectfully submitted this 12th day of December, 2019.

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 Petition for Review to the Supreme Court of the State of Washington, and regular mailed a true and correct copy to John Lauricella #408516, Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 on December 12, 2019.

Michele Lembcke

Michele Lembcke, Legal Assistant
for Erika George

STEVENS COUNTY PROSECUTOR'S OFFICE

December 12, 2019 - 9:47 AM

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