90645-9

No: 43702-3-II
Jefferson County Superior Court No: 12-1-00005-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK FRANCIS OWENS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Craddock Verser, Superior Court Judge

PETITION FOR DISCRETIONARY REVIEW TO THE WASHINGTON STATE SUPREME COURT
RAP 13.3

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IDENTITY OF THE PETITIONER

Mark F. Owens, Respondent in the Court of Appeals, petitions for review of a Court of Appeals Decision reinstating his conviction for a violation of RCW 9.41.270. Mr. Owens was determined to be indigent by order of the Jefferson County Superior Court, as accepted by the Court of Appeals on September 6, 2012. Current counsel was appointed at public expense to handle the State's motion for discretionary review at the Court of Appeals; and has drafted this petition for discretionary review *pro bono*.

ISSUES PRESENTED FOR REVIEW

This case presents questions regarding the interpretation RCW 9.41.270, a statute which acts as a time/place/manner restriction on the fundamental right to keep and bear arms. Cogent and defensible statutory interpretation of such a statute should balance the constitutional interests implicated by the statutory scheme; and this Court's intervention is essential to correct a confused and unconstitutional interpretive framework established by the various Courts of Appeal.

I. Was it Error for the Trial Court to Deny an Instruction on the Statutory Defense to a Charge of Unlawful Carrying of a Weapon?

Brief Answer: YES. *As Mr. Owens was clearly within the curtilage of his home—a secluded private place which was completely inaccessible to the public—the jury should have been able to decide if he qualified for the place of abode defense of RCW 9.41.270(3)(a).*

II. Is RCW 9.42.270 Unconstitutional As-Applied to Mr. Owens?

Brief Answer: YES. *If the facts of this case do not qualify for the "place of abode" statutory defense, then the statute fails constitutional muster because it cannot survive even rational basis scrutiny.*

III. Is RCW 9.41.270(3)(a)'s Use of the Term "Place of Abode" Unconstitutionally Vague?

Brief Answer: YES. *"Place of abode" does not adequately describe the scope of the defense set forth in RCW 9.41.270(3)(a), does not adequately inform an ordinary person what conduct is proscribed, and fails to provide standards to guard against arbitrary enforcement.*

STATEMENT OF THE CASE

Mark Owens was charged by criminal citation dated September 6, 2011, with two counts of Fourth Degree Assault against a family or household member, one count of Obstructing a Law Enforcement Officer, and one count of Unlawful Display of a Weapon. At jury trial on December 20, 2011, the district court Mr. Owens' denied request for an instruction on the statutory defense to the charge of Unlawful Display of a Weapon. Following trial by jury, Mr. Owens was convicted of a single violation of RCW 9.41.270: Unlawful Display of a Weapon. He was acquitted on the remaining three charges. Sentence was imposed and stayed by the court pending appeal to Superior Court. An order of forfeiture was entered regarding the firearm associated with the charge. Following the Jefferson County Superior Court's reversal of Mr. Owens'

conviction and vacation of the order of forfeiture, the State filed a Motion for Discretionary Review.

The facts below were adduced at Mr. Owens' jury trial. On September 3, 2011, at approximately 9:00 p.m., C.O., a juvenile son of the Appellant Mark Owens, placed a call to 911 to report an alleged assault upon himself and his mother. (VRP 47; CP 103). Deputies from the Jefferson County Sheriff's Office responded. (VRP 100, 141; CP 156, 197). The property to which the officers responded was in rural Jefferson County along Center Road between Chimacum and Quilcene. (VRP 100; CP 156). The five-acre property was surrounded on all sides by forest such that it was not possible to see any neighbors or adjoining property. (VRP 85; CP 141). Members of the family routinely carried a firearm on the property for protection due to past encounters with wild animals, including bears, cougars, and coyotes. (VRP 70, 84, 155, 192; CP 126, 140, 211, 248). Mr. Owens' property was behind a locked gate about one-eighth of a mile from Center Road along his driveway. (VRP 102; CP 158). This locked gate prevented vehicular access to the home which was one-quarter mile further up the driveway from the locked gate. (VRP 101; CP 157). In order to approach Mr. Owens' house, law enforcement had to abandon their vehicles, and circumvent the locked gate on foot by going through the woods. (VRP 100, 102; CP 156, 158).

The deputies surprised Mr. Owens as he was walking from the rear porch of his house toward his detached garage with a rifle in his hand. (VRP 103, 106; CP 159, 162). (VRP 103; CP 159 "[W]e were walking up the driveway. We came around the back corner of the house where the other door is ..."); VRP 106; CP 162 ("We were right at the corner of the house when [Mark Owens] emerged out his back door. ... He came from the house towards the garage ..."); VRP 69; CP 125 ("Q: About how far away is [the garage] from the house? A: 20, 30 feet."). Upon seeing the officers and hearing their order to drop the weapon, Mr. Owens moved behind a vehicle in the driveway and waited there for a brief time before putting down the weapon and surrendering to the officers. (VRP 149-50; CP 205-06).

Mr. Owens was arrested for assault, and subsequently charged, by complaint submitted by the Jefferson County Prosecutor, with two counts of Fourth Degree Assault, one count of Obstructing an Law Enforcement Officer, and one count of Unlawful Display of a Weapon. Mr. Owens was acquitted at trial of all charges, except for the final count of Unlawful Display of a Weapon.

On appeal, the Jefferson County Superior Court reversed Mr. Owens' single conviction and vacated the related order of forfeiture solely on the basis of the trial court's failure to instruct on the statutory defense

to Unlawful Carrying or Handling of Weapons, RCW 9.41.270(1). Having reversed the conviction on the instruction error, the superior court did not reach Mr. Owens' constitutional arguments, or the argument that the forfeiture order was independently invalid.

The State petitioned for discretionary review to the Court of Appeals, Division Two. After granting the State's Motion for Discretionary Review, the Washington Court of Appeals reversed the Jefferson County Superior Court, reinstating Mr. Owens' conviction for Unlawful Display of a Weapon. Because the State did not appeal the vacation of the forfeiture order, the vacation of that order became final judgment. Mr. Owens petitions for discretionary review.

STANDARD OF REVIEW

An appellate court reviewing the decision of a district court follows the standards set forth in RALJ 9.1. *State v. Owens*, __ Wn.App. __, __ P.3d __ (2014) WL 1745748 (citing *State v. Ford*, 110 Wn.2d 827, 829-30, 755 P.2d 806 (1988); *State v. McLean*, 178 Wn.App. 236, 242-43, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014)). As set forth by RALJ 9.1, an appellate court must ascertain whether the district court committed any errors of law.

"Alleged errors of law in jury instructions are reviewed de novo." *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005) (en banc)

(citing *Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004)). "In interpreting statutory provisions, our 'primary objective is to ascertain and give effect to the intent and purpose of the Legislature in creating the statute.'" *Owens*, __ Wn.App. at __, (citing *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002)).

"A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion." *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (en banc) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996)).

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court's intervention in this case is necessary to remedy a small, but confused, body of case law interpreting RCW 9.41.270. This Court should accept review of this case because the Court of Appeals' decision is in conflict with another decision of the Court of Appeals; and because the case presents a significant question of law as it relates to fundamental rights under the Washington State Constitution and the United States Constitution. The Court of Appeals' decision unconstitutionally infringes upon Mr. Owens' right to carry a firearm on his isolated rural property.

Decision in Conflict

As will be shown, *infra*, Divisions One and Two of the Washington Court of Appeals have interpreted RCW 9.41.270 in a manner inconsistent with an interpretation by Division Three.

In the instant case, Division Two held that it was not error to deny a jury instruction on the defense to a charge of unlawful display of a weapon under RCW 9.41.270 because the defendant "was neither inside his residence nor on a structure attached to his residence when he unlawfully displayed his rifle to police." *Owens*, __ Wn.App. at __.

Division One ruled that "[a] backyard does not satisfy the place of abode exception under RCW 9.41.270." *State v. Smith*, 118 Wn.App. 480, 485, 93 P.3d 877 (2003).

Division Three ruled that a person, standing fully exposed on a deck while threatening and pointing a BB gun at two juveniles, was on "an extension of the dwelling and therefore part of the abode." *State v. Haley*, 35 Wn.App. 96, 98, 665 P.2d 1375 (1983).

These decisions stand in conflict because the "split hair" distinction between being inside an abode or on a structure attached to the abode, versus merely being in a backyard, trivializes and obscures the key issue presented by the RCW 9.41.270: whether the display of the weapon occurred in a private area.

Significant Constitutional Question

The instant case presents a significant question regarding the nexus of the fundamental individual right to keep and bear arms with the rights to privacy and to be free from unreasonable searches and seizures.

The relevant statutory scheme was enacted by the Washington Legislature to "prevent someone from displaying dangerous weapons to as to reasonably intimidate *members of the public*." *State v. Maciolek*, 101 Wn.2d 259, 268, 676 P.2d 996 (1984) (citing House Journal, 41st Legislature (1969), at 201) (emphasis added). Despite this purpose, Mr. Owens was convicted for violating the statute in an area that was clearly not open or accessible to the public. RCW 9.41.270 is unconstitutional as applied to Mr. Owens because its purpose of protecting the public is not even rationally related to an interpretation that it is applicable to conduct in an area inaccessible to the public.

The Court of Appeals erred because it disregarded, with little analysis, the nexus between the right to bear arms at one's place of abode and the right to privacy in the context of RCW 9.41.270's provisions which protect the public from unlawful displays of firearms. Given the longstanding relationship between the curtilage of a home and the right to privacy, Fourth Amendment jurisprudence should inform any deliberation regarding whether RCW 9.41.270's prohibitions are constitutional.

Further, the uncertainty associated with the term "place of abode" has rendered the statute unconstitutionally vague, as it fails to provide adequate standards of guilt that ordinary people can understand and it fails to guard against arbitrary enforcement.

I. Mr. Owens Should have Received an Instruction on the Statutory Defense to a Charge of Unlawful Display of a Weapon.

Washington law prohibits carrying, exhibiting, displaying, or drawing a firearm in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of others. RCW 9.41.270(1). This prohibition, however, "*shall not apply to, or affect* ... [a]ny act committed by a person while in his or her place of abode or fixed place of business." RCW 9.41.270(3)(a) (emphasis added).

Division Two erroneously held that the trial court's denial of Mr. Owens' request for a instruction, based on an incorrect interpretation of the binding nature of the WPICS, was harmless because there was no evidence that Mr. Owens was in his place of abode. This ruling unreasonably limited the meaning of "place of abode" and deprived Mr. Owens of the ability to present his defense to the jury: that he was in an area of privacy where he could carry a weapon in any manner without fear of prosecution under RCW 9.41.270(1).

Decisions of the Courts of Appeals Stand in Conflict

The Court of Appeals, Division Two, reinstated Mr. Owens' conviction for Unlawful Carrying of a Weapon because it held that, "Owens was neither inside his residence nor on a structure attached to his residence when he unlawfully displayed his rifle to police." *Owens*, __ Wn.App. at __. Division One held that a backyard is not part of the abode, so a defendant in his backyard did not qualify for the statutory defense of RCW 9.41.270(3)(a). *State v. Smith*, 118 Wn.App. 480, 93 P.3d 877 (2003). These interpretations stand at odds with Division Three's interpretation in *State v. Haley*, 35 Wn.App. 96, 665 P.2d 1375 (1983), where a person standing open and exposed on a back deck was deemed to be in his place of abode within the meaning of RCW 9.41.270(3)(a).

Courts interpreting RCW 9.41.270(3)(a) agree that the statute fails to define the critical concept of "place of abode." *Owens* at __, *Haley*, at 98; *Smith*, at 484. The three divisions of Washington Court of Appeals unanimously agree that a court interpreting the statute should look to the ordinary and usual meaning of abode because it is not otherwise defined in the statute, but the holdings which flow from this superficially congruous approach differ significantly.

In *Haley*, Division Three held that a person who brandished a BB gun and threatened trespassing juveniles while standing on an open and

uncovered back deck on property up a hill from the Spokane River was in "an extension of the dwelling and therefore part of the abode." 35 Wn.App. at 97-98. Division Three considered the ambiguity in RCW 9.41.270(3)(a)'s use of the term "abode" in the context of the rule of lenity. 35 Wn.App. at 98. Division Three's interpretation construed the ambiguity against the state, as the concept of lenity mandates when interpreting a penal statute.

Without documented discussion of lenity, Division One reached a contradictory conclusion when it broadly held that "[a] backyard does not satisfy the place of abode exception under RCW 9.41.270." 118 Wn.App. at 485. In *Smith*, the Court of Appeals addressed a man who was "on the outskirts of his backyard where only a fence with breaks in it separated him" from people in a church parking lot in the adjacent property. *Id.* at 485. In *Smith*, the defendant's "behavior was not contained to an audience on his property; he *intended that his behavior traverse the fence to communicate threats*." *Id.* (emphasis added).

In both cases, the person asserting the defense of RCW 9.41.270(3)(a) was in an area of the property which was not technically inside the physical structure of the home.

Reconciling these two disparate holdings, Division Two held that Mr. Owens was not in his place of abode because he was not inside the

structure of the home or on a structure attached to his residence. *Owens*, __ Wn.App. at __. In short, Division Two did not hinge its ruling upon the relative privacy of where Mr. Owens displayed the weapon. It focused on the degree to which he was either inside his home or in physical contact with its structure. This focus on a contrived and strained analysis of "abode" prevented the Division Two from seeing the forest for the trees.

"Place of Abode" Should be Broadly Interpreted to Apply to Mr. Owens

Haley stands for the clear proposition that a person does not have to be "inside" his or her home to qualify for the "place of abode" defense set forth in RCW 9.41.270(3)(a). Pursuant to longstanding principles of lenity and strict construction of penal statutes, the concept of "abode" should be interpreted against the State.

Abode, as cited in *Haley*, includes "one's home, place of dwelling, residence, and/or domicile." 35 Wn.App. at 98 (citing Black's Law Dictionary 20 (4th rev. ed. 1968). This concept of "abode" should be understood in the context of the purpose of RCW 9.41.270, which is "to prevent someone from displaying dangerous weapons so as to reasonably intimidate members of the public." *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984). Reading *Haley* and *Smith* together, mindful of the purpose of RCW 9.41.270, the rational conclusion is that its prohibition on unlawfully carrying or handling weapons does not apply to areas of a

person's abode or fixed place of business where he or she has a reasonable expectation of privacy because they are concealed from the view of the public.

Consideration of time-tested principles of statutory construction suggests that the term "place of abode" does not exclusively apply to a physical structure.

> [E]ach provision of a statute should be read together with other provisions in order to determine legislative intent. "The purpose of reading statutory provisions in pari material with related provisions is to determine legislative intent underlying the entire statutory scheme and read the provisions 'as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.'"

In re Estate of Kerr, 134 Wn.2d 328, 336, 949 P.2d 810 (1998) (en banc) (quoting *State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012, 24 A.L.R. 4th, 1191 (1980)).

In the statutory defense, immediately following the phrase "place of abode" is the phrase "fixed place of business." RCW 9.41.270(3)(a). The term "fixed place of business," like "place of abode" describes an area in which the prohibitions of RCW 9.41.270(1) do not apply. "Fixed place of business" does not plainly refer to something inside or attached to a physical structure. Businesses such as a golf course or a farm are fixed

places of business where an employee or owner might carry a firearm, but to which the prohibitions of RCW 9.41.270(1) would not apply. These business operations are conducted primarily outdoors, so a person carrying a firearm on a golf course or farm may be entitled to the defense of RCW 9.41.270(3)(a).

The statutory interpretation canon *noscitur a sociis* instructs that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it. Blacks Law Dictionary, (9th ed. 2009). If "place of abode" is considered by its association with the phrase "fixed place of business," then it becomes apparent that the legislature did not contemplate that a person would be exempted from the prohibition of RCW 9.41.270(1) only when being literally "in" his or her home. As "fixed place of business" is not clearly a place inside a structure, "place of abode" should not be so limited. It would be absurd, in the context of the constitutional emphasis placed upon the strength of fundamental individual rights at a person's home, to more stringently circumscribe the right to bear arms in the home than at a business.

> General rules of statutory construction instruct that: a statute is to be interpreted in a manner that is consistent with its underlying purpose; unlikely, absurd or strained results are to be avoided; and where a statute is susceptible to more than one interpretation, some of which may render it

> unconstitutional, the court will adopt a construction which sustains the statute's constitutionality, it at all possible.

State ex rel. Faulk v. CSG Job Center, 117 Wn.2d 493, 500, 816 P.2d 725 (1991) (citing *In re Cross*, 99 Wn.2d 373, 382, 662 P.2d 828 (1983); *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)).

Mr. Owens was contacted by police when he exited his back door to walk to the detached garage twenty (20) to thirty (30) feet away. This area was located behind his home in his rural forested five-acre property which was segregated from the public roadway by a locked gate that prevented access to his quarter-mile long private driveway. This area of privacy is more like the inside of a residence than the exposed deck in *Haley*, and completely distinguishable from the facts of *Smith*. RCW 9.41.270(1)'s time/place/manner restriction, aimed at protecting the public from threatening displays of firearms, should not reach Mr. Owens' conduct in his private, isolated property.

II. If the Defense from RCW 9.41.270(3)(a) is not Interpreted to Include Mr. Owens' Conduct, then the Statute is Unconstitutional As-Applied.

At its essence, this case poses the question whether the curtilage of the home part of the "place of abode" within the meaning of RCW 9.41.270(3)(a). The nexus between the fundamental right to keep and bear arms to defend the home and the privacy protections of the home and its

curtilage militate in favor of defining the parameter of the "place of abode" exception to RCW 9.41.270(3)(a) to include the curtilage of the home, as understood in the context of Fourth Amendment and article I, section 7, jurisprudence. Ultimately, the fundamental right to keep and bear arms in the home for self-defense requires determination of the scope of the "home," or abode, where most fundamental rights are at their zenith.

An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that the application of the statute in the specific context of the party's actions is unconstitutional. *City of Redmond v. Moore*, 151 Wn.2d 664, 668-9, 91 P.3d 875 (2004) (citing *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n. 14, 4 P.3d 808 (2000)). "[A] court may not strain to interpret [a] statute as constitutional: a plain reading must make the interpretation reasonable." *Republican Party*, 141 Wn.2d at 282 (citing *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 757, 871 P.2d 1050 (1994)).

RCW 9.41.270 cannot be applied constitutionally to Mr. Owens because the area where he allegedly displayed his rifle is an area deserving of Fourth Amendment privacy protection, and no member of the public could lawfully enter that area, so the purpose of the statute to protect the public from displays of weapons is inapplicable.

This Court has declined to apply a level of scrutiny to the analysis of laws regulating the Second Amendment. *See State v. Sieyes*, 168 Wn.2d 276, 295, 225 P.3d 995 (2010). It observed that the United States Supreme Court rejected rational basis scrutiny—the minimal level of review—as being too low of a standard to apply to a Second Amendment analysis. *Id.* at 294-5. This Court instead looked to the original meaning of the Second Amendment and the traditional understanding of the right it conferred. *Id.* at 295.

RCW 9.41.270 does not even survive the inappropriately low rational basis level scrutiny when it is enforced upon Mr. Owens in his secluded rural property. Regulating the way he carries a firearm between his home and garage behind his house on his five-acre forested property has no rational relationship to the protection of the public from intimidating displays of weapons. The police officers did not enter his property that night as reasonably respectful members of the public. They circumvented a locked gate and approached his house in stealth.

If this Court follows its precedent in reviewing the constitutionality of RCW 9.41.270 in the context of the traditional understanding and original meaning of the Second Amendment, its infirmity as applied to Mr. Owens is apparent.

The right to keep and bear arms is an ancient right that was important for self-defense and hunting, as well as service in the militia and protection from tyranny. *District of Columbia v. Heller*, 554 U.S. 570, 559, 128 S.Ct. 2783, 171 L.Ed 2d 637 (2008). The right to self-defense "was the *central component* of the [Second Amendment] right itself." *Id.* at 559. (emphasis in original). Possession of a firearm was an essential tool for self-defense for Americans who lived on the edges of civilization during the people of colonization and westward expansion.

Compared to most in today's society, Mr. Owens lives in the wilderness. Carrying a firearm on his property is necessitated by its remoteness and the fact that dangerous predatory wildlife has been encountered on his property. Carrying a firearm at night between his house and detached garage behind the locked driveway gate and forested perimeter of his five-acre rural property does not endanger members of the public[1] because they are not lawfully allowed to access his property. As applied to Mr. Owens in this case, RCW 9.41.270 unconstitutionally infringes upon his fundamental right to bear arms on his property for self-defense.

[1] If the Court is concerned that he carried a firearm while police were on the premises, it should note that the police approached in stealth without sirens so he didn't have the chance to discard the weapon prior to their arrival. And, if Mr. Owens' conduct had truly risen to the level of an assault upon or tangible threat to either of the deputies, he could have been charged and prosecuted for any number of other offenses, such as Assault, Harassment, or Intimidating a Public Servant.

III. RCW 9.41.270 is Unconstitutionally Vague Because it Fails to Clearly Define "Place of Abode."

"The void-for-vagueness doctrine is rooted in principles of due process." *City of Sumner v. Walsh*, 148 Wn.2d 490, 499, 61 P.3d 1111 (2003) (internal string citation omitted). "What is forbidden by the due process clause are criminal statutes that contain no standards and allow police officers, judge and jury to subjectively decided what conduct the statute proscribed or what conduct will comply with the statute in any given case." *Maciolek*, 101 Wn.2d at 267 (1984).

Here, RCW 9.41.270 fails to adequately define the term "place of abode" in such a way to make it understandable for the average person. The ambiguity flowing from the failure to define "place of abode" has already been recognized by the Court of Appeals. *Haley*, at 98; *Smith*, at 484. This ambiguity makes it unclear for citizens how to avoid running afoul of the law, and provides no discernible enforcement standards for law enforcement.

The disparate decisions in *Haley*, *Smith*, and the instant case, reveal that the Courts of Appeals in Washington have differing perspectives on the meaning of "place of abode" in RCW 9.41.270(3)(a). Mr. Owens was charged and convicted for carrying a firearm in a way that

manifested the intent to intimidate the public in a place where the public was not allowed to be.

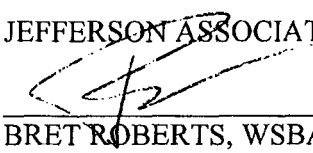
RCW 9.41.270 is vague because the term "place of abode" does not establish sufficiently clear standards for the law's enforcement, and it can be erroneously interpreted to reach a substantial amount of protected conduct.

CONCLUSION

This Court should accept review of this case so it can consider the disparate and conflicting decisions of the Courts of Appeals and issue an opinion which clarifies the interpretation of RCW 9.41.270. This Court should accept review because the case implicates the scope and interrelationship of the fundamental right of privacy and the right to keep and bear arms, thus presenting "a significant question of law under the Constitution of the State of Washington or of the United States" within the meaning of RAP 13.4(b)(3). Mr. Owens asks this Court to accept review and consider his argument that the Court of Appeals erred by reinstating his conviction.

Respectfully Submitted this 29 day of May, 2014.

JEFFERSON ASSOCIATED COUNSEL



BRET ROBERTS, WSBA No. 40628, Attorney for Petitioner

PROOF OF SERVICE

I, Bret Roberts, certify that, on this date:

I filed Mark Owens' Petition for Discretionary Review electronically with the Court of Appeals, Division II, through the Court's online filing system.

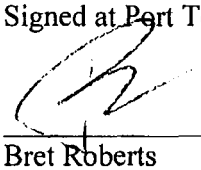
I delivered an electronic version of the same through the Court's filing portal to

Thomas Brotherton
Jefferson County Prosecutor's Office
tbrotherton@co.jefferson.wa.us

I also hand-delivered a hard copy of the Brief of Respondent to the Jefferson County Prosecutor's Inbox in the Jefferson County Superior Clerk's Office, Port Townsend, Washington.

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

Signed at Port Townsend, Washington, on May 29, 2014.



Bret Roberts
Attorney for Mark Owens

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. MARK FRANCIS OWENS, Respondent.	No. 43702-3-II PUBLISHED OPINION

LEE, J. — The State appeals the superior court's reversal of Mark Owens's unlawful display of a weapon conviction. A district court jury found Owens guilty of unlawful display of a weapon. On appeal, the superior court reversed Owens's conviction, ruling that the trial court erred in refusing Owens's proposed jury instruction requiring the State to prove that he did not commit the charged crime while "in his place of abode." Because the "place of abode" exception under RCW 9.41.270(3) is inapplicable to the facts of this case, the district court did not err in declining to give Owens's proposed jury instruction. Furthermore, RCW 9.41.270 is neither unconstitutionally vague nor unconstitutional as applied to the facts of this case. Accordingly, we reverse the superior court's decision and reinstate Owens's unlawful display of a weapon conviction.

FACTS

A. BACKGROUND

On the evening of September 3, 2011, Owens had an altercation with his 16-year-old son, CO,[1] at their home in rural Jefferson County. CO's mother, Tammy, intervened and Owens began arguing with her about interrupting him while he was disciplining their son. At that point, CO went outside and called 911.

CO told the 911 operator that Owens may have been drinking earlier in the evening and that Owens was yelling and hitting Tammy and him. CO also informed the operator that the family kept a number of rifles in the house. Owens came outside to talk with CO at some point during the 911 call, and CO put his phone in his pocket without hanging up. Owens told CO that it really hurt his feelings to have his son disrespect him in front of his wife. Owens also said, "You call the cops? Are they coming here? Well, good. I'll get the gun." Clerk's Papers (CP) at 109.

A number of Jefferson County Sheriff's deputies responded to the scene. Because a locked gate prevented vehicular access to the house, deputies had to park a quarter mile away and approach the home on foot. As the deputies "came around the back corner of the house," they saw Owens come out of the back door carrying a rifle. CP at 159. The deputies announced their presence, yelling, "Sheriff's office, drop the gun." CP at 159. Owens ignored the request and continued walking toward the detached garage, 20 to 30 feet away from the house. He then ducked down behind a car outside the garage and, after 30 seconds or so, stood up and walked towards the deputies with his hands in the air. The deputies arrested Owens.

[1] To provide confidentiality, we use the minor's initials in this opinion.

B. PROCEDURE

The State charged Owens with two counts of fourth degree domestic violence assault, one count of obstructing a law enforcement officer, and one count of unlawfully displaying a firearm. RCW 9A.36.041; RCW 10.99.020(5)(d); RCW 9A.76.020; RCW 9.41.270.[2] Owens was tried by a jury in Jefferson County District Court.

Owens, CO, Tammy, and the deputies who responded to the 911 call testified consistently with the events described above. However, CO and Tammy testified that Owens did not hit them during the incident. In addition, CO, Tammy and Owens all testified that family members usually carry firearms any time they walk outside on the property because they have had problems with bears, cougars, and coyotes. Finally, Owens acknowledged that he heard the police officer's request that he drop his weapon, but he ignored the request because he contemplated "suicide by cop" before peacefully surrendering. CP at 253.

At the conclusion of testimony, the State proposed that the Washington Pattern Jury Instruction for the crime of unlawful display of a weapon be given. The proposed instruction reads:

[2] RCW 9.41.270 reads, in part:

> (1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.
>
> . . . .
>
> (3) Subsection (1) of this section shall not apply to or affect the following:
>
> (a) Any act committed by a person while in his or her place of abode or fixed place of business.

> To convict the defendant of the crime of unlawfully displaying a weapon, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about (___date___), the defendant [carried][exhibited][displayed][or][drew] a [firearm]. . .
>
> (2) That the defendant [carried] [exhibited] [displayed [or] [drew] the weapon in a manner, under circumstances, and at a time and place that [manifested an intent to intimidate another][or][warranted alarm for the safety of other persons]; and
>
> (3) That this act occurred in the [State of Washington] [City of _____] [County of _____].
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.[3]

Based on RCW 9.41.270(3)(a), Owens argued that a fourth element should be added to the State's proposed jury instruction requiring the State to prove that "the act did not occur in the defendant's place of abode or fixed place of business." CP at 55.

The district court declined to give Owens's proposed instruction with the additional element, stating:

> [T]he problem that I have is, you know, the Supreme Court hasn't— Until they make a decision on a WPIC to add something based on new case law, my general tendency is not to . . . go beyond what the Supreme Court has indicated. And since it's not an element that is in the WPIC that the State has to prove . . . I'm not going to add it in as a jury instruction. . . . [B]ecause the WPIC 133.41 says what it says, I'm going to go ahead and offer the State's [proposed instruction].

CP at 289-90.

The jury found Owens guilty of unlawful display of a weapon but acquitted him of the other charges. The district court sentenced Owens and, pursuant to RCW 9.41.098, entered an

[3] 11A WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 133.41, at 612 (3d ed. 2008).

order forfeiting the rifle Owens carried during the incident. The court stayed Owens's sentence pending his RALJ appeal in superior court.

Jefferson County Superior Court heard Owens's RALJ appeal. In a memorandum decision, it ruled that "if one considers the curtilage of the home as part of [Owens's] abode, the State had to prove that Mr. Owens was not in his 'place of abode' when he displayed the rifle." CP at 355. The superior court reversed Owens's conviction, ruling that the "'in his place of abode' exception to prosecution under the statute applies" and that the "District Court erred when it failed to give the instruction proposed by Mr. Owens that included the exception as set forth in RCW 9.41.270(3)(a) as an element that the State had to disprove beyond a reasonable doubt." CP at 356. The superior court also reversed and vacated the district court's forfeiture order.

The State sought discretionary review in this court, arguing that the "Superior Court's decision is in conflict with the position of the Washington Court of Appeals [Division One] that 'A backyard does not satisfy the place of abode exception under RCW 9.41.270'" in *State v. Smith*, 118 Wn. App. 480, 485, 93 P.3d 877 (2003), *review denied*, 151 Wn.2d 1014 (2004). *See* spindle (Mot. For Discretionary Review). Because "the superior court's decision to rule that an 'abode' includes a backyard directly conflicts with *Smith*'s holding," this court granted review under RAP 2.3(d)(1). Ruling Granting Review, *State v. Owens*, No. 43702-3-II (Wash. Ct. App. Oct. 22, 2012).

ANALYSIS

A. UNLAWFUL DISPLAY OF A WEAPON

Given the facts of this case, the "place of abode" exception to unlawful display of a firearm is inapplicable. Therefore, we hold that the district court did not err in declining to give Owens's proposed instruction. Moreover, we hold that RCW 9.41.270(3) is neither unconstitutionally vague nor unconstitutional as applied to the facts of Owens's case.

1. Standard of Review

Our review is governed by the standards contained in RALJ 9.1. *State v. Ford*, 110 Wn.2d 827, 829-30, 755 P.2d 806 (1988); *State v. McLean*, 178 Wn. App. 236, 242-43, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014). Accordingly, we must determine whether the district court "has committed any errors of law." RALJ 9.1(a). We interpret statutes and alleged errors of law in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). In interpreting statutory provisions, our "primary objective is to ascertain and give effect to the intent and purpose of the Legislature in creating the statute." *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

2. RCW 9.41.270.

RCW 9.41.270(3) states that unlawful display of a weapon "shall not apply to or affect the following: (a) Any act committed by a person while in his or her place of abode or fixed place of business." The statute does not define the term "abode." Therefore, "this court will give the term its plain and ordinary meaning ascertained from a standard dictionary." *Watson*, 146 Wn.2d at 954. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 4 (1969) defines

"abode" as the "place where one abides or dwells" and lists "residence" and "home" as synonyms.[4] Given this definition, we hold that, contrary to Owens's assertions, a plain meaning analysis dictates that the exception found in RCW 9.41.270(3)(a) only applies to situations where a person is in his or her home or residence.[5] Here, it is undisputed that Owens displayed the rifle outside his home.

Division Three and Division One of this court have previously addressed the scope of the exception to the unlawful display of a weapon statute at issue in this case. Owens argues that the "disparate rulings of Divisions One and Three reveal that, at minimum, there is a *factual* dispute regarding the applicability of [RCW 9.41.270(3)(a)]." Br. of Resp't at 22. Disparate holdings of divisions of this court on the interpretation of statutory language do not create factual disputes. Such disparities, if any, involve questions of legal interpretation. However, under either decision, Owens's conviction for unlawful display should be reinstated.

In *State v. Haley*, 35 Wn. App. 96, 97-98, 665 P.2d 1375 (1983), Division Three of this court addressed the situation where a juvenile defendant, who "was target practicing with a BB gun from the deck area at the rear of his family residence," scared two other children who had inadvertently wandered on to the edge of his family's property. Noting that the legislature did not define the words "place of abode" used in RCW 9.41.270(3)(a), the court applied the ordinary meaning of "abode" and determined that "[t]he ordinary meaning of abode is: one's

[4] *Black's* also defines "place of abode" as "[a] person's residence or domicile." BLACK'S LAW DICTIONARY 1266 (9th ed. 2009).

[5] The facts of this case do not implicate a person's right to bear arms *inside* one's home. We decide only whether the definition of "place of abode" includes Owens's yard under RCW 9.41.270.

home, place of dwelling, residence, and/or domicile." *Haley*, 35 Wn. App. at 98 (citing BLACK'S LAW DICTIONARY 20 (4th rev. ed. 1968); 1 OXFORD ENGLISH DICTIONARY 25 (1978)). It then held that "the [attached] deck was an extension of the dwelling and therefore a part of the abode." *Haley*, 35 Wn. App. at 98.

In *Smith*, the defendant threatened tow truck workers with a gun when they were attempting to tow a vehicle on adjacent property. 118 Wn. App. at 482. At the time, the defendant was "on the outskirts of his backyard where only a fence with breaks in it separated him from the tow operators." *Smith*, 118 Wn. App. at 485 n.8. After accepting the *Haley* court's definition of "abode," Division One concluded that the "word 'in' clearly implies inside [the abode], not one's backyard. If the Legislature wanted to enact a broader exception, it could have used 'at' rather than 'in.'" *Smith*, 118 Wn. App. at 484. Accordingly, Division One held that a backyard does not satisfy the place of abode exception under RCW 9.41.270. *Smith*, 118 Wn. App. at 485.

Here, it is undisputed that Owens was neither inside his residence nor on a structure attached to his residence when he unlawfully displayed his rifle to police. Accordingly, under the holding in either *Smith* or *Haley*, RCW 9.41.270(3)(a) is inapplicable to this case and the district court did not err in refusing to give Owens's proposed instruction.[6]

[6] Owens is correct in asserting that the district court "mistakenly characterized the WPICs as binding recitations of the Washington Supreme Court's position on the current state of Washington law." Br. of Resp't at 10. The Washington Supreme Court has rejected this view. *See, e.g., State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) ("Just because an instruction is approved by the Washington Pattern Jury Instruction Committee does not necessarily mean that it is approved by this court."). Nevertheless, the district court did not err in refusing to give Owens's proposed instruction and the district court's characterization of the WPICs as binding law was harmless.

3. Vagueness Challenge

Owens challenges RCW 9.41.270 as unconstitutionally vague because it fails to adequately define the term "place of abode" and disparate interpretations of the term "place of abode" are possible as evidenced by the decisions in *Haley* and *Smith*. This argument is unavailing. As explained above, both the *Haley* and *Smith* courts applied dictionary definitions to interpret the term "abode" as being synonymous with "residence" or "dwelling." That the *Haley* court applied the rule of lenity to expand the definition of "place of abode" to incorporate a deck that was attached to a dwelling does not mean that the statute is unconstitutionally vague.

We presume that statutes are constitutional, and a defendant who challenges a statute as unconstitutionally vague must prove vagueness beyond a reasonable doubt. *State v. Watson*, 160 Wn.2d 1, 11, 154 P.3d 909 (2007). A statute is void for vagueness if (1) it does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Watson*, 160 Wn.2d at 6 (quoting *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)).

Here, Owens does not challenge the behavior generally proscribed by RCW 9.41.270—the illegality of displaying a weapon at a time and place that "manifests an intent to intimidate another or that warrants alarm for the safety of other persons."[7] Instead, he challenges only the exception to the proscribed conduct—allowing display of a weapon in one's abode. But, as discussed above, the plain meaning of this statute is clear to the average person: outside of the

[7] Nor would such a challenge succeed. In *State v. Maciolek*, 101 Wn.2d 259, 269, 676 P.2d 996 (1984), the Washington Supreme Court upheld this portion of the statute when faced with a vagueness challenge.

home, weapons cannot be displayed in an intimidating manner. The language of the exception is clear on its face. Owens's vagueness challenge fails.

4. Unconstitutional As-Applied Challenge

Owens argues that RCW 9.41.270 is unconstitutional as-applied to the facts of his case "because the area where he allegedly displayed his rifle is an area deserving of Fourth Amendment privacy protection" and "[t]he right to keep and bear arms is an ancient right." Br. of Resp't at 28-29. Because the facts of this case do not implicate the privacy protections of the Fourth Amendment or the right to bear arms, we disagree.

"An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional." *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). "Holding a statute unconstitutional as-applied prohibits future application of the statute in a similar context, but the statute is not totally invalidated." *Moore*, 151 Wn.2d at 669.

Owens's Fourth Amendment argument is not well taken. In his brief, Owens admits that "[t]here were certainly exigent circumstances to justify the [police's] warrantless entry [on his property] due to the report of a crime at Mr. Owens'[s] home." Br. of Resp't at 19 n.4. He thereby also admits that this case does not implicate the Fourth Amendment's protections against unwarranted searches.

Moreover, nothing in the statute implicates the Second Amendment by prohibiting someone from protecting himself on his property from wild animals or intruders. RCW 9.41.270 prohibits publicly displaying dangerous weapons with the intent to intimidate or cause fear in

another person. Here, Owens knew that his son had called the police, and when officers arrived, Owens refused to obey commands to put his weapon down. The behavior proscribed by statute was not Owens's carrying a firearm on his property. Rather, the proscribed conduct was Owens placing police in reasonable fear for their safety when he refused to follow their orders to put the weapon down. The facts of this case simply do not implicate the Second Amendment. Owens's as-applied challenge fails.

B. WEAPON FORFEITURE

Owens argues that, independent of our decision concerning his unlawful display of a firearm conviction, we should vacate the district court's forfeiture order. We need not address this issue. The State did not appeal the superior court's reversal of the district court's forfeiture order. Therefore, that order remains vacated.

We reverse the superior court and reinstate Owens's unlawful display of a weapon conviction.

Lee, J.

We concur:

Worswick, C.J.

Johanson, J.

JEFFERSON ASSOCIATED COUNSEL

May 29, 2014 - 11:56 AM

Transmittal Letter

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