NO. 919844

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BRYON KINGMA,

Petitioner.

RESPONDENT'S ANSWER TO AMENDED PETITION FOR DISCRETIONARY REVIEW

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STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF RESPONDENT AND RELIEF REQUESTED

The State of Washington, respondent, asks the court to deny review of the Court of Appeals' decision.

B. ISSUES PRESENTED FOR REVIEW

1. Can a police officer inform an individual that he is not to return to the property when asked to by the property owner?
2. Is an officer required to credit a "quasi" affirmative defense when considering probable cause?
3. Is an officer required to conduct a mini trial in resolving conflicting evidence regarding a quasi-affirmative defense before deciding on probable cause?
4. Is a trespasser's emotional and obnoxious behavior relevant to determining that he is unwelcome on a property and that he did not have permission to be present?
5. Is probable cause to be determined on a piece-by-piece basis, or is it a totality of the circumstances test?

C. STATEMENT OF THE CASE

On October 6th, 2013 Grant County Sheriff's Deputy David Delarosa was called to Dale Kingma's[1] residence regarding a motor vehicle theft. RP 24.[2] The issue was resolved with an agreement between Dale and Daniel Kingma that Daniel would not come back to the property. *Id.* Deputy Delarosa advised Daniel that he was trespassed, that his dad did not want him on the property and not to come back. *Id.* Kingma told Delarosa he understood. RP 24-25, 28. Deputy Delarosa also notified dispatch of the trespass in order to place that information into the system. RP 26. Dale had agreed that Daniel could make arrangements to come back at another time to pick up property. RP 29.

On October 14th, 2013 Deputy Hudson and CPL Mansford were called back out to Dale's property for a trespassing complaint. RP 30-31. CPL Mansford was aware of several calls that had been answered at the residence by other Deputies regarding Daniel. RP 40. When CPL Mansford arrived Dale was waiting for him. RP 42. Dale explained to CPL Mansford that Daniel had been trespassed from the property, had arrived to get some golf clubs, come on the property and tried to fight his

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[1] The defendant in this case is Daniel Kingma. His father, the complaining witness, is Dale Kingma. For clarity's sake the State will refer to the Kingmas by their first names. No disrespect is intended.

[2] All RP references are to the transcript prepared by Kenneth Beck on the motion hearing on 1/15/14.

dad. *Id.* Dale took a picture of Daniel, which he showed CPL Mansford, and called dispatch. *Id.* A copy of the photograph was admitted as an exhibit in the CrR 3.6 hearing. RP 43, State Supplemental Clerk's Papers (SCP). The picture shows Daniel with two raised middle fingers towards the camera. CPL Mansford obtained a written statement, signed under penalty of perjury, from Dale outlining these occurrences. RP 44, CP 29, SCP. The statement read:

> Danny Kingma trespassed on 10-14-13 wanted a set of golf clubs.
>
> Danny came onto my property yelling misc. profanity and wanted to fight. This is my son and I have a business to run and can't have him on my property.

CPL Mansford then contacted dispatch and was told that Daniel had been trespassed a week earlier by Deputy Delarosa. RP 45. Dale informed CPL Mansford that Daniel was last seen going across the street to a neighbor's house. RP 46. CPL Mansford recognized Daniel by sight. *Id.* CPL Mansford went over to the neighbor's house and saw Daniel in the driveway. RP 47. Daniel admitted that he went onto his father's property to get a set of golf clubs, but claimed that his father invited him onto the property. RP 48. Daniel did not have golf clubs with him when

he was arrested. RP 37. CPL Mansford never asked Dale directly whether he had invited Daniel onto the property. *Id.* CPL Mansford then placed Daniel under arrest for criminal trespassing. RP 49. During a search incident to arrest the Deputies found methamphetamine on Daniel, leading to the charges in this case. RP 49.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioner Daniel Kingma spends his petition for review unsuccessfully hacking at trees, and completely misses the forest. Even if each individual item attacked by the petitioner does not amount to probable cause, in sum total they do. "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been or is being committed." *State v. Knighten*, 109 Wn.2d 896, 899, 748 P.2d 1118 (1988). The determination will rest on the totality of facts and circumstances within the officer's knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer." *Id.* "Probable cause is not a technical inquiry." *State v. Terrovona*, 105

Wn.2d 632, 643, 716 P.2d 295 (1986). "Probable cause is not proof beyond a reasonable doubt, or even proof by a preponderance of evidence." *United States v. Jones*, 763 F.3d 777 (7th Cir 2014). Here petitioner Kingma ignores the totality of the circumstances and analyzes the issues in a hyper technical manner. His petition should be denied.

1. The Court of Appeals' decision did not conflict with any other decisions from the Supreme Court or Court of Appeals.

a. State v. E.J.J., 183 Wn.2d 497, __ P.3d __ (2015).

Daniel Kingma, without citation to authority, asserts that his obnoxiousness to his father is constitutionally protected speech. This is incorrect. He used "fighting words" on private property directed towards a private individual. The First Amendment applies to government actors, not private citizens. It would be a surprise to any homeowner to learn that the First Amendment required him to allow someone to come onto his private property and berate him. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219; 33 L. Ed. 2d 131 (1972) (Private shopping mall could prohibit distribution of handbills protesting Vietnam War); *Sunnyside v. Lopez*, 50 Wn. App. 786, 751 P.2d 313 (1988) (Woman could not enter onto private medical center premises to distribute anti-abortion literature).

Lloyd Corp. and *Lopez* involved political speech at the core of the First Amendment. Daniel Kingma's speech involved fighting words

unprotected by the First Amendment. Fighting words are "speech directed to the person of the hearer which consists of those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Seattle v. Camby*, 38 Wn. App. 462, 685 P.2d 665 (1984), overruled on other grounds *Seattle v. Camby*, 104 Wn.2d 49, 701 P.2d 499 (1985). "A threat of violence to and assault upon the person of another in immediate proximity to the speaker is not an expression protected by Amendment 1 of the United States Constitution or article 1, section 5 of the Constitution of the State of Washington." *Id.* at 465-66. Daniel Kingma's behavior towards his father probably constituted disorderly conduct (RCW 9A.84.030(1)(a)) and was not constitutionally protected.

Even protected speech may be evidence of another crime, just not a crime in and of itself. For example, "I hate that guy, I want him dead" may well be protected speech, depending on the context. It would also be admissible as evidence of motive if the object of the statement ended up murdered. In *E.J.J.* the Supreme Court held that obnoxious, abusive name calling towards police officers on the defendant's property alone did not rise to the level of obstruction. Daniel Kingma argues that the Court of Appeals held that his obnoxious behavior led to the conclusion there was probable cause to arrest him for trespassing. This is not what the Court of

Appeals held. The Court of Appeals held that abusive name calling, obnoxious behavior and showing his middle fingers to his father was relevant to determining whether there was probable cause to conclude Daniel trespassed, not that the behavior alone was probable cause *E.J.J.* did not hold that abusive language was not evidence as to whether probable cause or sufficient evidence existed for obstruction, only that abusive language alone was not enough. There is no conflict with *E.J.J.*

b. State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014).

Washington law recognizes two types of affirmative defenses. 'True" affirmative defenses require the defendant to introduce evidence of each element of the defense, and bear the burden of proof of the defense by a preponderance at trial. "Quasi"[3] affirmative defenses require the defendant to produce some evidence of each element of the defense at trial. After that the burden shifts to the State to disprove the defense beyond a reasonable doubt. True affirmative defenses provide an excuse for the crime. Quasi affirmative defenses negate an element of the crime. *W.R*, 181 Wn.2d. at 764. True affirmative defenses include, but are not limited to, duress, RCW 9A.16.060; intoxication, RCW 9A.16.090, medical marijuana, *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010); and

[3] The State has never seen an official shorthand term in case law for this type of affirmative defenses. For these purposes the State will use the term 'quasi affirmative defense'.

inability to appear for bail jumping, RCW 9A.76.170(2). Quasi affirmative defenses include, but are not limited to, the reasonable belief of licensed entry, RCW 9A.52.090; self-defense, RCW 9A.16.020; and good faith claim of title, RCW 9A.56.020(2). *W.R.* addressed whether consent as a defense to rape was a true or quasi affirmative defense. *W.R.* never addressed whether the defendant's claim of consent affected probable cause.

Daniel argues that the rule in *State v. Fry*, 168 Wn.2d 1, 228 P.3d 1 (2010), that an officer need not dispel affirmative defenses to establish probable cause, does not apply to quasi affirmative defenses. The problem with this argument is that it has already been decided. It has long since been established that self-defense negates the element of unlawful force in a homicide or assault, thus the State must prove the absence of self-defense beyond a reasonable doubt. *See, e.g. State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984).

Fry relied on *McBride v. Walla Walla County*, 95 Wn. App. 33, 40, 975 P.2d 1029 (1999) (petition for review denied 138 Wn.2d 1015, 989 P.2d 1137 (1999)), for the proposition that affirmative defenses did not negate probable cause. In *McBride* the defense at issue was the prototypical quasi affirmative defense, self-defense. Indeed, the officer in that case had significantly more reason to believe a self-defense claim than

CPL Mansford had to believe the claim made by Daniel Kingma, yet the *McBride* court still ruled that evidence of self-defense did not negate probable cause. Petitioner Kingma provides no argument, logic or reason to distinguish or overrule *McBride*. *W.R.* does not address *McBride* or its reasoning; it is simply not on point. While in certain instances the difference between a true and quasi affirmative defense may by important, Washington case law already establishes for the purposes of probable cause they are the same, they need not be refuted by the officer. The decision below did not conflict with *W.R.*, but followed *McBride*.

c. State v. Bowers. 36 Wn. App. 119, 672 P.2d 753 (1983).

In *Bowers* the court concluded there was insufficient information for probable cause where the reliable informant made the conclusory statement that the defendant was a drug dealer, but did not explain how the informant knew the defendant was a drug dealer. "An explicit recitation that the informant personally witnessed the incriminating facts might well be enough" to establish probable cause. *Id.* at 123. Here it is clear that not only did the named citizen informant, Dale Kingma, personally witness the offending acts, he took a picture of it. *Bowers* is of no help to the petitioner and does not conflict with Division III's opinion in this case.

2. *This Case Does Not Involve a Significant Question Under Washington or Federal Law.*

a. *There is no question under Washington law about the duty to investigate affirmative defenses. It has already been resolved.*

As already discussed in section 1b, *supra*, whether an officer has a duty to investigate quasi affirmative defenses in determining probable cause has long since been settled by *McBride*. *W.R.* does not dictate otherwise. Daniel makes no showing that *McBride* is incorrect or harmful, and does not argue that it should be overruled. There simply is no outstanding significant question of law. It is possible that Daniel would have had enough evidence to get a jury instruction on this issue, but the arresting officer was not required to hold a mini trial to resolve those questions. *McBride*, 95 Wn. App. at 40.

b. *Dale's statement, signed under the penalty of perjury, provided probable cause.*

Dale stated that Daniel trespassed on his property. Common usage of the word trespass indicates that he was on Dale's property without permission. Daniel does not argue that Dale is not a credible informant. Instead he argues he lacked the basis of knowledge because he used a legal term that is also a term in common usage. *Bowers* is not on point because Dale's basis of knowledge, personal observation, was clear. The photograph was also clear evidence of Dale's basis of knowledge. In

addition Dale was present the week previous when Daniel was trespassed. His basis of knowledge was clear, personal observation.

c. There was probable cause to conclude Deputy Delarosa trespassed Daniel at Dale's request.

Deputy Delarosa informed Daniel he was to be trespassed and not come back to Dale's property. While not explicitly stated the reasonable inference is that Delarosa did this at Dale's request. Daniel argues with whether all the technical details of the Sheriff's Office procedures to trespass someone were complied with. While this may or may not have been a basis for a motion to dismiss the trespass at a later time, or maybe exclude evidence had the trespass argument proceeded, it is a highly technical argument that does not affect the common sense analysis of probable cause. Officers are entitled to rely on the information of other officers. This forms the basis of the fellow officer rule.

In any event, even if the information from the Sheriff's database was, on its own, not reliable enough to establish probable cause, it was confirmed by Dale's statement that Daniel had trespassed on the property. Probable cause is a totality of the circumstances analysis, and one piece of information, not enough on its own, may be backed up by others and thus become sufficient when considered holistically.

d. Summary of Probable Cause.

Daniel spends considerable time arguing that each individual piece of evidence does not *amount* to probable cause. He does so in a highly technical manner, and ignores the cumulative effect of the evidence. He never establishes that each piece of evidence does not *support* probable cause. Deputy Delarosa told Daniel he was to be trespassed the week prior. This information was relayed to CPL Mansford via the Sheriff's information system. This was confirmed by Dale saying that Daniel was trespassed. Dale was present the week prior, and a reasonable inference from the evidence is that he asked Deputy Delarosa to trespass Daniel. Daniel was clearly engaged in obnoxious behavior that shows he was not welcome on the property. The First Amendment analysis is irrelevant, even protected speech can be used as evidence of a non-speech crime, such as trespass. In any event Daniel's speech was not protected because it was fighting words on private property addressed to a private person. Even if the court considers the affirmative defense of reasonable belief in licensed entry, the great weight of evidence discounts it. A person on property with permission does not challenge the property owner to a fight and then flick him off, as Daniel did in the picture. Even if every argument Daniel Kingma puts forth is accepted individually, under a

totality of the circumstances approach, there was probable cause in this case.

"Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been or is being committed." *State v. Knighten*, 109 Wn.2d 896, 899, 748 P.2d 1118 (1988). The determination will rest on the totality of facts and circumstances within the officer's knowledge at the time of the arrest. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer." *Id.* "Probable cause is not a technical inquiry." *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). "Probable cause is not proof beyond a reasonable doubt, or even proof by a preponderance of evidence. *United States v. Jones*, 763 F.3d 777 (7th Cir 2014). Daniel Kingma ignores every single one of these principles of probable cause in his brief. The Court of Appeals correctly determined there was probable cause for CPL Mansford to arrest Daniel Kingma for criminal trespass in the second degree.

E. CONCLUSION

CPL Mansford was not required to consider Daniel's affirmative defense to criminal trespass under long standing case law. Even if he was, Daniel's behavior as relayed by Dale would belie that affirmative defense. There was more than enough evidence, when taken in total, to support probable cause in this case. None of the requirements of RAP 13.4(b) are met in this case. There is no issue that addresses a significant question of State law, and there are no conflicting appellate court decisions. Even if one individual issue was presented as review worthy, this case is a poor vehicle because all of the other evidence tending to establish probable cause cannot be isolated. Review should be denied.

Dated this 14th day of September 2015.

Respectfully submitted,

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Prosecuting Attorney

By:_____
Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent.	)	No. 919844
	)	
v.	)	
	)	
DANIEL BRYON KINGMA,	)	DECLARATION OF SERVICE
	)	
Petitioner.	)	
	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Petitioner containing a copy of the Respondent's Answer to Amended Petition for Discretionary Review in the above-entitled matter.

Daniel Bryon Kingma
PO Box 1754
Moses Lake WA 98837

Dated: September 14, 2015.

Kaye Burns

OFFICE RECEPTIONIST, CLERK

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Supreme Court Clerk's Office

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Subject: State of Washington v. Daniel Bryon Kingma - Suprejme Court No. 919844

Attached for filing please find the Respondent's Answer to Amended Petition for Discretionary Review in the above matter. Thank you.

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Please note my new phone extension and e-mail address.