No. 93388-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIAN MCEVOY,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

REPLY IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

STATE V. MCEVOY
Court of Appeals No. 46795-0-II
Kitsap County Superior Court No. 14-1-00674-6

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I. SUMMARY OF REPLY

Review is required because:

1. Division Two erred in finding that the trial court's admission of improper officer opinion testimony, in violation of Mr. McEvoy's constitutional rights, was harmless. Pursuant to RAP 13.4(b), this issue is a significant question of state and federal constitutional law; Division Two's faulty holding conflicts with the appellate and Supreme Court cases cited in Mr. McEvoy's Petition for Discretionary Review ("PDR"); and Division Two's jurisprudence regarding application of the harmless error rule is a substantial issue of public importance that should be resolved by this Court.

2. The trial court's admission of certain receipts as adoptive admissions violated Mr. McEvoy's state and federal right constitutional right to confrontation, an issue relating to his fundamental constitutional rights which he may raise for the first time on discretionary review. Division Two's adoption of the theory that mere possession constitutes an adoptive admission, in turn, is contradictory to the weight of authority and has no precedential foundation in this state. The violation of Mr. McEvoy's right to confrontation thus presents a significant question of state and federal constitutional law as well as an issue of substantial public importance to be resolved by this Court.

3. Division Two erred in finding the evidence sufficient to convict Mr. McEvoy of violating a no contact order on April 12, 2014, a significant question of state and federal constitutional law under the Fourteenth Amendment as well as an issue of substantial public importance to be determined by this Court.

4. Division Two erred in finding the evidence sufficient to convict Mr. McEvoy of felony stalking, which is another significant question of state and federal constitutional law under the Fourteenth Amendment as well as a novel issue—statutory construction—of substantial public importance to be determined by this Court.

5. Division Two erred in ignoring the conflict between RCW 9A.04.100(2)'s directive that when a jury has a reasonable doubt as to which degree of a crime a defendant committed it must convict on the lowest degree and the judicially-created rule that a lesser included offense instruction is proper when the evidence supports an inference that the defendant committed *only* the lesser included offense and not the charged crime. This significant issue of state

constitutional law is also an issue of substantial public importance to be determined by this Court as the rules regarding lesser included offenses have wide applicability.

6. Division Two erred in finding that the trial court properly refused to instruct the jury on the lesser included charge of misdemeanor harassment and that the evidence was sufficient to support conviction. This significant issue of state and federal constitutional law is also an issue of substantial public importance to be determined by this Court.

II. EACH ISSUE PRESENTED WARRANTS REVIEW UNDER VARIOUS PROVISIONS OF RAP 13.4(b).

As explicitly argued in Mr. McEvoy's PDR, each issue he presented to this Court warrants review under RAP 13.4(b).

A. Review is Required Because Division Two's Failure to Properly Apply the Constitutional Harmless Error Test as to the Improper Officer Testimony on Intent and Guilt Conflicts with Appellate and Supreme Court Decisions; Is a Significant Question of State and Federal Constitutional Law; and Involves an Issue of Substantial Public Interest to be Determined by this Court

Division Two erred by misapplying the constitutional harmless error test and finding that officers' outrageous testimony did not impact the proceedings. This holding conflicts with the cases previously cited in Mr. McEvoy's PDR, is a significant question of state and federal constitutional law, and Division Two's interpretation and application of the harmless error rule is an issue of substantial public interest that this Court should determine.

As previously noted, Whitehurst and Fleck's impermissible opinions on guilt and intent violated Mr. McEvoy's "constitutional right to have a critical fact to his guilt determined by the jury." State v. Quaale,

182 Wn.2d 191, 201-202, 340 P.3d 213 (2014); see Const. art. I, § 22; U.S. Const. Amend. V-VI. This issue thus constitutes a significant issue of state and federal constitutional law under RAP 13.4(b)(3).

Division Two, next, cited the nearly factually analogous State v. Edwards to support its holding that the opinion testimony was error, yet somehow, without distinguishing Edwards, concluded that the offensive testimony is this case was harmless. PDR App. A at 12-13 (citing State v. Edwards, 131 Wn.App. 611, 613, 128 P.3d 631 (2006)). Division Two likewise cited to State v. Aaron, yet, again, without distinguishing Aaron, found the impugning testimony here harmless.

In Quaale, moreover, the Court reversed due to improper testimony on the defendant's intent and guilt, whereas here Division Two found the error harmless. As Division Two's holding thus conflicts with appellate and Supreme Court cases, review is warranted pursuant to RAP 13.4(b)(2)-(3).

Finally, Division Two's interpretation and application of the constitutional harmless error rule is "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

B. Review is Required Because Division Two's Failure to Properly Apply the Constitutional Harmless Error Test to the Improperly Admitted Receipts is a Violation of the State and Federal Confrontation Clause and an Issue of Substantial Public Importance

Although Division Two assumed, correctly, that the trial court erred in admitting hotel, rental car, and airline receipts as adoptive

admissions, the Court perpetuated such error by finding such error harmless. The receipts, offered to show that Mr. McEvoy travelled across the country, violated his state and federal rights to confrontation and fair trial under Const. art. I §§ 3, 22; U.S. Const. Amend. V-VI. That the trial court admitted the receipts as adoptive admissions where the issue is open in this state and where the weight of authority is that mere possession does not equate with adoption is an issue of substantial public interest to be determined by this Court.

C. Review is Required Because Division Two's Error in Finding the Evidence Sufficient to Convict Mr. McEvoy of Violating a No Contact Order is A Significant Question of State and Federal Constitutional Law

As Division Two erred in finding the evidence sufficient to convict Mr. McEvoy of violating a no contact order which provided deficient due process notice by failing to specify the prohibited location, this is a significant question of state and federal constitutional law calling for this Court's review pursuant to RAP 13.4(b)(3). See, e.g., In re Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (a conviction based upon insufficient evidence "contravenes the due process clause of the Fourteenth Amendment") (citations omitted); Seattle v. May, 171 Wn.2d 847, 854, 256 P.3d 1161 (2011) (the trial court should have exercised its gatekeeping role and excluded the no contact order because it could not "be constitutionally applied to the charged conduct" and "fail[ed] to give [Mr. McEvoy] fair warning of the relevant prohibited conduct"); Const. art. I §§ 3, 22; U.S. Const. Amend. V-VI.

Division Two's due process jurisprudence and statutory construction are also issues of substantial public importance to be determined by this Court pursuant to RAP 13.4(b)(4).

D. Review is Required Because Division Two's Error in Finding the Evidence Sufficient to Convict Mr. McEvoy of Felony Stalking is a Significant Question of State and Federal Constitutional Law and an Issue of Substantial Public Importance to be Determined by this Court

Because Division Two erred in finding the evidence sufficient to support a felony stalking conviction where Mr. McEvoy committed only one qualifying act of harassment, this significant question of state and federal constitutional law warrants this Court's review pursuant to RAP 13.4(b)(3). See, e.g., In re Martinez, supra, at 364.

Review is further appropriate under RAP 13.4(b)(4) insofar as Division Two's construction of the felony harassment statute is an issue of substantial public importance to be determined by this Court.

E. Review is Required Because the Rule that a Lesser Included Offense Instruction is Proper only where There Is No Inference that the Defendant Committed the Greater Crime Conflicts with RCW 9A.04.100(2); Constitutes a Significant Question of State Constitutional Law; and is a Matter of Substantial Public Interest to be Determined by This Court

Division Two declined to consider whether the court-created rule that instruction on a lesser included offense is required where the evidence supports an inference that the defendant committed *only* the lesser—to the exclusion of the charged crime—is in conflict with RCW 9A.04.100(2) because Mr. McEvoy purportedly offered insufficient briefing. App. A at

21 n.9. While Division Two might have been unprepared to analyze this significant issue of state constitutional law, this Court's review is warranted under both RAP 13.4(b)(3) and RAP 13.4(b)(4) as a matter of substantial public importance.

F. Review is Required Because Division Two's Holding that Refusal to Give the Lesser Included Instruction was Proper and that the Evidence Was Sufficient to Convict Mr. McEvoy of Felony Harassment Conflicts with an Analogous Decision of the Supreme Court, Is a Significant Question of State and Federal Constitutional Law, and Involves an Issue of Substantial Public Interest to be Determined by this Court

As the nature of Mr. McEvoy's alleged threat was exclusively a question within the sole province of the jury, the trial and appellate courts erred in finding that refusal to instruct on the lesser included offense of misdemeanor harassment was proper. See Const. art. I § 22; U.S. Const. Amend. V-VI. While Division Two attempted to distinguish State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2003), in which the defendant clearly made an affirmative threat to kill, its holding nevertheless conflicts with C.G. and warrants review by this Court under RAP 13.4(b)(1).

Given, then, that the conviction is supported by insufficient evidence, this significant of state and federal constitutional law further calls for review under RAP 13.4(b)(3).

Division Two's construction of the felony harassment statute, finally, is an issue of substantial public importance meriting this Court's review under RAP 13.4(b)(4).

III. MR. MCEVOY'S CLAIM THAT ADMISSION OF CERTAIN RECEIPTS VIOLATED HIS STATE AND FEDERAL RIGHT TO CONFRONTATION IS PROPERLY BEFORE THIS COURT FOR REVIEW

While the state is correct that this Court *generally* refrains from reviewing questions not raised in the Court of Appeals, Mr. McEvoy's challenge to admission of the receipts as adoptive admissions is nonetheless properly before this Court.

First, a limited exception applies where the claim pertains to an "invasion of fundamental constitutional rights." State v. Laviollette, 118 Wn.2d 670, 680, 826 P.2d 684 (1992), overruled on other grounds by State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) (quoting Peoples Nat'l Bank v. Peterson, 82 Wn.2d 822, 830, 514 P.2d 159 (1973)). As confrontation is a "fundamental constitutional right," State v. McDaniel, 83 Wn.App. 179, 187, 920 P.2d 1218 (1996), it clearly qualifies under this exception. Review is thus warranted.

Appellate counsel, moreover, actually raised the issue and argued that the error was not harmless.

IV. ADMISSION OF THE RECEIPTS AS ADOPTIVE ADMISSIONS VIOLATED MR. MCEVOY'S CONSTITUTIONAL RIGHT TO CONFRONTATION

As the state introduced the receipts to prove the truth of the matter asserted and establish that Mr. McEvoy did, in fact, travel overland across the country from Vermont back to Washington, admission violated his fundamental constitutional right of confrontation and reversal is required.

As an initial matter, Division Two assumed without deciding that the trial court erred, but then applied evidentiary rather than constitutional harmless error analysis. PDR App. A at 20. This, itself, was error.

First, admission of the receipts as adoptive admissions was improper because mere possession of a document does not necessarily mean that one adopts its contents as one's own statement. See, e.g., United States v. Ordonez, 737 F.2d 793 (9th Cir. 1983); United States v. Jefferson, 925 F.2d 1242 (10th Cir. 1991).

Next, as to the state's claim in its Answer that the receipts—found in Mr. McEvoy's property—were business records, the trial court seemed to foreclose this argument by redacting the date and time stamps as unreliable classic hearsay. And, because the state failed to argue on direct appeal that the receipts were business records, see Brief of Respondent at 22-27, the state cannot raise this claim for the first time in its Answer because no relevant exception applies. Laviollette, 118 Wn.2d at 679-80.

The cases upon which the state relies, finally, are unavailing. In Howard v. State, the court found no confrontation violation where the state obtained receipts directly from the original sources and the detective who obtained the receipts was available for cross-examination. 482 S.W.3d 741, 745 (Ark. App. 2016). Here, by contrast, the receipts were admitted as adoptive admissions, and only the officers who found them were available to testify. Note, too, that the Howard Court nevertheless applied constitutional harmless error analysis.

In Jennings v. State, the court likewise concluded that introduction of a store receipt to show the ostensible value of stolen items did not implicate the right to confrontation. 9 A.3d 446 (Conn.App. 2011). But, again, officers obtained the receipt from the original source, and the information on the receipt—only numbers—were not subject to cross-examination. Id. at 457-58.

Here, the trial court redacted the date and time stamps as unreliable, but admitted the remainder of the receipts precisely to prove the truth of the matter asserted. This violation of Mr. McEvoy's constitutional right to confrontation not only warrants this Court's review, but also mandates reversal.

V. THIS COURT SHOULD MODIFY ITS CURRENT JURISPRUDENCE REGARDING JURY INSTRUCTIONS ON LESSER INCLUDED OFFENSES, WHICH IS HARMFUL AND INCORRECT, TO CONFORM WITH THE STATUTORY DIRECTIVE THAT IF THE JURY HAS A DOUBT, THE DEFENDANT SHALL BE CONVICTED OF ONLY THE LOWEST DEGREE

As this Court's present iteration of the Workman rule is divorced from its precedential underpinnings; harmful; incorrect; and in conflict with the directive in RCW 9.04.100(2) that when a jury has a reasonable doubt as to which of two or more degrees the defendant is guilty, the jury shall convict only on the lowest degree, review is warranted.

A. Evolution of the Rule Regarding Jury Instructions on Lesser Included Offenses

As explicitly delineated in Mr. McEvoy's PDR, from 1920 through the 1990s, the rule was clear that a lesser included offense instruction was

proper where (1) each of the elements of the lesser is a necessary element of the charged offense (the legal/notice prong) and (2) the evidence supports an inference that the lesser crime was committed (the factual prong). See, e.g., State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong "encompasses the constitutional requirement that a defendant have notice of the charges ..." State v. Gamble, 154 Wn.2d 457, 463, 114 P.3d 646 (2005).

Earlier cases dictated that "the lesser degree of crime *must be* submitted to the jury along with the greater degree unless the evidence positively excludes any inference that the lesser crime was committed." State v. Gallagher, 4 Wn.2d 437, 447, 103 P.2d 1100 (1940) (emphasis added). In perhaps the progenitor of the rule, the Gottstein Court iterated that the defendant is under no affirmative obligation to present evidence to demonstrate that he or she committed the lesser to the exclusion of the greater. State v. Gottstein, 11 Wash. 600, 602, 191 P. 766 (1920)).

From the beginning, then, a defendant had no duty to present any evidence, and courts were *required* to provide instructions on lesser included offenses unless the evidence clearly excluded any inference that the defendant committed the lesser. The current rule, by contrast, is the complete opposite and mandates that the defendant must present evidence that he or she committed only the lesser to the exclusion of the greater. State v. Fernandez–Medina, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000)).

This inversion was incorrect, is harmful, improperly shifts the burden to the defendant, and thus beckons for this Court's review.

B. The Current Formulation of the Workman Rule Lacks Foundation and is Incorrect and Clearly Harmful

As the judicially-imposed requirement that a defendant must present affirmative evidence that he or she committed only the lesser to the exclusion of the greater to merit an instruction on a lesser included offense lacks precedential support and negatively impacts our criminal justice system from both the defense and prosecutorial perspectives, it is incorrect and clearly harmful.

Despite the many benefits of adhering to precedent, this Court will reject its prior holdings upon "a clear showing" that the rule "is incorrect and harmful." State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). Here, as argued in Mr. McEvoy' PDR, the Fernandez-Medina Court's analysis that the factual prong "necessarily" requires a more particularized factual showing than required for other jury instructions has no foundation. Prior to that decision and the inapposite cases upon which it relies, 70 years of uninterrupted jurisprudence held that the defendant had no burden to produce any evidence to get an instruction on a lesser included offense and that the court was, in fact, required to instruct on the lesser unless the evidence showed that the defendant committed solely the greater to the exclusion of the lesser. How the complete inverse could also be correct remains a mystery.

The reformulation of the rule and the imposition of an evidentiary burden on the defendant is not only incorrect and lacking in precedential support, but is also harmful to both the defendant and the state.

First, lesser included offenses are "crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free." State v. Henderson, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015). "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, *the jury is likely to resolve its doubts in favor of conviction.*" Id. (quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). (adding second emphasis)). To minimize the risk that the jury will convict despite the existence of reasonable doubt, courts "err on the side of instructing juries on lesser included offenses." State v. Henderson, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015).

The additional restrictions imposed by the Fernandez-Medina Court, however, make it nearly impossible for a court to err in favor of providing instructions on lesser included offenses—and elevate a factual issue which is exclusively within the province of the jury to a preliminary issue for the trial court to determine.

In this case, for example, the court assessed and analyzed whether Mr. McEvoy's telephonic threats actually constituted a threat to kill rather than properly permit the jury to perform its fact-finding duty. Mr.

McEvoy was thus precluded from receiving an instruction on the lesser included offense of misdemeanor harassment while the state had to hope that the evidence was sufficient to convict on felony harassment. Both parties, then, are adversely affected by the reformulation of the rule and the provision that the defendant is obligated to negate any inference that he or she committed the charged offense on order to earn a lesser included instruction. The new rule is thus not only incorrect, but also harmful.

The imposition of a burden of proof on the defendant also conflicts with the directive in RCW 9.04.100(2) that "[w]hen a crime has been proven against a person, and there exists a reasonable doubt as to which of two or more degrees he or she is guilty, he or she shall be convicted only of the lowest degree." See Henderson, 182 Wn.2d at 748 n.4 (McCloud, J., dissenting). Courts, however, simply cannot tell when jurors entertain reasonable doubts, and the new rule forces courts to limit instruction on lesser included offenses and make factual determinations as opposed to erring on the side of granting the instructions.

Where a statute appears to conflict with a court rule, "the court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." Waples v. Yi, 169 Wn.2d 152, 158, 234 P.3d 187 (2010).[1] Substantive law "creates, defines, and

[1] While this body of case law pertains to actually promulgated court rules rather than those simply created and applied by the judiciary, the same rationale and analysis seems appropriate.

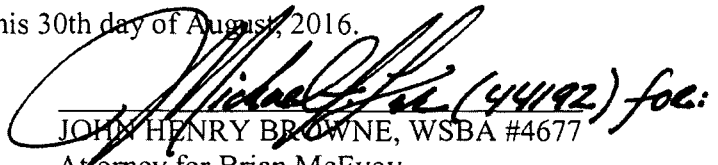
regulates primary rights" while procedural matters involve the "operations of the courts by which substantive law, rights, and remedies are effectuated." Id. at 161 (citations omitted).

RCW 9.04.100(2)'s mandate that the defendant shall be convicted only of the lowest degree is a substantive matter which cannot be reconciled with the current iteration of the Workman rule. As the statute thus prevails, it is time for this Court to revisit its lesser included instruction jurisprudence. Review is thus warranted.

VI. CONCLUSION

For the foregoing reasons, this Court should accept review and grant appropriate relief to Mr. McEvoy.

DATED this 30th day of August, 2016.



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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

BRIAN MCEVOY, Petitioner v. STATE OF WASHINGTON, Respondent.	SUPREME COURT NO. 93388-0 COURT OF APPEALS, DIV II NO. 46795-0-II DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent a copy of the "Reply in Support of Petition for Discretionary Review" to:

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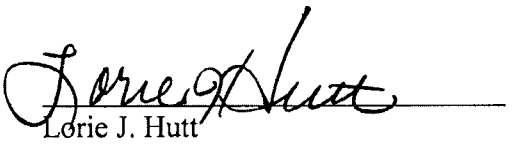
Dated this 30th day of August, 2016.



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Clerk,

Attached for filing please find our Reply in Support of Petition for Discretionary Review and Declaration of Service in the matter of Brian McEvoy v State of Washington, Case No. 93388-0, filed by John Henry Browne, #4677, attorney for Brian McEvoy.

Thank you.

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