SUPREME COURT NO. 98044-6
COURT OF APPEALS NO. 506335-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL KIBBEE,

Petitioner.

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

The Honorable Jill I. Landes, District Court Judge
The Honorable Keith C. Harper, Superior Court Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Michael Kibbee asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Kibbee, COA No. 50633-5-II, filed October 15, 2018, and the Order Denying the Motion for Reconsideration entered on December 4, 2018. A copy of the slip opinion and the Order are attached as Appendices A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Division II's refusal to consider Kibbee's challenge to the sufficiency of the evidence as to the telephone harassment charge on grounds it could not be raised for the first time on tertiary review conflicts with Division I's published decision in Kramer v. J.L. Case Mfg. Co., 62 Wn. App. 544, 547, 815 P.2d 798 (1991)?

2. Should this Court accept review to resolve this conflict among Divisions I and II? RAP 13.4(b)(2)?

3. Assuming this Court agrees Division II erred in declining to reach Kibbee's challenge to the sufficiency of the evidence, should this court address the issue on the merits as it involves a significant question of

law under the state and federal constitutions and an issue of substantial public interest? RAP 13.4(b)(3), (4)?

4. Where the state alleged Kibbee called his ex-wife's current husband Lee Fox and said, "I hope you mother-f-ing die,"[1] did the state fail to prove Kibbee used "lewd, lascivious, indecent or obscene" language as required to prove telephone harassment?

5. Did the state fail to prove Kibbee called Fox "anonymously" as required to prove the crime of telephone harassment where: (1) Fox's phone reported the incoming call as either blocked or unknown; but (2) Fox instantly recognized Kibbee's voice as the caller; (3) Fox and Kibbee knew each other for years; (4) Fox and Kibbee used to speak on the phone in earlier days when they were friendly; (5) the phone call potentially lasted as long as two minutes; and (6) Kibbee made no attempt to hide his identity?

6. Assuming the Court finds sufficient evidence to support one of the alternative means of committing telephone harassment, was Kibbee's right to a unanimous jury verdict violated where the jury returned a general verdict and the other alternative means was not supported by sufficient evidence?

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[1] Fox paraphrased the statement. RP 105.

D. STATEMENT OF THE CASE

At Kibbee's trial in Jefferson County District Court for (inter alia) telephone harassment of Lee Fox, Fox – who is the husband of Kibbee's ex-wife Jan Fox – testified he and Kibbee became acquainted back in 2009 through the "pool league." RP 101. Kibbee was still married to Jan at the time.[2] RP 101. Fox would trade vegetables from his garden with Kibbee for fresh seafood. RP 101. The two occasionally spoke on the phone during this time and Fox testified he would recognize Kibbee's voice. RP 101.

Jan and Kibbee were married for 34 years but divorced in April 2012. RP 117. In June 2012, Jan married Fox. RP 102.

In December 2015, Fox learned he had a terminal brain tumor. RP 94-95.

At 4:23 p.m. on January 6, 2016, Fox was watching television with Jan and received a telephone call from an unknown or blocked number. RP 105, 133. Fox testified that when he answered:

> I was told in a sarcastic way – hey, Lee, heard you have a brain tumor – and I can't say the F word, but he said – I hope you mother-f-ing die.

RP 105. Fox testified the caller was Kibbee. RP 105.

[2] To avoid confusion, Jan Fox is referred to by her first name.

Fox testified he put the call on "speakerphone" and called Jan over. RP 106. When asked what else the caller said, Fox answered:

> THE WITNESS [Fox]: He wished that I'd die from my brain tumor.
>
> BY MS. WILSON [prosecutor]: How long did the – did he say more that day?
>
> A. Well, he said that you need to die.
>
> Q. Did he say that one time?
>
> It was several – I mean, it was over and over, you know? Glad to hear you have a brain tumor.

RP 107. The caller hung up after saying (4-5 times) that he hoped Fox would die. RP 107-108. Fox and Jan subsequently called police.

The state charged Kibbee with telephone harassment on grounds he "used lewd, lascivious, indecent, or obscene words or language in the telephone call; or "called anonymously, whether or not a conversation occurred." CP 179, attached as Appendix C.

Following his conviction, Kibbee appealed to the Superior Court on grounds the judge violated the appearance of fairness doctrine and that trial counsel was ineffective for failing to ensure that Kibbee's case was heard by a fair magistrate. Ruling Granting Review, attached as Appendix D, at 5. The Superior Court disagreed and affirmed Kibbee's conviction. Appendix D, at 5-6.

Kibbee filed a pro se motion for discretionary review with the Court of Appeals on grounds the judge violated the appearance of fairness doctrine. In addition to the appearance of fairness issue, Kibbe sought review of the sufficiency of the evidence at trial. Appendix D, at 8.

In its Ruling Granting Review entered February 6, 2018, Division II granted review of the appearance of fairness issue. Appendix D, at 7. But the court also granted review of Kibbee's sufficiency of the evidence issue "as well as any other issues that can be raised for the first time on appeal." Appendix D, at 8. The state did not move to modify this Ruling.

On October 31, 2018, Kibbee filed his opening brief raising the appearance of fairness issue. Brief of Appellant (BOA) at 31-34. But the main issue Kibbee raised was the state's failure to prove all elements of the telephone harassment offense beyond a reasonable doubt as required under the Fourteenth Amendment. BOA at 14-28 (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1086, 25 L. Ed. 2d 368 (1970)).

The state filed its response March 1, 2019. Brief of Respondent (BOR). For the first time, the state argued the sufficiency of the evidence claim could not be raised for the first time on tertiary discretionary review. BOR at 6 (citing RAP 2.3(d)[3]).

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[3] **(d) Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction.** Discretionary review of a superior court decision entered

At oral argument on September 17, 2019, undersigned counsel argued that review was appropriate under RAP 2.3(d)(2), because the sufficiency of the evidence claim involved a significant question of law under the state and federal constitution. See http://www.courts.wa.gov/content/OralArgAudio/a02/20190917/506335%20-%20State%20v%20Kibbee.mp3 (last accessed 11/1/19).

In its decision entered October 15, 2019, Division II disagreed with one aspect of Kibbee's appearance of fairness claim and held the other aspect was moot. Appendix A at 8-9. This Court declined to consider Kibbee's sufficiency of the evidence claim regarding the telephone harassment charge, on grounds none of the provisions of RAP 2.3(d) applied, not even subsection (2) "because although sufficiency of the evidence may have constitutional implications, here these claims do

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> in a proceeding to review a decision of a court of limited jurisdictions will be accepted only:
>
> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction to call for review by the appellate court.

RAP 2.3(d).

not involve *significant questions* of constitutional law." Appendix A at 5 (emphasis in original).

Kibbee filed a motion for reconsideration arguing that since the state did not move to modify the Commissioners Ruling Granting Review, the ruling of the Commissioner was the final decision of the appellate court and determined the scope of review. Motion for Reconsideration at 6 (citing In re Detention of Broer, 93 Wn. App. 852, 857, 957 P.2d 281 (1998) (citing Kramer v. J.L. Case Mfg. Co., 62 Wn. App. 544, 547, 815 P.2d 798 (1991); Gould v. Mutual Life Ins. Co., 37 Wn. App. 756, 758, 683 P.2d 207 (1984)).

Division II denied the motion for Reconsideration. Appendix B.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE DIVISION II'S REFUSAL TO CONSIDER KIBBEE'S SUFFICIENCY OF THE EVIDENCE CHALLENGE CONFLICTS WITH DIVISION I'S PUBLISHED DECISION IN KRAMER V. J.I. CASE MFG. CO.

By Commissioner Ruling dated February 6, 2018, this Court granted review of Kibbee's sufficiency of the evidence claim. The state did not seek review of that Ruling. Rather, it argued for the first time in its response brief that review was wrongly accepted. The state should not be allowed to collaterally attack the appellate court's rulings.

RAP 17.7 provides:

> **(a) Motion to modify.** An aggrieved person may object to a ruling of a commissioner or clerk, including transfer of the case to the Court of Appeals under rule 17.2(c), only by a motion to modify the ruling directed to the judges of the court served by the commissioner or clerk. Except as set forth in subsection (b), the motion to modify the ruling must be served in all persons entitled to notice of the original motion and filed in the appellate court not later than 30 days after the ruling is filed. A motion to the Justices in the Supreme Court will be decided by a panel of five Justices unless the court directs a hearing by the court en banc.
>
> **(b) RAP 18.13 And RAP 18.13A.** A motion to modify a Court of Appeals commissioner's ruling terminating review of a motion for accelerated review filed pursuant to RAP 18.13 or RAP 18.13A is governed by the provision of those rules.

Underlining added.

The state did not file a motion to modify the Commissioner's Ruling. A party aggrieved by a Commissioner's Ruling may obtain relief solely by motion to modify. RAP 17.7. Because the state did not move to modify, the ruling of the Commissioner is the final decision of the appellate court and determines the scope of review. In re Detention of Broer, 93 Wn. App. at 857 (citing Kramer v. J.L. Case Mfg. Co., 62 Wn. App. at 54; Gould v. Mutual Life Ins. Co., 37 Wn. App. at 758.

Kramer v. J.I. Case Mfg. Co. is directly on point. There, Garey Kramer appealed a judgment of dismissal following a verdict in favor of the defense in his product liability action against Case Mfg. Co. "Case."

Kramer, at 546. A preliminary issue in the appeal was the adequacy of the record. In an effort to save costs, Kramer had only a partial VRP prepared. Case obtained an order in the trial court requiring Kramer to supplement the existing transcript. Kramer did not do so, and Case moved for an order in the appellate court requiring Kramer to comply with the trial court order. The Commissioner denied Case's motion and ordered:

> The Kramers' appeal on the merits may proceed on the record they have provided. This ruling in no way finds that record sufficient for purposes of appellate review. If a panel later agrees with the trial court that additional record is necessary, it may refuse to consider the issue on appeal. State ex rel. Dean v. Dean, 56 Wn. App. 377, 382, 783 P.2d 1099 (1989).

Kramer, at 547.

Case challenged this ruling in its Respondent's brief 1 months after the Ruling. The appellate court held it was too late:

> Case attacks this ruling in its Respondent's brief filed 1 month after the Commissioner's order. Its attack is untimely. A party aggrieved by a commissioner's ruling can only object by a motion to modify filed no later than 10 days after the ruling is filed. RAP 17.7. If no such motion is filed, the ruling becomes a final decision of the court. Gould v. Mutual Life Ins. Co., 37 Wn. App. 756, 758, 683 P.2d 207 (1984); see also State v. Rolax, 104 Wash.2d 129, 135, 702 P.2d 1185 (1985).

Kramer, 62 Wn. App. at 547.

Like Case, the state here did not challenge the Commissioner's Ruling until its response brief. As such, the challenge was untimely. Division II's decision refusing to consider Kibbee's sufficiency of the evidence claim conflicts with Division I's decision in Kramer v. J.L. Case Mfg. Co. This Court should accept review. 13.4(b)(2).

2. THIS COURT SHOULD ACCEPT REVIEW AND DECIDE KIBBEE'S SUFFICIENCY OF THE EVIDENCE CLAIM ON THE MERITS BECAUSE IT INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Whether or not sufficient evidence has been produced to support a criminal conviction presents a question of law under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Jackson v. Virginia, 443 U.S. 307, 317-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). And contrary to the appellate court's decision, the sufficiency issue raised by Kibbee is *significant*. This Court should accept review. RAP 13.4(b)(3).

Kibbee was prosecuted in part for violating the telephone harassment statute under the obscenity prong. The state claimed his use of the word "motherfucking" amounted to obscenity. RP 176 ("he used the term m-f-er") ("using bad language"), RP 181 ("the foul language"), Kibbee argued on appeal that as a matter of law and statutory

interpretation the use of a single swear word cannot be considered "obscene." BOA at 16-24.

Kibbee was sentenced to a year in jail for uttering this word.[4] Yet, a prohibition against profane language has been held unconstitutionally overbroad. City of Bellevue v. Lorang, 140 Wn.2d 19, 922 P.2d 496 (2000). This case involves a question of statutory interpretation, not just a fact question for the jury. It therefore involves a significant question of law and an issue of substantial public interest. Free speech is a vital concern for all Washington citizens. RAP 13.4(b)(4).

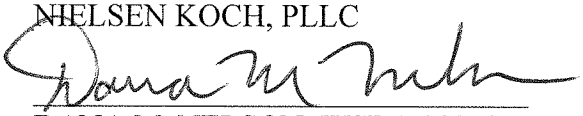
F. CONCLUSION

This Court should accept review and reach the merits of Kibbee's constitutional challenge. What he said to Fox was not nice, but it was not a crime.

Dated this 3rd day of January, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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[4] Alternatively, he was convicted of making an "anonymous" call when all parties involved knew one another and knew who they were speaking to, which is equally ludicrous. BOA at 24-25.

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 15, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID KIBBEE, Petitioner.	No. 50633-5-II UNPUBLISHED OPINION

MAXA, C.J. – Michael Kibbee seeks discretionary review of the superior court's affirmance of his district court convictions of violation of a protection order and telephone harassment with a domestic violence designation. The convictions arose from Kibbee's telephone call from a blocked number to his former wife Jan Fox's husband, Lee Fox, in which he stated that he heard Lee[1] had a brain tumor and that he hoped Lee would "mother-f***ing die." Report of Proceedings (RP) at 105.

We hold that (1) under RAP 2.3(d), discretionary review is not appropriate for Kibbee's sufficiency of evidence claim regarding his telephone harassment conviction; (2) as the State concedes, the State did not present sufficient evidence to prove that Kibbee's offenses constituted domestic violence because Lee was not a member of Kibbee's family or household;

[1] For clarity, this prehearing refers to Jan and Lee Fox by their first names. No disrespect is intended.

(3) the district court judge did not violate the appearance of fairness doctrine by her comments during arraignment about Kibbee's military service; and (4) Kibbee's appearance of fairness claim regarding his sentencing hearing is moot because he has completed his sentence. Accordingly, we affirm Kibbee's conviction, but we remand for the trial court to strike the domestic violence designations from Kibbee's judgment and sentence.

FACTS

Initial Incident

On January 6, 2016, Lee received a phone call from an unknown number. Lee recognized the voice on the call as Kibbee, although Kibbee apparently did not identify himself. Kibbee told Lee that he heard that Lee had a brain tumor and he hoped Lee would "mother-f-ing die." RP at 105. Kibbee repeated several times that he was glad Lee had a brain tumor and that he wanted Lee to die. Kibbee also called Lee a "mother-f-ing piece of F." RP at 120.

At the time, Lee had a restraining order against Kibbee. Lee called the police to report the violation of the protection order. The State charged Kibbee with violation of a protection order and telephone harassment. The State designated both charges as domestic violence offenses.

Arraignment

Kibbee was arraigned on February 22. At the arraignment, defense counsel noted that Kibbee was a Marine Corps veteran. The district court stated, "I know a lot of Marine Corp [sic] vets that go back to Viet Nam . . . and that doesn't mean that they have halos over their head, okay? And a lot of them were having troubles because a lot of them had control issues." RP at 7.

The district court noted that Kibbee had a history of violating protection orders. The district court stated, "I don't have any confidence . . . that you're going to follow any order that I

tell you at all." RP at 8. The court also stated, "So, you know, one of these things could be PTSD, it could be a lot of things, I don't know. I don't know what it is with you, but you don't follow orders." RP at 9.

The district court then released Kibbee without bail with the condition that he have no contact with Lee or Jan. The court concluded, "(Indiscernible) you're not some whack job that's going to go out and shoot somebody after this, so I hope you don't." RP at 9.

Trial and Sentencing

The jury convicted Kibbee of both charges. The jury also found that Kibbee and Lee were members of the same household or family.

Kibbee appeared at the subsequent sentencing hearing by video monitor from jail. The trial court imposed consecutive 364 days sentences on the two convictions. After completion of the hearing, Kibbee walked out of view of the camera. A corrections officer then walked into the view of the camera. As the officer walked back out of view, the court stated, "You better say goodbye." Video Recording (Dec. 15, 2016) at 34:00 min. The officer then returned and pulled down a sign which read "goodbye" above a big, yellow smiley face. The court laughed and clapped and said, "Bravo." RP at 224.

RALJ Appeal

Kibbee appealed his convictions to superior court. Kibbee argued on appeal that the district court had violated the appearance of fairness doctrine and that he had received ineffective assistance of counsel because defense counsel had not filed an affidavit of prejudice. The superior court ruled that the district court had not violated the appearance of fairness doctrine and Kibbee had not received ineffective assistance of counsel. Accordingly, the superior court denied Kibbee's appeal and affirmed his judgment and sentence. Kibbee did not argue in the

superior court that the evidence was insufficient to convict him of telephone harassment. Therefore, the superior court made no ruling on that issue.

Kibbee filed a motion for discretionary review, arguing that the district court violated the appearance of fairness doctrine by participating in a practical joke at his expense during the sentencing hearing. A commissioner of this court granted discretionary review on the appearance of fairness issue. Ruling Granting Review (Feb. 6, 2018) at 8. The commissioner also stated that Kibbee was free to raise sufficiency of the evidence arguments in his merits briefing because a defendant may raise a sufficiency of evidence for the first time on appeal. *Id.*

Defense counsel confirmed at oral argument that Kibbee has now completed his sentence.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Kibbee argues that that State did not present sufficient evidence to prove that he committed telephone harassment. He also argues, and the State concedes, that the State did not present sufficient evidence to prove that the convictions constituted domestic violence offenses. The State argues that discretionary review is not appropriate for Kibbee's sufficiency of evidence claims under RAP 2.3(d).

We agree with the State and hold that discretionary review is not appropriate for Kibbee's sufficiency of evidence claims. However, we exercise our discretion under RAP 1.2(a) to accept the State's concession regarding the domestic violence designation.

1. Availability of Discretionary Review

Initially, the State argues that discretionary review is not appropriate for Kibbee's sufficiency of evidence claims because these claims do not fall within one of the grounds for granting discretionary review under RAP 2.3(d). We agree.

Our review of a superior court's decision on an RALJ appeal is limited to discretionary review under RAP 2.3(d). RALJ 9.1(h); *State v. Chelan County Dist. Ct.*, 189 Wn.2d 625, 644, 404 P.3d 1153 (2017). We will accept discretionary review only on one of four grounds:

> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
>
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
>
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

RAP 2.3(d).

As the commissioner noted in the order granting discretionary review, a defendant may raise a sufficiency of evidence claim for the first time on appeal. RAP 2.5(a)(2). However, even sufficiency of the evidence claims must fall within one of the RAP 2.3(d) categories before we can accept discretionary review of those claims.

Regarding Kibbee's sufficiency of evidence claims, subsection (1) of RAP 2.3(d) is inapplicable because the superior court did not render a decision on Kibbee's sufficiency of evidence claims. Subsection (2) is inapplicable because although sufficiency of the evidence may have constitutional implications, here these claims do not involve *significant* questions of constitutional law. Subsection (3) is inapplicable because these claims do not involve issues of public interest. And subsection (4) is inapplicable because the district court did not depart from accepted judicial proceedings regarding sufficiency of the evidence.

The order granting discretionary review stated that Kibbee was free to raise a sufficiency of the evidence claim in his briefing. Ruling Granting Review at 8. To the extent that this statement can be interpreted as granting discretionary review on the sufficiency of the evidence claims, the commissioner erred. We hold that discretionary review on the sufficiency of the evidence claims was improvidently granted.

We decline to consider Kibbee's sufficiency of evidence claim regarding his telephone harassment claim. However, the State concedes that there was insufficient evidence to support the domestic violence designations. Therefore, we exercise our discretion under RAP 1.2(a) to consider that claim.

2. Domestic Violence Designations

Under RCW 9.94A.525(21)[2], a misdemeanor conviction for an offense that was designated as domestic violence may count against a defendant's offender score in a subsequent sentencing for domestic violence. For an offense to be designated as a crime of domestic violence the defendant and victim must be members of the same family or household. RCW 10.99.020(5)[3]. RCW 10.99.020(3) defines members of the same family or household as people who are spouses, former spouses, related by blood or marriage, have a child in common, reside together or have resided together in the past, are in a dating relationship, or have a biological or legal parent-child relationship.

[2] RCW 9.94A.525 was amended in 2017. Because those amendments do not affect our analysis, we cite to the current version of the statute.

[3] RCW 10.99.020 was amended in 2019. Because those amendments do not affect our analysis, we cite to the current version of the statute.

Here, Lee and Kibbee were not family or household members as defined in RCW 10.99.020(3), and the State did not present any evidence that Kibbee and Lee ever were family or household members. Lee testified that Kibbee was his wife's former husband. But the State concedes that a relationship with someone who has a family or household relationship with the defendant does not bring Lee within the meaning of RCW 10.99.020(3).

Accordingly, we hold that the State did not present sufficient evidence to prove that Kibbee's convictions were domestic violence offenses.

B. APPEARANCE OF FAIRNESS

Kibbee argues that the district court judge violated the appearance of fairness doctrine based on her comments about his military service during the arraignment and her response when the corrections officer displayed the sign that read "goodbye" at the end of his sentencing hearing. We disagree regarding the judge's conduct at arraignment and conclude that the issue regarding the judge's conduct at sentencing is moot.

1. Legal Principles

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee that criminal defendants will be sentenced by an impartial court. *State v. Solis-Diaz*, 187 Wn.2d 535, 539-40, 387 P.3d 703 (2017). "Pursuant to the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing." *Id.* at 540. Under this doctrine, a presiding judge must actually be impartial and also appear to be impartial. *Id.* The question is "whether the judge's impartiality might reasonably be questioned." *Id.*

To make this determination, we apply an objective test that assumes a reasonable person knows and understands all the relevant facts. *Id.* The party asserting a violation has the burden of showing evidence of a judge's actual or potential bias. *Id.*

2. Arraignment Hearing

Kibbee argues that the district judge's comments at his arraignment demonstrated a bias against former Marines. He claims that the judge demonstrated a preconceived notion that Marine Corps veterans have control issues and do not follow orders.[4]

At the arraignment, defense counsel noted Kibbee's military service as a Marine. The judge stated that she knew other Marine Corps veterans who had issues with controlling their behavior. The judge speculated that Kibbee's history of violating protection orders could be related to post-traumatic stress disorder. And the judge sought an assurance that Kibbee was not a "whack job" who was going to go out and shoot somebody.

However, there is no indication that the judge's comments affected her decision-making or reflected any bias or animosity towards veterans generally or towards Kibbee personally. The judge recited some of Kibbee's history of violating protection orders, and stated that this history was the reason she did not have confidence that Kibbee would follow a protection order in the future. Further, the judge then released Kibbee on his own recognizance without requiring bail.

We determine that an objective observer would conclude that Kibbee received a fair and impartial arraignment hearing. Accordingly, we reject Kibbee's appearance of fairness claim based on that hearing.

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[4] In the facts section of his brief, Kibbee also references an incident in which the district judge sharply criticized defense counsel for appearing late to a pretrial hearing and for his attitude toward the court. However, Kibbee presents no argument that this interaction violated the appearance of fairness doctrine. And nothing in the record suggests that this interaction had any effect on the judge's attitude toward Kibbee.

3. Sentencing Hearing

Kibbe argues that the judge's response to the corrections officer's sign after sentencing violated the appearance of fairness. But Kibbee was sentenced to serve two years in December 2016, and he has now completed his sentence. Therefore, we must address whether his claim regarding the sentencing hearing is moot.

A case is moot if an appellate court no longer can provide effective relief. *State v. T.J.S.-M.*, 193 Wn.2d 450, 454, 441 P.3d 1181 (2019). The expiration of a sentencing term renders a sentencing issue moot. *Id.* We generally decline to consider moot issues. *Id.*

We may address a moot issue if the case involves an issue of continuing and substantial public interest. *Id.* We consider three factors in determining if an issue affects a continuing and substantial public interest: (1) whether the question presented is of a public or private nature, (2) the importance of an authoritative determination to guide public officers, and (3) whether the question is likely to recur in the future. *Id.* We conclude that this issue is not one of continuing and substantial public interest.

Accordingly, we decline to consider the moot issue regarding Kibbee's sentencing hearing.

CONCLUSION

We affirm Kibbee's convictions, but we remand for the trial court to strike the domestic violence designations from Kibbee's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, C.J.

We concur:

MELNICK, J.

GLASSGOW, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

December 4, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID KIBBEE, Petitioner.	No. 50633-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Michael Kibbee has moved for reconsideration of this court's October 15, 2019 unpublished opinion in this case. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Melnick, Glasgow

FOR THE COURT:

Maxa, C.J.

CHIEF JUDGE

APPENDIX C

INSTRUCTION NO. 6

To convict the defendant of the crime of telephone harassment, each of the following four elements must be proved beyond a reasonable doubt:

(1) That on or about January 6, 2016, the defendant made a telephone call to another person;

(2) That at the time the defendant initiated the phone call the defendant intended to harass, intimidate, torment, or embarrass that other person;

(3) That the defendant:

(a) used lewd, lascivious, indecent, or obscene words or language in the telephone call; or
(b) called anonymously, whether or not a conversation occurred;

and
(4) That the phone call was made or received in the State of Washington, County of Jefferson.

If you find from the evidence that elements (1), (2), and (4), and any of the alternative elements (3)(a) or (3)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON, Respondent, v. MICHAEL D. KIBBEE, Petitioner.	No. 50633-5-II RULING GRANTING REVIEW

Michael Kibbee moves for discretionary review of a superior court's decision affirming his limited jurisdiction court convictions of violating a harassment no contact order and telephone harassment, for which he received consecutive one year sentences. Mot. for Disc. Rev., Appendix at 1-3 (Superior Court Appellant's Brief at 1-3 (April 18, 2017); Mot. for Disc. Rev., Appendix Attachment A, Exhibit C at 10-13 (Superior Court Appellant's Brief at 1-3 (April 18, 2017)). Concluding that Kibbee demonstrates review is appropriate under RAP 2.3(d)(3), this court grants review.

BACKGROUND

This court does not have transcripts of the district court proceedings. Because the State relies on the superior court's fact statement and because Kibbee's *pro se* motion for discretionary review[1] does not contain a separate statement of facts with citations to the relevant portions of the record, RAP 6.2(c); RAP 17.3(b)(8); or assign error to the superior court's findings, this court reprints the superior court's facts here:

> FACTS
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> Defendant was originally charged with Violation of a Harassment No Contact Order DV and appeared in the District Court for arraignment on February 22, 2016. Later, Defendant was also charged by amended complaint with Telephone Harassment DV [domestic violence]. A deputy prosecutor appeared for the State. A public defender (Defendant's present appeal counsel) appeared for Defendant; Defendant said he would need a public defender and was to file documents to be screened for the same). The Court reviewed Defendant's prior record of convictions/arrests. The State recommended a PR release of Defendant, Defense counsel agreed and also mentioned that Defendant has served in the [United States] Marines in representing that Defendant took the proceeding seriously and would appear in court as required. The trial judge responded substantially as set forth in the State's appeal brief; her comments concerning the Marines were in response to Defense counsel bringing it up. The trial judge's comments were based generally on her experience with military

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[1] On August 1, 2017, this court received a four-page Motion for Discretionary Review, with one hundred forty-eight pages of appendices. Kibbee did not include an Affidavit of Service showing service of this document on the State. He requested review because of "gross problems in this case of evidence of fact and also extreme prejudice on the part of the district court judge." Mot. for Disc. Rev. at 1-2. By letter dated August 21, 2017, this court requested Kibbee to provide proof of service of his motion for discretionary review on opposing counsel. On August 25, 2017, Kibbee filed an affidavit of service stating he had served his Motion for Discretionary Review on opposing counsel on August 4, 2017.

On August 17, 2017, however, this court received a 14-page document also captioned "motion for discretionary review," which was docketed as additional correspondence. Mr. Kibbee signed this document on August 10, 2017, but he did not provide proof of service of this document on opposing counsel. The August 17, 2017 document will be placed in the court file without action as a supplemental motion that Kibbee did not request permission to file, and will not be reviewed by this court.

personnel; in this Court's view she did not personally attack or belittle the Defendant. The trial judge expressed concern based upon Defendant's prior record of not complying with court orders and reiterated a portion of the probable cause statement in this case. The trial court judge appeared surprised that no bail was requested by the State. Notwithstanding that, the trial court judge released Defendant on [personal recognizance].

At the pretrial hearing on May 4, 2016, the case was called at about 9:29 AM. Defendant was present but his out-of-town trial counsel, Mr. Anderson, was not and running late. The case was set down and recalled at 9:50 AM. The trial judge pointed out trial counsel was 45 minutes late to court. Trial counsel said he had a conflict. The judge said he shouldn't take cases over here (if he can't be on time). Trial counsel responded that he could take cases "anywhere in the State of Washington and . . .". The communication went downhill from there: The trial judge mentioned that "your smart mouth will get you found in contempt of court." Defense counsel spoke and the trial judge said "listen to me--you smug little person you," and referred to "your arrogant, egotistical type of conversation you're having with me". At this point the trial judge specifically said that this "won't affect Mr. Kibbee; he's been nice, polite and waited for you, who he hired to represent him." The argument continued moments between trial counsel and the trial judge. The trial judge again said "thank you Mr. Kibbee" but admonished trial counsel for showing disrespect to the trial court. For the second time in response to the trial judge asking trial counsel if he understood, trial counsel said "Yes, you've made yourself abundantly clear." The trial judge responded, "Good, we're here for pretrial." The pretrial hearing proceeded with the setting of dates. Twice the trial judge reminded trial counsel to be on time. However, at the end, the trial judgment [sic] said "Thank you Mr. Kibbee. Go have breakfast at "_____" (not understandable). You'll like it." Although the trial judge berated trial counsel for being late and his responses to the judge, the trial judge expressed courtesy and respect to the Defendant personally throughout the pretrial hearing.

A one-day jury trial was held on July 28, 2016. Defendant was found guilty of each count. Of note, Defendant raises no errors on appeal arising out of the jury trial.

Sentencing was set for August 10, 2016. Prior to that Defendant's trial counsel submitted written sentencing materials. Apparently Defendant was originally present at the courtroom for sentencing but left before the case was called. A warrant was issued for Defendant's arrest. The warrant was executed and Defendant appeared in custody on the warrant on November 16, 2016.

Sentencing was held December 15, 2016. The Deputy Prosecutor appeared for the State; Mr. Anderson appeared for Defendant; and Defendant appeared on the video monitor from the jail. The trial judge

acknowledged having already read defense counsel's written sentencing materials.

The State argued Defendant's history of violence; not having taken responsibility; serious domestic violence; his prior record; continual harassment; the victims have tried to hide from Defendant; Defendant told a victim he hoped that the victim would die.

Victim Mr. Fox spoke at some length from prepared notes. He described extreme violence by Defendant upon victim Mrs. Fox; multiple threats; harassing, stalking, etc. He asked for a maximum sentence and alcohol-drug treatment and a mental health evaluation of defendant. Victim Mrs. Fox spoke briefly. The State asked for 180 days on each count consecutive for a total of 360 days, saying the request was more after Defendant had failed to appear and absconded.

The trial judge called on Defense trial counsel, who responded "Thanks your honor." The trial judge responded "You're welcome." Trial counsel proceeded with his presentation. He apologized for his client failing to appear; was not seeking sympathy but wanted to establish a context for some of the conduct and described a mutual and dysfunctional relationship between the Defendant and victims over a period of years. He requested 60 days in jail on each count to be served concurrently.

The Defendant spoke at some length; acknowledged the hate between the parties; said he has tried to get away from the victims and wants to be left alone; his 38 year relationship with Mrs. Fox and 3 kids together; said he had been successful and a good man and had been a minister for a period of time; apologized for failing to appear; acknowledged be would serve some time; and appreciated being able to speak.

The Judge then spoke. She referred to people (eg [sic] victims) who have been with monsters for a long time; that upstanding people like pastors can do bad things; that you are pretending to have a "halo"; that your words were vicious; that you're a vicious person; the victims have been victimized by you; that you failed to appear in court, are dangerous and showed the court disrespect; that the victims have more credibility than the Defendant; that "treatment won't work for you---you think you're perfect." The Judge then sentenced Defendant to one year on each count, consecutive, for a total of two years less good time; the case is closed; "that's how dangerous you are to the victims"; and no fines or fees.

The Defendant then walked out of view of the video camera for a few seconds; the jail officer appeared and said "what?" The judge responded, "Better say goodbye" to the jail officer, who then turned and unfastened a poster that hung down from the wall saying "Goodbye" with a smiley face. The trial judge said "Bravo", clapped and laughed, as apparently did court staff.

Mot. for Disc. Rev., Appendix at 11-13 (Superior Court Memorandum Opinion and Order at 1-3 (June 20, 2017)).

After he was sentenced, Kibbee appealed to the superior court. He raised two issues: (1) that the trial judge violated the appearance of fairness doctrine; and (2) that trial counsel was ineffective for failing to ensure that Kibbee's case was heard by a fair magistrate. Mot. for Disc. Rev., Appendix at 1; Mot. for Disc. Rev., Appendix Attachment A, Exhibit C at 10 (Superior Court Appellant's Brief at 1 (April 18, 2017)).

The superior court concluded that the district court judge did not violate the appearance of fairness doctrine. Mot. for Disc. Rev., Appendix at 14-15 (Superior Court Memorandum Opinion and Order at 4-5 (June 20, 2017)). It found that the superior court "did not stereotype or demean the specific Defendant" when she referenced his military service or when she "use[d] harsh language towards defense trial counsel in connection with being late to court." Mot. for Disc. Rev., Appendix at 15-16 (Superior Court Memorandum Opinion and Order at 4-5 (June 20, 2017)).

In addition, the superior court determined that the district court judge "listened very carefully" at sentencing and "articulated reasons for the sentence." Mot. for Disc. Rev., Appendix at 15 (Superior Court Memorandum Opinion and Order at 5 (June 20, 2017)). With respect to the "goodbye" poster or banner, the superior court found that it was displayed after sentencing was complete and Kibbee had left the room, concluding, "[t]he actions and display had absolutely nothing to do with this defendant nor his sentence." Mot. for Disc. Rev., Appendix at 16 (Superior Court Memorandum Opinion and Order at 5 (June 20, 2017)). The superior court also determined that Kibbee did not receive

ineffective assistance of counsel. Mot. for Disc. Rev., Appendix at 17 (Superior Court Memorandum Opinion and Order at 6 (June 20, 2017)).

ANALYSIS

Discretionary Review

RAP 2.3(d) provides:

> Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:
> (1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
> (2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (3) If the decision involves an issue of public interest which should be determined by an appellate court; or
> (4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

Kibbee does not identify which subsection or subsections of the rule govern his motion.

Appearance of Fairness

According to *State v. Gamble*,

> Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). "'The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.'" *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972), *quoted in* [*State v.*]*Post*, 118 Wn.2d [596,] 618, 826 P.2d 172[(1992)]. "Evidence of a judge's actual or potential bias must be shown before an appearance of fairness claim will succeed." *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007); *see also Post*, 118 Wn.2d at 619, 826 P.2d 172. Under the Code of Judicial Conduct, designed to provide guidance for judges, "'[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.'" CJC Canon 3(D)(1), *quoted in Chamberlin*, 161 Wn.2d at 37, 162 P.3d 389; *see also State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996).

168 Wn.2d 161, 187-88, 225 P.3d 973 (2010); *see also State v. Davis*, 175 Wn.2d 287, 306, 290 P.3d 43 (2012).

The State argues that the superior court's decision does not require review because the appearance of fairness issue is "a relatively minor issue involving a question of judicial temperament." Resp. to Mot. for Disc. Rev. at 3. It adds that Kibbee, although he complains of the judge's pretrial and post-sentencing conduct, "does not allege any conduct by the trial judge during trial indicating any type of bias, prejudice or partiality." Resp. to Mot. for Disc. Rev. at 3 (quoting Superior Court Memorandum Opinion and Order at 5 (June 20, 2017)).

In light of the facts as found by the superior court, this court concludes that Kibbee raises an issue of public interest. RAP 2.3(d)(3). Regardless whether the superior court correctly determined that the trial judge violated the appearance of fairness doctrine, at a minimum, the post-sentencing incident requires additional appellate review, particularly when it appears that the "goodbye" banner was a permanent fixture in this sentencing court.

The use of this banner at sentencing also supports review of whether other actions or statements by the district court judge violated this doctrine. *See* Mot. for Disc. Rev., Appendix at 15-16 (Superior Court Memorandum Opinion and Order (June 20, 2017)). This court grants Kibbee's August 1, 2017 motion for discretionary review. This grant of review includes both of the issues addressed by the superior court on appeal—the appearance of fairness issue and the related ineffective assistance of counsel issue. Mot. for Disc. Rev. at 1; RAP 2.3(d)(3); RAP 2.3(e).

With respect to Kibbee's additional arguments raised in his motion regarding the "lack of evidence," this court notes that RAP 2.3(d) provides for discretionary review of the *superior court*'s decision. Mot. for Disc. Rev. at 2. Here, the superior court did not issue any decision on this issue for this court to review. Nevertheless, because a defendant may challenge the sufficiency of the evidence for the first time on appeal, Kibbee remains free to raise this issue in his merits briefing as well as any other issue that can be raised for the first time on appeal. RAP 2.3(e); RAP 2.5(a)(2); *State v. Clark*, 195 Wn. App. 868, 873-77, 381 P.3d 198 (2016), *review granted in part*, 187 Wn.2d 1009 (2017). Accordingly, it is hereby

ORDERED that Kibbee's motion for discretionary review is granted. The clerk of court will appoint counsel and issue a perfection notice.

DATED this 12th day of February, 2018.

Aurora R. Bearse
Court Commissioner

cc: Michael D. Kibbee, Pro Se
Michael E. Haas
Hon. Jill Landes
Hon. Keith Harper

NIELSEN, BROMAN & KOCH P.L.L.C.

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