No. 98863-3
COA No. 52852-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

GEORGE F. JONES,

Petitioner.

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

The Honorable James J. Dixon, Judge
Cause No. 16-1-01621-34

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# ANSWER TO PETITION FOR REVIEW

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2. Whether this Court should review a jury unanimity claim where this case has provided guidance on the issue and the Court of Appeals properly followed that guidance.

3. Whether this Court should review Jones' Confrontation Clause claim where the Court of Appeals properly followed the precedent set by this Court and the United States Supreme Court in finding that the statements elicited at trial were non-testimonial.

B. STATEMENT OF THE CASE.

On September 15, 2016, Thurston County Sheriff's Office Deputy Ryan Hoover responded to the appellant, George Jones', residence for a possible violation of protection order. RP 131-132.[1] Deputy Hoover was responding to a reported violation involving Jones and Virginia Norris. RP 133. When Deputy Hoover arrived, he did not see anybody around the house at first, but he did see

[1] The jury trial that occurred December 21-22, 2016, is reported in two sequentially paginated volumes by court reporter Ralph Beswick and will be referred to herein collectively as RP. The sentencing hearing December 26, 2018, reported by court reporter Kathyn Beehler will be referred to as 2 RP.

Jones' vehicle. RP 133. Deputy Hoover walked around behind the shop building on the property and made contact with a female who was not Norris. RP 134.

After checking the perimeter of the property around the yard, Deputy Hoover was in the driveway discussing what to do next when Ms. Norris made contact with him. RP 135. Deputy Hoover identified Virginia Norris as the person who contacted him by comparing a certified copy of her driver's license. RP 136. Deputy Hoover noted that Norris appeared "somewhat apprehensive" when she approached him and "seemed a little bit scared to talk to" him. RP 139-140. When Deputy Hoover asked her "Where's Mr. Jones at?" Norris told him "that he had probably left to Olympia." RP 140.

Deputy Hoover then pointed out that Jones' car was there and asked which vehicle he had left in, to which Norris lowered her voice and told Deputy Hoover "he's actually under the house watching us." RP 140-141. Deputy Hoover noticed that Norris appear nervous to tell him. RP 141. Jones was detained by other deputies near the crawl space of the residence. RP 142. Deputy Hoover testified that Jones was "completely dirty across the front of him, his face. Very sweaty." RP 142-143.

Deputy Hoover interviewed Jones, who acknowledged that he knew that there was a no contact order in effect where he was the respondent and Norris was the protected party. RP 143. Deputy Hoover testified:

> . . . he had told me that – that he had actually been with her earlier in the day in a vehicle with her, and he made comments that she had gone to the Lewis County courts earlier in that day and had - - when she had returned had told him that the order had been dropped, and but he was suspicious that it had been dropped.

RP 143. Deputy Hoover testified that Jones "said he caused a little bit of a ruckus and things hit the fan." RP 146. When asked about where he was when law enforcement arrived, Jones told Deputy Hoover, "that he had been under the house, but he had panicked when he saw" law enforcement. RP 146. Deputy Hoover later clarified that Jones "admitted that he was hiding under the house." RP 155-156.

The State admitted the Lewis County Superior Court no contact order, in which Jones was the respondent and Norris was the protected party. RP 147, Ex. 1. The order prohibited contact with Norris and indicated that Jones and Norris had been intimate partners. RP 148-149.

Jones testified in his defense. RP 166. Jones testified that he saw movement in his backyard and Norris and another person were there without permission. RP 176-177. Jones indicated that he told Norris to leave, and she started yelling at him. RP 178. He stated that "there was a ruckus back and forth." RP 179. He then said that he attempted to leave in his car, but he did not leave. RP 179-180. He testified that he did not leave because he believed the police were coming. RP 180. He testified that Norris tailed him around the house. RP 181.

Jones admitted that he was aware of the no contact order. RP 182. Jones eventually testified that he "panicked" and went out of the window to get away from Norris and she followed him out of the window. RP 184. He stated that he then went into the cellar underneath the house and she followed him "only part of the way." RP 185. Jones denied that he told law enforcement that he had been with Norris earlier in the day. RP 191-192; 205. He indicated that Norris had informed him that she was calling the police. RP 192.

Prior to trial in the matter, Jones, through his defense counsel, filed a motion in limine seeking to exclude statements made by Norris to law enforcement pursuant to the confrontation

clause if Norris failed to appear for trial. CP 18-19. The State countered that Norris' statements were both present sense impressions and excited utterances. CP 13-16.

The trial court addressed the admissibility of Norris' statements to law enforcement at the start of the trial. RP 15. Defense counsel indicated, "my motion in limine addressed two circumstances, the 911 call and potential testimony of Deputy Hoover." RP 16. The prosecutor indicated:

> There are two things that the state intends to get in as far as through Deputy Hoover, and as an offer of proof I'll tell the court I intend to explore with Deputy Hoover the fact that he goes to the residence based on calls from dispatch, and that's how he got the address, that's how he believed there was a potential violation of a no-contact order, and that he was looking for Virginia Norris and George Jones. That's the extent of what I expect to get in from him as far as what he received from dispatch.

RP 18-19. The prosecutor continued:

> I then expect to ask him about his contact with Ms. Norris initially, where the evidence I believe will show that they were at the residence looking for Mr. Jones and Ms. Norris, that they were at the residence, Ms. Norris walks from a different residence than where he was, walks up to him. They ask – he asks her, "Are you Ms. Norris?" She says "Yes." He asks, "Where is Mr. Jones?" She says, "He's headed to Olympia." Then lowers her voice, appears scared to Deputy Hoover, and says, "He's hiding under the house watching us." Those are the extent of the statements

> from Ms. Norris that the state intends to get in - - to ask.

RP 19. The prosecutor then stated:

> The first set through dispatch the state believes are non-testimonial in nature. While they are hearsay, they are not offered for the truth of the matter asserted, simply to explain why Deputy Hoover was at the residence at all, and the second set I do believe would fall under either the excited utterance or present sense impression.

RP 19-20.

With regard to the statements to dispatch, the trial court stated:

> The court will find that the state may offer - - may allow Deputy Hoover to testify that he received information from dispatch that resulted in Deputy Hoover responding to that location seeking Mr. Jones and/or Ms. Norris for a potential violation of a protection order or no contact order, whatever the order is at issue. The court makes that ruling because the court finds such statement is not hearsay. It is not offered to prove the truth of the matter asserted; rather, it is offered by the state to establish why Deputy Hoover acted the way he did.

RP 110.

With regard to the statements made by Norris directly to Deputy Hoover, the trial court stated:

> The court has considered the rules of evidence, and this court is familiar with the rules of evidence. This court considers Evidence rule 803 dispositive. 803 subsection (a)(1), that rule provides in part that a

> present sense impression is not excluded by the hearsay rule, and a present sense impression is defined as a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

RP 114. The court continued:

> The court is not at this point convinced that an excited utterance exception would be appropriate because the court hasn't heard any offer of proof with respect to how and under what circumstances Ms. Norris was making that statement to Deputy Hoover, in other words, under what mental condition or then existing state of mind she was in. However, it does appear to the court that the statement at issue from Ms. Norris was a statement describing or explaining an event or a condition, in this case the whereabouts allegedly of Mr. Jones, made while the declarant, in this case Ms. Norris, was perceiving the event or condition. It's this court's understanding that the state's offer of proof is that Ms. Norris made those statements - - or that statement to Deputy Hoover while Mr. Jones was on the premises.

RP 114-115. The trial court allowed the state to elicit the limited testimony from Deputy Hoover. RP 115.

During opening statements, the prosecutor described the no contact order violation at issue in the case, stating:

> [Deputy Hoover] was dispatched to a call arising out of an address in Rochester belonging to Mr. Jones. And you'll hear that Ms. Norris was at the residence and Mr. Jones was at the residence. And you'll hear - - and you'll see the no-contact order that's - - that was in place at that time, and you'll see that Mr. Jones

> having any contact direct or otherwise with Ms. Norris is prohibiting by that order.

RP 129.

During her closing argument, the prosecutor elaborated on the extent of the violation that occurred at the residence in Rochester, stating, “This act occurred in the State of Washington. We’ve heard a lot of testimony from both Mr. Jones and Deputy Hoover that this occurred at Mr. Jones’ residence on Guava Street in Rochester.” RP 262. Later the prosecutor stated, “Mr. Jones has gotten on the stand and admitted that Virginia Norris was at his residence and they had contact.” RP 264. After discussing the evidence that demonstrated that Jones knowingly contacted Ms. Norris, the prosecutor stated, “He knew Ms. Norris was at his house. He knew that she was at his house when law enforcement came because he’d been with her all day. And that’s what he told law enforcement.” RP 268. The prosecutor concluded her rebuttal closing argument stating, “He knew Ms. Norris was there. He knew he was having direct contact with her, and he hid under the house trying to avoid being caught by law enforcement. The State asks that you return a verdict of guilty.” RP 290.

Jones was convicted of felony violation of a no contact order. RP 297-298; 315; CP 45, 46, 52. Jones appealed, and Division II of the Court of Appeals affirmed his conviction. He now seeks review.

C. ARGUMENT.

A petition for review will be accepted by this Court only for the reasons set forth in RAP 13.4(b). Jones focuses his argument on RAP 13.4(b)(3), which allows review if "a significant question of law under the Constitution of the State of Washington or of the United States is involved," and RAP 13.4(b)(4) which allows review "if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." The Petition does not justify the acceptance of review.

1. The issue of whether a person can be convicted of violation of a no-contact order when the violation occurs at their residence was not litigated in the Court of Appeals and should not be considered on review.

Jones argues that the fact that Jones' conviction for a violation of no contact order that occurred at his home presents a matter of significant public interest and a significant constitutional problem. Petition for Review at 6. Contrary to Jones' argument, Jones could have raised a sufficiency of the evidence argument at the Court of Appeals and chose not to do so. The jury instructions

properly informed the jury that a violation must be knowingly committed. CP 38-40.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here, Jones' statements to law enforcement, combined with the fact that he was found hiding from law enforcement at the scene more than justified the jury's finding that Jones had knowingly violated the no contact order. RP 142-143, 146.

There is no basis for this Court to review the decision of the Court of Appeals on the basis argued by Jones. This Court is not required to consider an issue raised for the first time in a petition for review. RAP 2.5(a); Heg v. Alldrege, 157 Wn.2d 154, 162, 137 P.3d 9 (2006). Jones has not provided justification for this Court to do so.

2. The Court of Appeals correctly decided the issue of jury unanimity based on the existing case law.

The Court of Appeals correctly held that the State relied on a single act to support Jones' conviction. Unpublished Opinion, No. 52852-5-II, at 5. In so doing, the Court of Appeals relied on this

Court's decisions in State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), *abrogated on other grounds*, In re Pers. Restaint of Stockwell, 179 Wn.2d 588, 316 P.3d 1007 (2014); and State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). The decision of the Court of Appeals was supported by the record. The State repeatedly noted that the incident in question was that which was observed by Deputy Hoover at the Rochester residence. RP 129, 262, 290.

The State agrees that jury unanimity is a significant issue of constitutional law. Wash. Const. art. I, §21; State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). However, this Court has provided guidance on the issue, that was followed by the Court of Appeals in this case. There is no basis upon which this Court should accept review.

3. The Court of Appeals followed existing precedent provided by this Court and the United States Supreme Court when it affirmed the trial court's decision to admit statements of Ms. Norris.

This Court provided guidance to the trial courts and the Court of Appeals on deciding when a statement is testimonial for purposes of the confrontation clause in State v. Koslowski, 166 Wn.2d 409, 418, 209 P.3d 479 (2009). The Court of Appeals

properly applied that guidance to the statements made by Ms. Norris to police Dispatch and to Deputy Hoover. Unpublished Opinion, at 7-8. There was no violation of the confrontation clause.

The State agrees that Confrontation Clause is a significant issue of constitutional law. U.S. Const. amend. VI; Wash. Const. art. I § 22; Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The decision of the Court of Appeals both acknowledge the law in this regard and applied the law as set forth in the United States Supreme Court and this Court. There is no basis upon which this Court should accept review on this issue.

D. CONCLUSION.

For the reasons included herein, the State respectfully requests that this Court deny review of the decision of the Court of Appeals.

Respectfully submitted this 4th day of September, 2020.

Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

**DECLARATION OF SERVICE**

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court using the Appellate Courts' Portal utilized by the Washington State Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: September 4, 2020

Signature: _____

## THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

## September 04, 2020 - 8:56 AM

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