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Supreme Court No. 98934-6
COA No. 36574-3-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent

v.

JAMES MICHAEL KOOGLER,

Defendant/Petitioner.

ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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I. IDENTITY OF PARTY AND INTRODUCTION

Respondent, State of Washington, respectfully requests that this Court deny review of the Court of Appeals, Division Three, unpublished decision in case number 36574-3-III, filed July 23, 2020.¹

II. STATEMENT OF THE CASE

James and Karolyn Koogler were married in 2008. RP 131.² In December of 2017, Ms. Koogler's son, Colin Mathieson, was visiting from out of town for a family Christmas celebration. RP 132-33. On December 28, 2017, Mr. Koogler found out that Ms. Koogler had incurred and hidden from him a substantial debt, amounting to nearly \$30,000. RP 133. The next day, the family had made plans to shop, go roller skating, and have a family gathering. RP 135. Instead, Mr. Koogler started drinking beer at a local bar, shortly after noon. RP 136.

After Mr. Koogler's fourth beer, Ms. Koogler left the bar to go shopping as planned. RP 137-38. At 4:00 p.m., Mr. Koogler was still drinking, so Ms. Koogler arranged to have Mr. Mathieson pick him up.

¹ Since the opinion was inadvertently not attached to the Petition, a copy is attached hereto as Appendix A.

² The transcript of proceedings reported by Ms. Korina Kerbs will be referred to simply as "RP." The transcript of proceedings reported by Ms. Jody Dashiell of the afternoon session on October 29, 2018, will be referred to as "2RP."

RP 139. Mr. Mathieson looked for Mr. Koogler at several area bars but could not find him and eventually the entire family returned home. RP 140-41; 2RP 52-53. Mr. Koogler did not arrive home until hours later, after 9:30 p.m., having gone to three different bars. RP 142, 232.

Mr. Koogler entered the master bedroom where Ms. Koogler was laying down, and immediately began to scream obscenities at her, including that he wanted to kill her. RP 143. Ms. Koogler pretended to be sleeping. RP 144.

Mr. Koogler moved behind her while continuing to yell. RP 144.

Ms. Koogler described what happened next:

He picked up the shotgun and racked it as he continued to tell me what a dumb bitch I was and how worthless I was. And he picked up the shotgun and racked the shotgun and said, "Does this sound real, fucking bitch? I'm going to fucking kill you." And I think he did that a couple times.

RP 144. Ms. Koogler said that Mr. Koogler next put the shotgun at her back and said, "Does this feel fucking real, bitch? I'm going to fucking kill you."

RP 147. In addition to being upset, Mr. Koogler still was intoxicated from drinking all day. RP 147, 240. Ms. Koogler thought, "he's got that gun to my back, he's going to kill me." RP 148-49.

Mr. Mathieson was in an adjacent bedroom at the time. 2RP 57. He estimated that Mr. Koogler returned home and began to yell at Ms. Koogler within 30 seconds of arrival. 2RP 57. Mr. Mathieson heard Mr. Koogler

yelling and racking a shotgun. 2RP 57. Mr. Mathieson heard Mr. Koogler yelling about the \$30,000 debt, saying that Ms. Koogler was worthless and that if she ever left him at a bar again he “would kill her.” 2RP 59. Mr. Mathieson heard Mr. Koogler rack the shotgun at least twice and, alarmed, ran out of the house to call law enforcement. 2RP 59. Mr. Mathieson called law enforcement because he thought Mr. Koogler would kill Ms. Koogler. 2RP 59.

Law enforcement arrived on scene. RP 112. Law enforcement first attempted to contact Ms. Koogler by calling her cell phone, but no one answered the call. RP 113, 149. Ms. Koogler – still in the bedroom with Mr. Koogler and the shotgun at her back – attempted to answer that call, but Mr. Koogler grabbed her phone and threw it away, while warning her that no one better show up at the house. RP 150. Law enforcement called the house landline, and Mr. Koogler answered the phone. RP 153.

Eventually, Mr. Koogler came outside, and law enforcement placed him under arrest. RP 114-15. Law enforcement officers observed Mr. Koogler was obviously intoxicated, and still upset. 2RP 79. Mr. Koogler also yelled to Ms. Koogler either, “you’re finished,” “we’re through,” or that she was “dead meat as soon as I get out.” RP 124, 159, 206, 253.

The State charged Mr. Koogler with second degree assault and felony harassment. CP 3. After the State rested its case-in-chief, Mr. Koogler testified on his own behalf. RP 230. He denied Ms. Koogler's allegations that he pointed a shotgun at her. RP 231. Mr. Koogler claimed he was only upset, to the point of threatening to kill Ms. Koogler, only because she had abandoned him at the bar. RP 247. Mr. Koogler specifically admitted to threatening to kill Ms. Koogler, if she left him again, at that time. RP 247-48. Mr. Koogler claimed he arrived home, saw his shotgun was out of place, and checked to see if it was loaded, while commenting, "this sounds real loud, doesn't it[?]" RP 246. During the State's cross examination, Mr. Koogler said he asked this question because he wanted Ms. Koogler to speak to him. RP 267. On redirect examination, Mr. Koogler's trial counsel specifically rehabilitated Mr. Koogler regarding some of the State's questions he had answered. RP 269.

The jury found Mr. Koogler guilty of second degree assault and returned affirmative special verdict forms for the allegations that this was a domestic violence offense and that Mr. Koogler was armed with a firearm. CP 25-26, 38-57; RP 340-43. The jury acquitted Mr. Koogler of the charge of harassment. RP 340; CP 38-57. Mr. Koogler filed an unsuccessful motion for arrest of judgment and new trial, alleging the evidence was

insufficient. CP 9-15. Mr. Koogler timely appealed, and Division Three of the Court of Appeals affirmed his conviction. CP 23; Appendix A.

III. REASONS WHY REVIEW SHOULD NOT BE ACCEPTED

Mr. Koogler has failed to demonstrate the existence of any issues meriting review under RAP 13.4(b).

A party seeking discretionary review of a Court of Appeals decision must demonstrate one or more of the criteria required by RAP 13.4(b) warrants review of the opinion. These criteria preclude review unless (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) the decision of the Court of Appeals is in conflict with another published decision of the Court of Appeals; (3) the case involves a significant question of law under the Constitution of the State of Washington or the United States; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1)-(4). Petitioner has not met his burden.

A. THE COURT SHOULD DENY REVIEW UNDER RAP 13.4(b)(1) BECAUSE THE COURT OF APPEALS FOLLOWED WELL-ESTABLISHED PRECEDENT AND ITS OPINION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Mr. Koogler has petitioned for review based on a general disagreement with the Court of Appeals' opinion. Mr. Koogler's petition fails to demonstrate how the decision of the Court of Appeals is in conflict

with any decision of this Court. Mr. Koogler's petition is a verbatim recitation of his opening brief on appeal, sans citation to RAP 13.4 and a new theory of review based on COVID, and this petition wholly fails to identify or reference any part of the opinion that he believes conflicts with a decision from this Court.

B. MR. KOOGLER HAS NOT IDENTIFIED ANY CONFLICTING PUBLISHED DECISION CONTRARY TO THE COURT OF APPEALS OPINION UNDER RAP 13.4(b)(2).

Where "the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals," a basis exists for a petition for discretionary review by the Supreme Court. RAP 13.4(b)(2). Mr. Koogler does not seek review pursuant to this prong of RAP 13.4(b).

C. MR. KOOGLER'S PETITION FAILS TO ESTABLISH THE DECISION BELOW INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS UNDER RAP 13.4(b)(3).

Mr. Koogler's direct appeal and petition raise issues which are constitutional in nature, but which do not present significant questions of constitutional law. Consequently, Mr. Koogler does not demonstrate review is necessary.

Mr. Koogler's first ground for relief in his appeal, repeated verbatim in his petition, alleged the State's evidence was insufficient to establish his intent to assault his wife. Pet. at 10-12. His argument relies primarily on his own testimony that he was simply checking to make sure his shotgun was

safe and unloaded and wished to talk to his wife, and that the victim's testimony was not credible. Pet. at 11-12.

The Court of Appeals relied on well-settled precedent from this Court in determining that intent can be inferred. *See* Appendix A at 11-12; *State v. Bencivenga*, 137 Wn.2d 703, 708-10, 974 P.2d 832 (1999); *State v. Eastmond*, 129 Wn.2d 497, 500, 919 P.2d 577 (1996). The State provided evidence that Mr. Koogler pointed his firearm at his wife, placed it against her back, yelled, and made threats before, during, and after the assault. The jury was free to disregard Mr. Koogler's self-serving testimony that he simply wanted his wife's attention.

Regarding Mr. Koogler's allegation that the victim testified inconsistently, the Court of Appeals also relied on well-settled precedent from this Court holding that that credibility determinations are not subject to review. *See* Appendix A at 10-11; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). Mr. Koogler's petition fails to argue or assert that this application of law to the facts of his case is novel or requires further review from this Court. Quite simply, the jury believed Ms. Koogler, and disbelieved Mr. Koogler.

Mr. Koogler's second ground for relief alleged that counsel he retained for the trial³ was constitutionally deficient for failing to clarify one statement during redirect examination. Pet. at 13-14. The Court of Appeals cited the well-settled principle that the decisions of counsel which may be characterized as legitimate trial tactics will not constitute ineffective assistance of counsel, again citing precedent from this Court. *See* Appendix at 12-13; *State v. Carson*, 184 Wn.2d 207, 221, 357 P.3d 1064 (2015); *State v. Killo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). The Court of Appeals noted that counsel tactically could have chosen to avoid emphasizing the brief testimony from Mr. Koogler that he wanted Ms. Koogler's attention. Mr. Koogler does not explain how this presents a significant issue of constitutional law.

Ineffective assistance of counsel and sufficiency of the evidence are among the most litigated issues in criminal law. Mr. Koogler's case does not present a unique situation that gives rise to a significant question of constitutional law. To the contrary, Mr. Koogler issues simply boil down to the familiar contentions that the State's witnesses were not credible, and that counsel, aided by the hindsight of a conviction, should have conducted

³ Mr. Koogler retained the same counsel for his direct appeal and Petition for Review to this Court.

redirect examination in a different manner. Neither contention presents a significant question of constitutional law.

D. THE PETITION DOES NOT ADDRESS WHETHER THERE ARE ANY ISSUES OF SUBSTANTIAL PUBLIC INTEREST UNDER RAP 13.4(b)(4).

Finally, Mr. Koogler claims review is appropriate because it involves an issue of substantial public interest. Review is not merited under this prong.

Mr. Koogler claims that this Court should grant review because of current COVID-19 pandemic. This is an argument that Mr. Koogler is raising for the first time in this petition. This Court will not consider issues that were not raised in the Court of Appeals. *In re Lord*, 152 Wn.2d 182, 188 n.5, 94 P.3d 952 (2004); *State v. Laviollette*, 118 Wn.2d 670, 679, 826 P.2d 684 (1992); *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993).

Further, this issue is not ripe. The ripeness doctrine exists to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Mr. Koogler’s claim has not been adjudicated by the trial court. Mr. Koogler acknowledges that he has filed a motion with the trial court seeking relief from judgment due to the COVID-19 pandemic. Pet. at 6.

There is no decision for this Court to review. Moreover, Mr. Koogler has not been harmed by any potential unfavorable decision or potential incarceration.⁴ Additionally, there is no information in the record about Mr. Koogler's physical condition, his susceptibility to COVID-19, whether he possibly has already been infected, given the prevalence of asymptomatic individuals, whether the Department of Corrections may make any accommodations for him, or the condition of the physical location at which he is to serve his sentence. For these reasons, this Court should decline Mr. Koogler's request for review.

IV. CONCLUSION

Mr. Koogler has not provided a basis for this Court to grant review. The Court of Appeals' opinion relied on well-settled constitutional law, and that court did not err when affirming Mr. Koogler's conviction. Mr. Koogler's complaint about COVID-19 was not raised in his appeal. The complaint is also not ripe because Mr. Koogler has acknowledged he has filed a motion for relief at the trial court, which has not yet been decided. There is no compelling reason for this Court to grant discretionary review

⁴ Mr. Koogler has not begun serving his sentence, as the trial court permitted him to post an appeal bond.

under RAP 13.4. The State respectfully requests this Court deny Mr. Koogler's request for review.

Respectfully submitted this 9 day of September 2020.

LAWRENCE H. HASKELL
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Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

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JAMES KOOGLER,

Appellant.

NO. 98934-6
(COA 36574-3-III)

CERTIFICATE OF MAILING

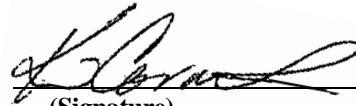
I certify under penalty of perjury under the laws of the State of Washington, that on September 9, 2020, I e-mailed a copy of the Answer to Defendant's Petition for Review in this matter, pursuant to the parties' agreement, to:

David Partovi

davepartovi@gmail.com; partovilaw@gmail.com

9/9/2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

September 09, 2020 - 9:26 AM

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