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NO. 50633-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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MICHAEL KIBBEE,

Appellant,

vs.

STATE OF WASHINGTON,

Respondent.

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

**Brief of the Respondent**

Jefferson County District Court No. 2016A0023  
Jefferson County Superior Court No. 17-1-00013-8

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## I. STATEMENT OF THE CASE

On January 6<sup>th</sup>, 2016 Deputy McCarty with the Jefferson County Sheriff's Office responded to a reported protection order violation at 191 Schoolhouse Road in Brinnon, WA. Clerk's Papers at 151. Upon arriving, Deputy McCarty encountered the married couple Jan and Lee Fox. *Id.* Lee informed the deputy that he had received a call on his cell phone earlier that day from a blocked number. *Id.* Although the voice did not identify itself, both Jan and Lee recognized it as belonging to the Appellant, Michael Kibbee, Jan Fox's ex-husband. *Id.* According to Lee Fox the voice said "you piece of shit, you need to hurry up and die you son of a bitch, just die". *Id.* Lee Fox disclosed that he had recently been diagnosed with a brain tumor and that he suspected that Mr. Kibbee had learned of this through a third party. *Id.* The Fox's also informed Deputy McCarty that there was a no-contact order in place preventing Mr. Kibbee from having contact with Mr. Fox. *Id.*

On February 22<sup>nd</sup>, 2016, Mr. Kibbee had his first appearance in Jefferson County District Court where he was also arraigned. (Verbatim Report of Proceedings at 5). At this hearing the deputy prosecutor requested that conditions of release be ordered by the court, however, the State did not request that the defendant be held on bail. (VRP at 6). Mr. Kibbee's attorney, Ryan Anderson, agreed and informed the court that Mr. Kibbee was a U.S. Marine Corps veteran, apparently in an attempt to show the court

that Mr. Kibbee was disciplined and could follow orders. VRP at 7. The judge, however, was viewing Mr. Kibbee's criminal record which contained a prior conviction for a no-contact order violation, numerous prior accusations of no-contact order violations, and also indicated that Mr. Kibbee has been the respondent on five separate no-contact orders. *Id.* The court even informed Mr. Kibbee that it was looking at precisely this history *after* it had informed him that being a veteran would brook no special favors in her court. *Id.* The judge stated that being a veteran does not mean "that they have halos over their head" and that a lot of them had "control issues". *Id.* The court then immediately delved into Mr. Kibbee's criminal history citing his numerous brushes with the law. VRP at 7-8. The court then explained that it did not have "any confidence, given these – all these charges..." that he was going to follow the court's conditions of release. VRP at 8. Given Mr. Kibbee's apparent inability to follow orders the court then went back and inquired about his prior military service. *Id.* The court then concluded its colloquy with Mr. Kibbee and agreed to release him on his personal recognizance. VRP at 10 – 11.

On May 4<sup>th</sup>, the parties convened in Jefferson County District Court for a pre-trial conference. VRP at 14. This was originally scheduled to take place at 9:00 am. At 9:53 Mr. Kibbee's case was called – apparently not for the first time that morning – and the court began with an admonishment to Mr. Kibbee's attorney for being 45 minutes late to court. *Id.* The court

informed Mr. Anderson not to take cases in Jefferson County if he was not going to be able to make it to court on time. *Id.* Mr. Anderson retorted he would “take cases anywhere in the State of Washington. And I’ll tell you that...” before the court warned him about talking back to the court. *Id.* The court explicitly stated that the attorney’s behavior was a matter that was between him and the court. That “[i]t won’t affect Mr. Kibbee at all to be very polite and very nice. And he waited for you – he’s hired you to represent him”. VRP at 14. The court further explained that it would have normally held the case over to the afternoon docket at 2:00 pm, but it did not want to do that to Mr. Kibbee just because his attorney had not shown up. VRP at 15.

Following a jury trial, which took place on July 28<sup>th</sup>, 2016, the Appellant was found guilty of Telephone Harassment and Violations of a No-Contact Order. VRP at 194. The Court then set a sentencing hearing for August 10<sup>th</sup>, 2016. VRP at 198. The Appellant presumably did not show up to his sentencing hearing because the actual sentencing hearing took place on December 15<sup>th</sup>, 2016, and the Appellant has a bail jumping conviction out of Jefferson Court District Court stemming from an incident which took place on August 10<sup>th</sup>, 2016. VRP at 203. At the beginning of the sentencing hearing the Appellant’s attorney noted that he had filed sentencing materials with the court for the court’s consideration. VRP at 203. The court acknowledged these and stated that they had been read. *Id.*

The deputy prosecuting attorney began by highlighting the fact that the Appellant had not taken responsibility for his actions, that he was uncooperative, and that he had failed to appear for his sentencing. VRP at 204. The prosecutor discussed some of the facts that were revealed at the trial such as the Appellant's lengthy history of domestic violence with his ex-wife, Jan Fox; including an incident where he had caused her to dislocate a hip. VRP at 205. The victim, Mr. Fox, explained his long history with the Appellant, and the Appellant's long criminal history in multiple jurisdictions. VRP at 207. After detailing his and his wife's lengthy history with the Appellant, Mr. Fox requested that the court impose "the maximum penalty for each count that he is and was found guilty of". VRP at 210. The State concluded by asking for 364 days of confinement with 184 days suspended on each count, to run consecutively. VRP at 212. Following the Appellant's allocution, the court observed that the Appellant attempted to shift blame away from himself and cast himself as the victim. VRP at 223. The court further observed that the Appellant had been disrespectful to the court and that he had "seethed with anger". VRP at 223-224. The court then ordered the Appellant to serve 12 months on each case consecutively to which the Appellant responded by walking off the screen<sup>1</sup>. *Id.* A moment

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<sup>1</sup> The Appellant was physically located at the jail and was appearing in court by video.

later the jail staff unfurled a banner which read “Goodbye” and had a smiley face, the court responded by saying “bravo” and court was adjourned. *Id.*

## II. ISSUES PRESENTED

1. The issue of sufficiency of the evidence cannot be raised for the first time on tertiary discretionary review
2. Assuming *arguendo* that sufficiency of the evidence can be raised for the first time on tertiary discretionary review, there was sufficient evidence to convict the Appellant of the crime of Telephone Harassment.
  - a. There was sufficient evidence for the jury to find that the Appellant’s language was lewd, lascivious, indecent, or obscene
  - b. There was sufficient evidence that the defendant made the phone call anonymously
  - c. The Appellant was properly convicted using alternative means because there was sufficient evidence to establish both of the means alleged
  - d. The State concedes that there was insufficient evidence to find that the Appellant committed a crime against a family or household member
3. The Court did not violate the appearance of fairness doctrine

### III. ARGUMENT

#### 1. The issue of sufficiency of the evidence cannot be raised for the first time on tertiary discretionary review

The present case is currently before the Court of Appeals pursuant to RAP 2.3(d) on tertiary discretionary review. Cases that originated in district court and appealed to superior court pursuant to the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) may be reviewed by the court of appeals only pursuant to RAP 2.3(d). RAP 2.3(d) provides that the court of appeals may review superior court decisions of limited jurisdiction courts *only* when:

- 1) “If the decision of the superior court is in conflict with a decision of the Court of Appeals of the Supreme Court;
- 2) If a significant question of law under the Constitution of the State of Washington or 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). Unlike a matter on direct appeal, the issues before the court on discretionary review are limited to those as provided by RAP 2.3. This is similar to the rules granting discretionary review by the Washington Supreme Court. *See* RAP 13.4(b). According to the Ruling Granting View, the Court of Appeals determined that it was accepting review of *State v. Kibbee* under RAP 2.3(d)(3) – an issue of public interest. Ruling at 5. This

was directly tied to the issue of the jail unfurling a banner that said “goodbye” after the Appellant’s sentencing had concluded. Ruling at 5.

If a case is not being reviewed under one of the enumerated reasons under RAP 2.2 then it stands that the case is being reviewed by the court under one of the specified reasons for discretionary review under RAP 2.3. *In Re Chubb*, 112 Wn.2d 719, 721; 773 P.2d 851 (1989). Discretionary review is granted under narrow reasons as directed by RAP 2.3, the courts will “decline to address other issues for which discretionary review was not granted”. *City of Bothell v. Barnhart*, 156 Wn. App. 531, 538 Fn. 2; 234 P.3d 264 (2010). Parties may not raise for the first time issues on discretionary review that were not specifically granted review under RAP 2.3. *State v. Jarvis*, 160 Wn. App. 111, 119; 246 P.3d 1280 (2011).

In the present case, the Appellant sought direct review on RALJ for district court’s alleged violation of fairness and for ineffective assistance of counsel, the issue of insufficiency of the evidence was not addressed. CP at 019. Even though the issue of sufficiency of the evidence was not raised at trial, it could have been raised for the first time on direct appeal. *See* RALJ 2.2(d)(2); RAP 2.5(a)(2). Instead, the Appellant chose to raise sufficiency of the evidence for this first time on tertiary discretionary review – this is beyond the scope of RAP 2.3. Although Commissioner Barse granted review of this issue under 2.3(e) (along with RAP 2.5(a)(2), this was improper. Discretionary review is not the appropriate time to raise issues

for the first time because the issues on discretionary review must fall under one of the *narrowly tailored* reasons under RAP 2.3(d). RAP 2.3(e), which allows the court to specify the issues being granted review, does not allow the court to specify *any* issue that may be reviewed, otherwise RAP 2.3(e) would result in becoming an end-run around RAP 2.3(d) and simply allow any issue to be addressed at any time for any reason.

Because the issue of sufficiency of the evidence was not raised at trial or on direct appeal it is beyond the scope of RAP 2.3(d) and is not properly before the court of the appeals, therefore the court should not consider this merits of this issue.

**2) Assuming *arguendo* that sufficiency of the evidence can be raised for the first time on tertiary discretionary review, there was sufficient evidence to convict the Appellant of the crime of Telephone Harassment**

In determining whether there was sufficient evidence at the trial court to sustain a conviction the courts ask “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt”. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant”. *Id.* When a defendant claims insufficiency of the evidence they “admit the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom”. *Id.*

**a) There was sufficient evidence for the jury to find that the Appellant's language was lewd, lascivious, indecent, or obscene**

A person commits telephone harassment when, with the intent to harass, intimidate, torment, or embarrass any other person they “make a telephone call to such other person:

- (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
- (b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
- (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household”.

RCW 9.61.230. At the Appellant’s trial the State pursued the theory that the Appellant had called anonymously or repeatedly and that the Appellant had used lewd, lascivious, indecent, or obscene words. CP at 131.

The word “indecent<sup>2</sup>” is defined as “ ‘not decent: ... altogether unbecoming: contrary to what the nature of things for which circumstances would dictate as right or expected or appropriate: hardly suitable: unseemly’ ”. *State v. Lansdowne*, 111 Wn. App. 882, 891, 46 P.3d 836 (2002) (quoting Webster’s Third New International Dictionary 1147 (1993)). The word “obscene” is defined as “marked by violation of

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<sup>2</sup> Indecent is also defined as altogether unbecoming, unseemly, not conforming to generally accepted standards of morality; tending toward or being in fact something generally viewed as morally indelicate or improper or offensive. Webster’s Third New International Dictionary (2002), 1147.

accepted language inhibitions and by the use of words regarded as taboo in polite usage”. *Id.* at 892 (quoting Websters, *supra*, at 1557). In *Lansdowne*, the defendant made a phone call to their child’s school and told a receptionist that “she would send someone to beat the shit out of [her daughter’s teacher]” and that she would “take care of that bitch”. *Id.* at 891. On appeal, the court of appeals held that the usage of the words “bitch” and “shit” were both indecent and obscene and that a rational trier of fact could have determined that those words, as used, were indecent or obscene.

In the present case the Appellant told the victim that he had heard that the victim had a brain tumor. VRP at 105. The Appellant then informed the victim that “I hope you motherfucking die”. *Id.* The Appellant then continued that he wanted the victim to die from his brain tumor and repeated it “over and over”. VRP at 107. The Appellant’s conduct in this case clearly falls within the definitions of “indecent” and “obscene<sup>3</sup>” as provided by the *Lansdowne* court. Therefore, taking all reasonable inferences in favor of the state and interpreted most strongly

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<sup>3</sup> Also define as offensive or revolting as countering or violating some ideal or virtue, marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage, or repulsive by reason of malignance, hypocrisy, cynicism, irresponsibility, crass disregard of moral or ethical principals. Webster’s Third New International Dictionary (2002), 1557.

against the Appellant, sufficient evidence exists in the present case to support the Appellant's conviction of Telephone Harassment.

In his brief, the Appellant suggests that the holding in *Lansdowne* should be ignored in favor of other case law. However, the cases cited by the Appellant are either not on point, out of this jurisdiction, or both<sup>4</sup>. The court should decline the Appellant's invitation to ignore the holding of the *Lansdowne* court because other courts offered different opinions on different subject matter.

Consequently, the State respectfully requests that the Court find, consistent with *Lansdowne*, that sufficient evidence existed to support the conviction of Telephone Harassment.

**b) There was sufficient evidence that the Appellant made the call anonymously**

A phone call is considered anonymous not necessarily when the phone call is in fact anonymous, but when the caller makes attempts to conceal his or her identity. *State v. Dyson*, 74 Wn. App. 237, 249-250, 872 P.2d 1115 (1994) (overruled on other grounds). In *Dyson*, the defendant made repeated

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<sup>4</sup> The Appellant relies on the following cases to support his point: *State v. Murray*, 190 Wn.2d 727, 416 P.3d 1225 (2018) (holding that the sexual motivation aggravator can be applied to indecent exposure); *Briggs v. Maryland*, 599 A.2d 1221 (1991) (affirming the defendant's conviction for disorderly conduct for using profanity at police officers, even if certain aspects of the defendant's conduct was protected speech); *State v. Alphonse*, 142 Wn. App. 417, 174 P.3d 684 (2008) (holding that the Telephone Harassment's prohibition on lewd, lascivious, profane, indecent, or obscene speech was not unconstitutionally vague).

hang-up calls to an individual. *Id.* On appeal, the defendant argued that a call could only be anonymous if the suspect made attempts to conceal their identity, which the defendant in *Dyson*, did not. *Id.* The court of appeals disagreed, holding that by hanging up the defendant in fact concealed his identity regardless of whether the defendant attempted to conceal his identity. *Id.*

Using both the dictionary definition and commonsense, the word “anonymous” is defined under the telephone harassment statute as “whether or not the caller identifies himself and to whether or not the other person recognizes the caller's voice”. *State v. Alexander*, 76 Wn. App. 830, 841-42, 888 P.2d 175 (1995) (citing Webster's New World Dictionary 29 (2d ed. 1975)). In *Alexander*, the court observed that dictionary defined anonymous as “ ‘with no name known or acknowledged’ and ‘given, written, etc. by a person whose name is withheld or unknown’ ”. *Id.* (citing Webster’s *supra* at 29).

In the present case the Appellant called the victim from a number that displayed “unknown” on his phone. VRP at 105. At no point did the Appellant ever identify himself on the phone to the individuals he called. *Id.* The fact that his voice was recognized by the victim is of little to no consequence. The Appellant’s phone call was in fact anonymous because the Appellant concealed his identity. The Appellant’s argument that because his voice was recognized his call could not be anonymous is both

inconsistent with case law and facially absurd. It begs the question of how telephone harassment could ever be prosecuted if the caller both called from an unknown number and used an unrecognizable voice. In those instances it is unlikely that a caller would ever be identified to allow charges to be filed.

Because sufficient evidence exists to establish that the Appellant made the calls anonymously after taking all reasonable inferences in favor of the state and interpreted most strongly against the Appellant, the Court should affirm the conviction of telephone harassment.

**c) The Appellant was properly convicted using alternative means because there was sufficient evidence to establish both of the means alleged**

Under the alternative means doctrine, when a singular offense can be committed in different ways by different methods, the jury must be unanimous as to the defendant's guilt, but not necessarily the means in which the defendant committed the act. *Dyson*, 74 Wn. App at 248. In order to obtain a conviction under alternative means sufficient evidence must be presented to the jury for each of the means alleged. *Id.*

In the present case the State properly alleged that the Appellant had committed the crime of telephone harassment using the alternative means of lewd, lascivious, indecent, or obscene language and that the calls were made anonymously. CP at 180. As discussed above the Appellant's conduct in repeatedly declaring that he hoped that Mr. Fox "motherfucking die"

from his recently diagnosed brain tumor was at a minimum indecent and obscene. VRP at 105. And furthermore, the fact that the Appellant called from an “unknown” number and failed to disclose his identity clearly constitutes anonymity. *Id.*

Because sufficient evidence was presented to establish both of the alleged means of telephone harassment the Appellant’s conviction should be affirmed.

**d) The State concedes that there was insufficient evidence to find that the Appellant committed a crime against a family or household member**

A crime is properly designated as a crime of domestic violence when it is committed against a spouses, former spouses, persons who have a child in common, adults related by blood or marriage, adults presently residing together or who have resided in the past, adults who have or have had a dating relationship, and parents and children. RCW 10.99.020. The victim, Mr. Fox is not related to the Appellant, nor have they ever been married. VRP 101-102. The Appellant’s relationship to Mr. Fox is simply that Mr. Fox is married to the Appellant’s ex-wife, Jan Fox. *Id.* While Jan Fox does have a relationship with the Appellant that falls under RCW 10.99.020 she was a witness to the present case, not the victim. CP at 85-86; VRP 105. Mr. Fox’s relationship to Ms. Fox, does not, by extension, bring his relationship with the Appellant under the purview of RCW 10.99.020.

### **3) The District Court did not violate the appearance of fairness doctrine**

The appearance of fairness doctrine establishes that “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. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010). There must be evidence of actual or potential bias before an appearance of fairness claim can succeed. *State v. Chamberlin*, 161 Wn.2d 30, 37, 162 P.3d 389 (2007). The appearance of fairness is not violated without evidence of actual or potential bias, such claims cannot succeed and are deemed to be without merit”. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172 (1992).

In the present case the court did not violate the appearance of fairness with the Appellant. At Appellant’s first appearance he introduced the fact that he was a veteran of the United States military as a way to convey to the court that he was someone who could be trusted to follow the court’s orders. The court, viewing his extensive history, simply rebutted his assertion as if to say that he should not expect better treatment or leniency because of his service. In fact, it is because the court was fair and impartial with the Appellant at his first appearance that he cites error. The Appellant apparently is convinced that the judge should have been deferential to him due to his military service and the fact that she was not is a matter to be

disputed on appeal. Ultimately, the court did not hold the Appellant on bail and the Appellant does not explain how this episode caused him prejudice.

At the pre-trial hearing on May 4<sup>th</sup>, 2016, the exchange that occurred when the Appellant's case was called was exclusively between the court and the Appellant's trial counsel. The court was not pleased that the Appellant's attorney was late for court, having made his client sit for the duration of the docket until he arrived. The situation was exacerbated by Appellant's attorney talking back and being disrespectful to the bench. The court was careful to observe that the Appellant had been patiently waiting for his attorney and that the present exchange between the court and the Appellant's attorney *would not* affect the Appellant. Additionally, the Court stated that it could have moved the Appellant's case to the afternoon docket but did not want to do so because the court did not want to punish the Appellant on account of his attorney's lateness. VRP at 15. Again, the Appellant fails to explain how this exchange ultimately caused him prejudice.

On July 28<sup>th</sup>, 2016, the Appellant was tried and convicted of two gross misdemeanors. The Appellant does make any allegation that error occurred at this trial or that court violated the appearance of fairness doctrine during trial or in front of the jury. Sentencing was then set for August 10<sup>th</sup>, however the Appellant failed to appear for his sentencing hearing and a warrant was issued. On December 15, 2016, after the Appellant had been picked up on

his warrant, he was finally sentenced on his case. The court read the sentencing materials provided by the Appellant's attorney and heard arguments from the parties. Additionally, the court heard from the victim, Mr. Fox and his wife. Mr. Fox detailed the years of harassing behavior that he and his wife received from the Appellant despite numerous interventions by the criminal justice system and asked for the "maximum penalty". VRP at 210. The court also heard from the Appellant himself. The Appellant acknowledged that the feud between him and the Fox's had been ongoing for years but repeatedly stated that the situation was "two-sided". VRP at 217-18.

Following the Appellant's allocution, the court rendered its sentence. The court observed that the Appellant had avoided taking responsibility for his behavior and appear to deflect blame back at the victims. VRP 223-224. The court also observed that the Appellant had previously failed to appear for his sentencing and interpreted this as another sign that the Appellant refused to accept responsibility for his actions. In determining the Appellant's sentence the court focused mainly on the Appellant's record, the statements made by Mr. and Mrs. Fox, and also the Appellant's behavior in court. *Id.* The court then sentenced the Appellant to one year on each count consecutive to each other, citing in particular, the danger the Appellant posed to the Fox's and the court's belief that the Appellant was not amenable to treatment. *Id.*

After the imposition of sentence, the Appellant walked off the video screen and could no longer be viewed by the court. After a brief pause, corrections deputies unfurled a banner that read “goodbye”. The court responded with “bravo” and then adjourned. There is nothing from this exchange, or anything else that occurred during the sentencing that implicates the appearance of fairness. Importantly, this exchanged occurred *after* the court imposed its sentence. As the superior judge held on direct appeal “the actions and display had absolutely nothing do with this Defendant nor his sentence”. CP at 020. The Appellant offers only conjecture to contrary, this fails the requirement of the *Post* court that the “appearance of fairness is not violated without evidence... such claims cannot succeed and are deemed to be without merit”. 118 Wn.2d at 619.

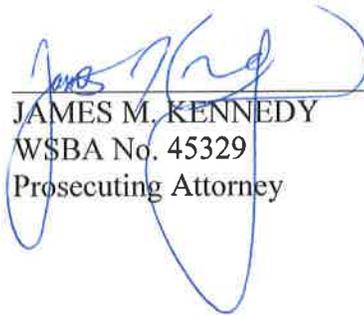
Because the Appellant cannot provide any evidence or actual or potential bias, the State respectfully requests that the Court Affirm the lower court’s holding.

#### **IV. CONCLUSION**

For the aforementioned reasons the Respondent respectfully requests that the Court of Appeals affirm the Superior Court’s holding and reject the Appellant’s claims on discretionary review.

Dated this 28 day of February, 2019

Respectfully submitted,



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