NO. 103509-8

IN THE WASHINGTON STATE SUPREME COURT

State of Washington, Plaintiff/Respondent

v.

Owen Gale Ray, Defendant/Appellant

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

The Honorable Timothy Ashcraft, Judge

PETITIONER'S MOTION TO STRIKE RESPONDENT'S ANSWER IMPROPERLY CHARACTERIZING FACTS

Michael Austin Stewart
Dena Alo-Colbeck
Attorney for Petitioner
1105 Tacoma Avenue South
Tacoma, WA 98402
253.383.5346

I. IDENTITY OF MOVING PARTY

Appellant Owen Ray, by and through counsel of record, Michael Austin Stewart and Dena Alo-Colbeck, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Mr. Ray moves to strike the Answer to his Petition for Review filed by the State on October 29, 2024. The Answer does not comply with court rules as it misstates several important facts and raises an argument not raised below. Petitioner further requests this Court disregard any argument that uses these facts for support.

III. GROUNDS FOR RELIEF

RAP 17.1 allows a party to seek relief from this Court. RAP 10.3 (a)(5),(6) sets forth the requirements for the contents of briefs filed before this court.

Additionally, pursuant to RPC 3.1, counsel may not assert or controvert an issue in a proceeding "unless there is a basis in law and fact for doing so that is not frivolous." RPC 3.1. Counsel is likewise barred from knowingly making a false statement of either fact or law to the tribunal or failing to correct "a false statement of material fact or law previously made to the tribunal." RPC 3.3(a)(1).

IV. STATEMENT OF RELEVANT FACTS

Petitioner filed a Petition for Review of the Division I decision denying Petitioner relief in his appeal. Petitioner identified two issues for review. First, Petitioner seeks a definition of "exigent circumstances" as it applies to the Privacy Act. Second, and relevant to this pleading, Petitioner sought resolution of a split between the divisions regarding whether convictions for felony harassment and second-degree assault on the same set of facts violate double jeopardy.

Under Division I precedent, the Court found that Mr. Ray was properly sentenced for both crimes. Had his case been heard in Division II, however, Mr. Ray would have received a different outcome based on precedent in that jurisdiction.

The State timely filed an Answer to Petitioner's Petition on October 29, 2024. As part of its argument with respect to the Double Jeopardy issue, the State claims, contrary to arguments made before Division I, below, that Mr. Ray pointed a gun at K.R. four times. *State's Answer* at 6, 21. In the State's briefing below, it did not propose a count of the number of times Mr. Ray allegedly pointed the same gun during the course of the evening – the entirety of which the trial court found was the same criminal conduct. RP 1554. And in fact, a reading of the record in fact makes it difficult to determine how many times the gun may have been raised and lowered during the course of the evening.

The State then claimed that Mr. Ray made verbal threats to kill K.R. *State's Answer* at 21. The State did not cite to the record for this proposition, and in fact there is no support for this

claim in the record. When asked about verbal threats, Officer Pyon specifically testified he heard none. RP 354. K.R., as with much of her testimony, claimed to be unable to remember if there was any verbal threat made by Mr. Ray. RP 847-8.

In closing arguments at Mr. Ray's trial, the State argued

> He doesn't have to say the words 'I'm going to kill you' for him to be guilty of harassment. If the circumstances surrounding the situation of him pointing the gun at her and yelling at her... and telling her he hates her, and that 'You go to hell,' right? -- that's harassment at that point.
>
> RP 1448
>
> If you point a gun at someone, you are assaulting them with a deadly weapon. If you don't point a gun at someone, but you bring a gun into an argument under circumstances where it's clear that your intent is to create that apprehension and fear and it does, in fact, create that apprehension and fear, that's also assault.
>
> RP 1446

The State now, for the first time on appeal, attempts to use both of these unsupported facts to argue that there is no double jeopardy violation because the finder of fact could have

determined that separate facts supported each crime. This argument was not made during the trial, nor was it made on direct appeal. *See, e.g., State's Response* at 53. ("Ray was convicted of **multiple crimes arising from a single incident** in a single proceeding.") [Emphasis supplied.] None of the facts argued in support of this motion were alleged on direct appeal, and these specific facts have no support in the record.

V. ARGUMENT

RAP 10.3(a)(5) requires "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement." RAP 10.3(a)(6) requires "[t]he argument in support of the issues presented for review, together with citation to legal authority and references to relevant parts of the record." The record on review is the verbatim report of proceedings and Clerk's papers in this matter. RAP Title 9.

In this case, the State has filed an answer in which they raise a new argument in opposition to Mr. Ray's Petition for resolution of a split between the divisions with respect to a discrete double jeopardy issue. In support of this argument, however, the State makes claims that are not supported by the record. The claims are likewise either not cited to the record, in the case of the claim that there were verbal threats by Mr. Ray, or, when there are citations, such as to the claim regarding the number of times Mr. Ray allegedly pointed a weapon at K.R., those citations do not support the State's claims.

"The failure to cite to the record is not a formality. It places an unacceptable burden on opposing counsel and on this court." *Lawson v. Boeing Co.*, 58 Wn. App. 261, 270-71, 792 P.2d 545 (1990). "Appellate courts need not consider arguments that are unsupported by pertinent authority, references to the record, or meaningful analysis." *Cook v. Brateng*, 158 Wn. App. 777, 794, 262 P.3d 1228 (2010).

Moreover, the State did not make this argument below. There was never a claim in trial or at the appellate level that separate facts supported the second degree assault and felony harassment charges. Rather, Mr. Ray argued, and the State did not contest, that these charges stemmed from the same fact: an allegation that Mr. Ray pointed a gun at K.R. The State should not be allowed to raise a new argument in response to this claim for the first time on appeal. *See Douglas v. Freeman*, 117 Wn.2d 242, 258, 814 P.2d 1160 (1991). This argument also does not respond to Mr. Ray's petition, which seeks resolution of a split between the divisions regarding whether second degree assault and felony harassment stemming from the same act constitute double jeopardy.

If a party submits an improper brief, the Court may order the brief stricken, may order a replacement brief, or accept the brief. RAP 10.7. As the brief submitted by the State relies on facts not part of the record, Petitioner respectfully requests this Court strike or order correction of the State's brief.

VI. CONCLUSION

For the above stated reasons, Mr. Ray respectfully requests that this Court strike the respondent's Answer and direct the State to file an answer that complies with all of the court rules in the above captioned matter.

I certify that this motion contains 1220 words in compliance with RAP 18.2

Respectfully presented this 6th Day of November 2024.

/s/ Michael Austin Stewart
Michael Austin Stewart, Attorney for Petitioner
WSBA No. 23981

/s/Dena Alo-Colbeck
Dena Alo-Colbeck, Attorney for Petitioner
WSBA No. 26158