NO. 91176-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES MICHAEL McCLURE,

Appellant.

Superior Court Cause No. 13-1-00016-5
Court of Appeals No. 70516-4-I

ANSWER TO PETITION FOR REVIEW

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926
Law & Justice Center
P.O. Box 5000
Coupeville, WA 98239
(360) 679-7363

By: David E. Carman
Deputy Prosecuting Attorney
WSBA # 39456
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT DECISIONS

WASHINGTON COURT OF APPEALS DECISIONS

I. STATEMENT OF THE ISSUES

A. Whether review should be denied when the Court of Appeals correctly found the pre-voir dire excusal of two jurors did not violate the appellant's right to a public trial or his right to be present.

B. Whether review should be denied when the Court of Appeals appropriately found that the appellant made a true threat.

C. Whether review should be denied when the Court of Appeals correctly found sufficient evidence that Mrs. Hawley was placed in reasonable fear the appellant would carry out his threat to kill her.

II. STATEMENT OF THE CASE

Between December, 2012 and January, 2013, the appellant made repeated calls to the Island County 911 dispatch center, including up to fifteen calls per night of at least six to seven minutes per call. RP 190. In total, the appellant made over 100 unnecessary calls to the dispatch center during that time, straining the center's ability to respond to other calls. RP 193, 201.

On December 28, 2012, the appellant delivered a suspicious package to the dispatch center's office, prompting a bomb scare. RP 264-67. Based on that package and the continuing calls, the dispatch center requested assistance from the Island County Sheriff's Office. RP 68, 283. Island County Sheriff's Lieutenant Mike Hawley began an investigation into the appellant's actions. RP 70. On January 6, 2013, Lt. Hawley was

able to contact the appellant by phone and instructed him to stop calling into the dispatch center. RP 73.

The appellant then immediately called back to the dispatch center with "a message for whoever the senior bastard is, you have a Hawley that used to be sheriff." RP 104. He threatened to turn Lt. Hawley into a "smoking hole". RP 106. He stated he would "take out [Hawley's] filbert or walnut farm, his wife, his kids." RP 108.

Lt. Hawley lives with his wife, M'Liss Hawley, on a five acre property where he has planted an orchard of filberts and hazelnuts. RP 58. The farm is not advertised or open to the public, and the Hawleys do not harvest or sell the nuts. RP 119-120.

Lt. Hawley had prior contacts with the appellant in 2008, when the appellant had been arrested for brandishing a flare gun at an attorney's office. RP 64. At that time, a second attorney had taken a protection order against the appellant after he made threatening and harassing phone calls to that attorney. RP 64. Because of the protection order, Lt. Hawley personally removed half a dozen or a dozen firearms from the appellant's house. RP 64-65. Lt. Hawley also knew the appellant had delivered a suspicious package to the dispatch center. RP 68.

Because of the specificity of the threat, the appellant's knowledge about his home, and the threat to his family, Lt. Hawley alerted his wife.

RP 76, 124. He told his wife about the threat, the phone calls to the dispatch center, and the suspicious package. RP 127-28. Although Lt. Hawley had been working with the Sheriff's Department for 27 years, RP 55, this was the first time he had warned his wife of a threat to her life. RP 126. Based on that information, Mrs. Hawley believed the threat was "extremely serious" and "credible". RP 128, 136.

The appellant was charged with Harassment, Threat to Kill against Mrs. Hawley. CP 54-56. Prior to voir dire, the court informed the parties that thirteen potential jurors had not appeared, including two jurors who been excused from service. RP 30. Neither party objected to the excusals. RP 30. The appellant was convicted of Harassment, Threat to Kill by unanimous verdict. RP 380-83.

The appellant seeks review of the excusal of two potential jurors prior to voir dire. He also claims insufficient evidence was provided that his statements constituted a "true threat" and that Mrs. Hawley was placed in reasonable fear that he would carry out his threats. In an unpublished opinion, the Court of Appeals found the appellant failed to demonstrate that the excusals prior to the venire being presented for voir dire violated his public trial right or his right to be present. Decision at 8. The court below further found the evidence at trial was sufficient to establish a true threat because a reasonable person in the appellant's position would

foresee that his statements would be interpreted as a serious expression of an intent to carry out the threat. Decision at 10. Finally, the Court of Appeals found, viewed in the light most favorable to the State, the evidence was sufficient to establish that Mrs. Hawley reasonably believed the appellant would carry out his threat to kill. Decision at 11.

III. ARGUMENT

A. The Court of Appeals correctly found that the pre-voir dire excusal of two jurors did not violate the appellant's right to a public trial or his right to be present.

This Court should deny review because the Court of Appeals correctly found no violation of the appellant's public trial right or his right to be present when two jurors were excused from service prior to the venire being presented for voir dire. The Court of Appeals began its analysis of the appellant's claim by reiterating the basic principle that the right to public trial is not implicated by every interaction between the court, counsel, and defendants. Decision at 6 (citing *State v. Koss*, ___ Wn.2d. ___, 334 P.3d 1042, 1045 (2014)). The court then specifically found the excusals in this case were similar to the administrative excusals in *State v. Wilson*, 174 Wn.App. 328, 298 P.3d 148 (2013). Consistent with the holding in *Wilson*, the court found, because the excusals in this case were not related to the appellant personally or to the circumstances of this particular case, there was no violation of the appellant's right to a

public trial. Review of that decision is not warranted because it was based on the appropriate holdings from both Washington Supreme Court and the Court of Appeals.

The decision below that a pre-voir dire dismissal of two potential jurors was not violative was consistent with decisions from both the Court of Appeals and the Washington Supreme Court. The Court of Appeals has consistently held that excusal of potential jurors before voir dire begins does not implicate a public trial right or a right to be present. The decision below provided an extensive analysis of *Wilson*, wherein the Court of Appeals made that exact finding. That finding has since been reaffirmed. *State v. Miller*, ___ Wn.App. ___, 338 P.3d 873 (Div. 2, 2014). Most particularly, the court in *Miller* emphasized the distinction between dismissal of jurors during voir dire and pre-voir dire dismissals. *Id.* at 878 (juror dismissal before voir dire begins generally do not implicate the public trial right). This Court agreed with that analysis when it found no error in a dismissal of four prospective jurors pre-voir dire for outside knowledge of the case. *State v. Slert*, 181 Wn.2d 598, 334 P.3d 1088, 1089 (2014). In *Slert*, this Court, like the Court of Appeals, cited *Wilson* with approval and distinguished between pre-voir dire excusals of jurors and excusals after jurors were sworn in and formal voir dire had begun. *Id.* 1091-92.

The Court of Appeals also correctly found the appellant failed to bear his burden of showing a closure. The decision below noted an appellant bears the responsibility to provide a record showing that a closure occurred. Decision at 8 (citing *Koss*, 334 P.3d at 1047). This Court has consistently placed the burden of showing a courtroom closure on the appellant. *Koss*, 334 P.3d at 1093 ("In the absence of an adequate record, we will not infer that a trial judge violated the constitution.") The appellant attempts to circumvent this burden by insisting the record shows two jurors were excused prior to voir dire. Petition at 11. While that assertion is true, the excusal of two jurors prior to the start of voir dire does not equate to a courtroom closure. The Court of Appeals correctly noted the record, which fails to reveal who excused the jurors, when they were excused, and for what reason, cannot bridge the significant gap from two pre-voir dire excusals to a courtroom closure.

The decision below was based on an analysis of the appropriate precedential law and has no conflict with decisions from either the Court of Appeals or this Court. The decision correctly noted the record does not show a closure or trial error. Both the Court of Appeals and this Court agree that administrative dismissal of jurors prior to voir dire does not implicate a defendant's public trial right or right to be present. Beyond that claim, the appellant provides only a bald, unsupported assertion that

he has raised an issue of public interest or substantial public interest. However, those unsupported claims cannot form the basis for review. Because there is no conflict of law and no support for the appellant's additional assertions, this Court should deny review.

B. The Court of Appeals appropriately found that the appellant made a true threat.

The appellant next requests review of the finding below that a reasonable person in his position would foresee that his statements would be interpreted as a serious expression of an intent to carry out his threat. He and the Court of Appeals both correctly note that a conviction in this case must rest on a "true threat" as opposed to a statement made in jest, idle talk, or political argument. Petition at 12; Decision at 9. The appellant compares the facts of this case to those in *State v. Kilburn*, 151 Wn.2d 36, 84 P.3d 1215 (2004), and *State v. Locke*, 175 Wn.App. 779, 307 P.3d 771 (2013) in his attempt to characterize his threat as idle talk and hyperbole. However, the Court of Appeals referenced both those cases and found, contrary to the appellant's assertion, that a reasonable person in his position would foresee that his threat would be interpreted as a serious expression of an intent to carry out the threat.

In fact, the Court of Appeals specifically found the appellant's threat, especially his threats to take out the Hawley farm and turn it into a

smoking home, combined with the specific, private information about the farm's location, carried similar menace to the threat in *Locke*. Decision at 10. The court also contrasted this case to *Kilburn*, noting there was no preexisting amicable relationship between the appellant and the Hawleys that would result in an expectation that his threat would not be taken seriously. Id. Instead, Lt. Hawley had previously had contacts with the appellant when he was arrested for brandishing a flare gun at an attorney's office, he had personally removed numerous firearms from the appellant's residence, and the appellant had recently delivered a suspicious package to the sheriff's dispatch center. RP 64-65, 68. Based on the evidence provided at trial, the finding by the Court of Appeals that the appellant made a true threat was correct and consistent with Washington law.

The Court of Appeals considered the same law and compared the same cases as the appellant, and found he made a true threat to kill Mrs. Hawley. The appellant disagrees with the court's conclusion, but has presented no legal principle in conflict with the appellant decision. The appellant's simple assertion that he has raised a significant constitutional question and an issue of substantial public interest also cannot support review. This Court should, therefore, deny review.

C. The Court of Appeals correctly found of sufficient evidence that Mrs. Hawley was placed in reasonable fear the appellant would carry out his threat to kill her

Finally, the Court of Appeals correctly found sufficient evidence of Mrs. Hawley's reasonable fear that the appellant would carry out his threat to kill. The court began its analysis by noting evidence is sufficient if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Decision at 9. A claim of insufficiency not only admits the truth of the State's evidence, but also all inferences that can reasonably be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellant has correctly acknowledged that deferential standard of review, but disagrees with the court's finding that sufficient evidence was presented in this case. Because the Court of Appeals decision does not conflict with any other decisions, this Court should deny review.

The appellant correctly observes that a conviction for Harassment, Threat to Kill requires proof that the victim was placed in reasonable fear that the defendant would carry out his threat to kill and not simply that the defendant would commit some other, unspecified act. Petition at 18-19 (citing *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003)). While the Court of Appeals did not specifically cite to *C.G.*, its analysis addressed the same point of law. The court reviewed the evidence presented in the

case, including the specific threats to turn the Hawley farm into a "smoking hole" and to "take out" Lt. Hawley's wife and kids. The court also considered the appellant's knowledge of private details of the Hawley property, the fact that Lt. Hawley found the threat credible enough to inform his wife, and that Mrs. Hawley immediately took additional safety precautions and obtained a concealed weapons permit. Based on that evidence, viewed in the light most favorable to the State, the court specifically found, "the evidence establishes more than a suspicion that [the appellant] might do 'something.'" Decision at 11.

The Court of Appeals decision does not conflict with any other decision from either the Supreme Court or the Court of Appeals. In fact, the legal basis for the decision is the same as the appellant's. The appellant simply disagrees with the conclusion reached by the Court of Appeals based on the same legal foundation. Beyond his argument for conflicting law, the appellant has provided only an unsupported assertion that he has raised a significant question of law and an issue of substantial public interest. Because there is no conflict of law and no support for his bald assertions, this Court should deny review.

///

Respectfully submitted this 15th day of January, 2015.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: _____
DAVID E. CARMAN
DEPUTY PROSECUTING ATTORNEY
WSBA # 39456