70516-4

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No. 70516-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES M. MCCLURE,

Appellant.

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

The Honorable Vickie I. Churchill

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Two prospective jurors were excused prior to voir dire in closed proceedings, in violation of the open court guarantee of the First and Sixth Amendments and of Article I, §§ 10, 22.

2. Two prospective jurors were excused prior to voir dire outside Mr. McClure's presence, in violation of his Sixth Amendment right to be present at all critical stages of his trial.

3. The State failed to prove beyond a reasonable doubt that Mr. McClure uttered a "true threat" to kill, in violation of his First Amendment right to free speech.

4. The State failed to prove beyond a reasonable doubt every essential element of harassment by a threat to kill, in violation of Mr. McClure's Fourteenth Amendment right to due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee an accused person and the public the right to an open and public trial. Violation of the public trial right is presumptively prejudicial. Where two prospective jurors were excused prior to voir dire during closed proceedings, did the excusal violate the constitutional right to open and public proceedings and require reversal of Mr. McClure's conviction?

2. The federal and state constitutions guarantee an accused person the right to be present at all critical stages of the trial against him. Where two prospective jurors were excused prior to voir dire outside Mr. McClure's presence, did the excusal violate Mr. McClure's right to be present, and require reversal of his conviction?

3. To convict a defendant of harassment by a threat to kill, the constitutional right to free speech requires the State to prove beyond a reasonable doubt that the threat was a "true threat." A "true threat" to kill is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another. In the absence of evidence to prove beyond a reasonable doubt that a reasonable person in Mr. McClure's position would foresee his statement would be interpreted as a serious expression of intention to take the life of another, must his conviction for harassment by a threat to kill be reversed?

4. A defendant may not be convicted of a crime unless the State proves every element of the crime beyond a reasonable doubt. To convict a defendant of harassment by a threat to kill, the State must prove beyond a reasonable doubt that, *inter alia*, the defendant uttered a threat to kill, and the person threatened reasonably feared that the threat to kill would be carried out. In the absence of evidence to establish beyond a reasonable

doubt that the person threatened reasonably feared Mr. McClure would kill her, must his conviction for harassment by a threat to kill be reversed?

C. STATEMENT OF THE CASE

For a period of time in 2008, James M. McClure placed repeated, rambling, and often disjointed calls to the Island County 911 dispatch center, sometimes 20 calls in a single night. 5/14/13 RP 61. Lieutenant Michael Hawley, with the Island County Sheriff's Office, and other deputies made numerous trips to Mr. McClure's home in futile attempts to stop him tying up the dispatchers unless he needed assistance. 5/14/13 RP 62-63. During the same time period, Lieutenant Hawley learned that Mr. McClure was arrested for brandishing a flare gun in an attorney's office and another attorney obtained a protection order against Mr. McClure for harassing telephone calls. 5/14/13 RP 64. As a result of the protection order, Lieutenant Hawley removed six to twelve guns from Mr. McClure's home. 5/14/13 RP 65.

Mr. McClure resumed his repeated calls four years later in mid-December 2012, and he frequently asked to speak with a specific dispatcher, Erin Petersen. 5/14/13 RP 65-67. In some calls, Mr. McClure seemed intoxicated, or he used sexual phrases or crude language. 5/15/13 RP 196, 197, 224-25. Deputies again futilely told him to stop calling unless he needed assistance. 5/14/13 RP 66. In late December, Mr.

McClure went to the dispatch center and left a package addressed to Ms. Petersen. 5/14/13 RP 68; 5/15/13 RP 198. The bomb squad was called but the package contained only playing cards, a book about poker, and some notes. 5/14/13 RP 68, 70; 5/15/13 RP 199.

Lieutenant Hawley opened an investigation into Mr. McClure for telephone harassment of Ms. Petersen, and he went to Mr. McClure's home several times to speak with him, but Mr. McClure was not home. 5/14/13 RP 70-71. Lieutenant Hawley then called Mr. McClure and warned him that he would be arrested if he did not stop calling 911. 5/14/13 RP 73. Immediately after that conversation, Mr. McClure again placed repeated calls to 911, including one call in which he and Ms. Petersen had the following conversation:

JAMES MCCLURE: This is a message for whoever the senior bastard is, you have a Hawley that used to be sheriff.
ERIN PETERSEN: Okay.
JAMES MCCLURE: I had to sign a letter that said I would not talk about, discuss or release any press releases for 20 years after I got out of the Navy. And I got out of the Navy on the 31st of May, 1993. But due to Internet technology and everything else, it's leaking out.
So I'm kind of fuzzy a little bit. So I cleared it with three Navy captains and an admiral.
ERIN PETERSEN: Okay.
JAMES MCCLURE: Lives right here on Whidbey Island. They're all retired.
ERIN PETERSEN: So you weren't supposed to do – You weren't supposed to talk about what? I'm sorry.
JAMES MCCLURE: Everything I did in the Navy.
ERIN PETERSEN: Okay.

JAMES MCCLURE: Okay. Any my Navy references are: VO-67, Albadron-67 (phonetic), VAH-21, Heavy 21.

ERIN PETERSEN: Mm-hmm.

JAMES MCCLURE: And I had an Ace of Diamonds and a Queen of Spades painted on my tail. Yes, ma'am. I put 'em up there myself.

ERIN PETERSEN: Mm-hmm.

JAMES MCCLURE: Pretty thing. Pretty thing. Gun ships, ma'am. Gun ships.

And after I talked to captain -- Well, I talked to the Master Chief first. He's here, too. He talked with Captain. Captain called me. Captain called the Admiral. Admiral approved it.

He says, "Forget about that last five months, Chief. Go ahead and let him have it."

ERIN PETERSEN: Okay.

JAMES MCCLURE: You know what the Admiral wants to see happen to Mike Hawley?

ERIN PETERSEN: Oh. I don't know.

JAMES MCCLURE: Smoking hole (indiscernible). I don't know what he did to piss the admiral off, but the admiral said, "Chief, you're flying tonight in a black airplane. We're all going to bed with their wives, you poor E7 son of a bitch. Now, go get 'em!"

ERIN PETERSEN: Mmm.

JAMES MCCLURE: Ahhh! That was terrifying!

ERIN PETERSEN: Goodness.

JAMES MCCLURE: So I had another little -- Ma'am, I had another little drink of scotch.

ERIN PETERSEN: Okay.

JAMES MCCLURE: Put all the switches up. Turned all the knobs to the right. Push all the levers all the way forward. U.S.S. Barque Road[1] is ready for combat.

ERIN PETERSEN: Okay.

JAMES MCCLURE: And so is Navy 902 circling overhead. And them 30-caliber mini guns, they're so heavy my wings are tipping down. And when I blast, there's nothing left.

I'll take out that filbert or walnut farm, his wife, his kids. And you know what? I'll feel no sorrow tomorrow.

ERIN PETERSEN: You would –

JAMES MCCLURE: Because the admiral told me to do it.

ERIN PETERSEN: Okay.

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[1] Lieutenant Hawley believed that Mr. McClure lived on Barque Road.

JAMES MCCLURE: And I love it! That's why I got 31 years, six months and 17 days as an E7.

ERIN PETERSEN: Okay.

JAMES MCCLURE: Yeah. Because they just send me the shit like this.

ERIN PETERSEN: Oh.

JAMES MCCLURE: I think they (indiscernible). Because I'm a Cherokee outlaw. They look through the windows to see if they can find me my buffalo graves.

ERIN PETERSEN: Uh-huh.

5/14/13 RP 74, 104-09; Ex. 4. The call lasted approximately ten minutes and Mr. McClure also discussed his military service in Viet Nam, "Black Ops," the Cherokee Nation, and the Bureau of Indian Affairs.[2] 5/14/13 RP 91, 96.

The dispatcher did not alert Lieutenant Hawley to Mr. McClure's statements. 5/15/13 RP 252. Lieutenant Hawley did not become aware of the conversation until the following week, when he listened to recordings of Mr. McClure's calls as part of his investigation into telephone harassment of Ms. Petersen. 5/14/13 RP 74, 83. He interpreted Mr. McClure's statements as a threat to his family and home. 5/14/13 RP 75. Even so, he waited one more day before alerting his wife, because she was leaving for an out-of-town business trip and he did not want to unduly alarm her. 5/14/13 RP 76-77, 93-94.

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[2] The conversation was played in its entirety for the jury. A transcript of the full conversation is attached as Appendix A.

Based on the purportedly threatening statements about the Hawleys, Mr. McClure was charged with harassment by a threat to kill Lieutenant Hawley's wife, M'liss Rae Hawley, in violation of RCW 9A.46.020(1) and (2).[3] CP 54-55.

As the parties were preparing for voir dire, the court stated that two potential jurors were already excused. 5/14/13 RP 30.

Mr. McClure was convicted of harassment by a threat to kill, as charged. CP 24.

D. ARGUMENT

1. The excusal of two potential jurors prior to voir dire, during closed proceedings and outside the presence of Mr. McClure, violated the right to open and public proceedings, and further violated Mr. McClure's right to be present at all critical stages of the trial against him.

As the parties were preparing to conduct voir dire, the court stated, without explanation or elaboration:

> Let me tell you on Page 1 of your juror sheet the ones that are not here. I've drawn a line through 2, 4, 5, 10, 15, 16, 19, 24, 33, 37, 41, 42, and 44.
>
> That's 13 no-shows or excused. There were two excuses but the rest were no-shows.
>
> So that's what we have to work with.

5/14/13 RP 30. The two excusals were in violation of the right of the public and Mr. McClure to an open and public trial, as well in violation of

[3] Mr. McClure was also charged with telephone harassment of Erin Petersen, in violation of RCW 9.61.230(1), but he was acquitted by the jury. CP 25, 55.

Mr. McClure's right to be present at all critical stages of a trial against him.

a. The constitutional guarantee of open and public trials was violated when two jurors were excused during closed proceedings.

Criminal cases must be tried openly and publicly. U.S. Const. amend. VI, XIV; Wash. Const. art. I, §§ 10, 22; *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012). Both the accused person and the public have the right to open and public judicial proceedings. *Presley v. Georgia*, 558 U.S. 209, 212, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010); *State v. Lormor*, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011). "Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

"A pubic trial is a core safeguard in our system of justice." *Wise,* 176 Wn.2d at 5. The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward,

and to discourage perjury." *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012); *accord State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

The public trial right includes jury selection. *Presley*, 558 U.S. at 212; *State*, 176 Wn.2d at 71. "[A] closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004)). "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise*, 464 U.S. at 505.

Courtroom closure is prohibited except in limited circumstances and only after consideration of the following five factors:

> 1. The proponent of closure or sealing must make some showing of [a compelling interest], and where the need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method of curtailing open access must be the least restrictive means available for protecting the threatened interests.

> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (alteration in original) (quoting *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). The presumption of openness may be overcome only be a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve those values. *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (quoting *Press-Enterprise*, 464 U.S. at 510).

Whether a trial court procedure violates the right to a public trial is a question of law and reviewed *de novo*. *Momah*, 167 Wn.2d at 147. Courtroom closure implicates a constitutional right and may be raised for the first time on appeal. *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). A violation of the right to a public trial has never been found to be *de minimis*. *Id.* at 230 (citing *State v. Easterling*, 157 Wn.2d 167, 180, 137 P.3d 825 (2006). Unnecessarily closing a portion of jury selection is a structural error that requires automatic reversal. *Wise*, 176 Wn.2d at 6; *Paumier*, 176 Wn.2d at 352; *Strode*, 167 Wn.2d at 231.

b. A court or its delegee may excuse a juror only upon a showing of undue hardship, extreme inconvenience, public necessity, or a reason deemed sufficient by the court.

A trial court must disqualify a juror who does not meet the basic statutory qualifications and the court must excuse a juror it deems unfit to serve. RCW 2.26.070, 2.26.110. A court may excuse a juror who demonstrates undue hardship, extreme inconvenience, public necessity, or any other reason deemed sufficient by the court. RCW 2.26.100(1). A court may delegate to court staff and clerks the authority to disqualify or excuse a potential juror from service. GR 28; *State v. Rice*, 120 Wn.2d 549, 559-62, 844 P.2d 416 (1993).

In *State v. Tingdale*, the court clerk excused three jurors prior to voir dire on the grounds they were acquainted with the defendant, in accordance with the court's policy. 117 Wn.2d 595, 597-98, 817 P.2d (1991). On appeal, the court ruled the policy violated the defendant's right to a randomly selected, impartial jury. "[T]he practice allows the judge, and even the clerk, to assemble a jury panel of their own choosing. This practice violates the statutorily required element of chance and calls into doubt the impartiality of the jury selected." 117 Wn.2d at 601.

On the other hand, in *State v. Wilson*, the bailiff excused two jurors prior to voir dire due to illness and rescheduled their jury service, again in

accordance with the court's policy. 174 Wn. App. 328, 332, 298 P.3d 148 (2013) (petition for review pending). However, the trial court offered to bring the excused jurors into the courtroom for voir dire in the defendant's presence, but the defendant did not pursue the offer. *Id.* On appeal, the court ruled the excusal did not violate the defendant's public trial right because the excusal was "a preliminary administrative component of the jury selection process," that did not implicate the public trial right. *Id.* at 340.

Here, the record is completely devoid of details regarding excusal of the two jurors. There is no indication who excused the jurors, when they were excused, why they were excused, whether they were under oath, whether they had filled out a juror questionnaire, whether they were informed of the nature of the charges against Mr. McClure, or whether Mr. McClure was offered an opportunity to question the excused jurors. The only fact to be gleaned from the record is that two jurors were excused behind closed doors. Accordingly, the excusals violated the right of Mr. McClure and the public to an open and public trial.

c. Mr. McClure's constitutional right to be present at all critical stages of the trial against him was violated when two jurors were excused in his absence.

An accused person "has the fundamental right to be present at all critical stages of a trial." U.S. Const. amend. VI, XIV; Wash. Const. art. I, § 22; *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The right to be present encompasses jury selection and allows the accused person "to give advice or suggestions or even to supersede his lawyers altogether and conduct the trial himself." *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674 (1932), *overruled in part on other grounds by Mallory v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). A violation of that right is reviewed for harmless error, and the State bears the burden of proving harmlessness beyond a reasonable doubt. *Irby*, 170 Wn.2d at 885-86; *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983).

On this record, the State cannot meet its burden. As discussed, the record is completely devoid of any details regarding the excusal outside Mr. McClure's presence. Reversal is required. *See Irby*, 170 Wn.2d at 887; *Bone-Club*, 128 Wn.2d at 257.

2. **The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. McClure made a "true threat" to kill Ms. Hawley and that Ms. Hawley reasonably believed Mr. McClure would carry out his purported threat to kill her.**

    a. The State is required to prove every essential element of the crime beyond a reasonable doubt and, where the crime implicates speech, the State is further required to prove the proscribed speech is unprotected by the constitution.

Due process requires the State to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). An accused person's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

Where a challenge to the sufficiency of evidence implicates core First Amendment rights, the appellate court must conduct an independent

review of the record to determine whether the speech in question was unprotected. *State v. Johnston*, 156 Wn.2d 355, 365-66, 127 P.3d 707 (2006). "It is not enough to engage in the usual process of assessing whether there is sufficient evidence in the record to support the trial court's findings." *State v. Kilburn*, 151 Wn.2d 36, 49, 84 P.3d 1215 (2004). Rather, the "rule of independent review" requires an appellate court to "freshly examine 'crucial facts.'" – those facts that are intricately intermingled with the legal question. *Id.* at 50-51. "Also, the appellate court may review evidence ignored by a lower court in deciding the constitutional question." *Id.* at 51; *accord State v. Locke*, 175 Wn. App. 779, 790, 307 P.3d 771 (2013).

b. The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. McClure communicated a "true threat."

A threat is pure speech. *State v. Williams*, 144 Wn.2d 197, 206, 26 P.3d 890 (2001). The United States Constitution and the Washington Constitution guarantee freedom of speech. U.S. Const. amend. I; Wash. Const. art. 1, § 5; *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L.Ed.2d 305 (1992); *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). To comport with the constitutional right to free speech, a statute that criminalizes pure speech must be limited to unprotected speech only, such as "true threats," "fighting words," or words that produce a

"clear and present danger." *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L.Ed.2d 664 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L.Ed.2d 1031 (1942); *Schenck v. United States*, 249 U.S 47, 52, 39 S. Ct. 247, 63 L.Ed.2d 470 (1919); *State v. Allen*, 176 Wn.2d 611, 626, 294 P.3d 679 (2013).

Not all threats are "true threats." *Watts*, 394 U.S. at 707. "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listener." *Bauer v. Sampson*, 261 F.3d 775, 783 (9th Cir. 2001) (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

In Washington, courts adhere to an objective speaker-based test for a "true threat."

> A "true threat" is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another. A true threat is a serious one, not one said in jest, idle talk, or political argument. Under this standard, whether a true threat has been made is determined under an objective standard that focuses on the speaker.

Kilburn, 151 Wn.2d at 43-44 (internal citations and quotations omitted); *accord Allen*, 176 Wn.2d at 626. Thus, statements that "bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole" are

not true threats. *State v. Schaler*, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

Here, in context and under the circumstances, a reasonable person in Mr. McClure's position would not foresee that his statement would be interpreted as a serious express of intent to kill Ms. Hawley. He had a history of repeated long and disjointed conversations with dispatchers, especially with Ms. Petersen, which were frequently crude and inappropriate. His reference to the Hawleys was very enigmatic and involved only a short portion of a rambling conversation that lasted ten minutes. In fact, Ms. Petersen, whose job necessitates accurately assessing and routing calls to the fire department, medics, or police, as needed, did not single out Mr. McClure's statements for special consideration. 5/14/13 RP 88; 5/15/13 RP 181-82, 252-54. Rather, she included it in the recordings of all Mr. McClure's calls to assist Lieutenant Hawley in his harassment investigation. 5/14/13 RP 88. Even when Lieutenant Hawley became aware of the purported threats several days later, he waited yet another day before alerting his wife to avoid alarming her. 5/14/13 RP 76-77, 93-94.

By contrast, in *State v. Locke*, over a four-minute period of time, the defendant sent three e-mails to Governor Gregoire's government web site. 175 Wn. App, at 785. In the first e-mail, he identified his city as

"Gregoiremustdie," and wrote that he hoped she would see a family member raped and murdered by a sexual predator, and that she had put the state "in the toilet." *Id.* In the second e-mail, the defendant again identified his city as "Gregoiremustdie," and wrote that she was a "fucking cunt," and she should be burned at the stake. *Id.* In the third e-mail, the defendant requested permission for his organization called "Gregoire Must DIe" to hold an event at the Governor's mansion, he described the event as "Gregoire's public execution," he invited the Governor to be the event "honoree," the event would last 15 minutes, the media would be invited, and the event would be attended by more than 150 people. *Id.* at 786. The court ruled that the first e-mail, albeit "crude and upsetting," was hyperbolic political speech "threatening personal consequences from the state's policies," rather than a true threat. *Id.* at 791. The court further ruled that the second e-mail, standing alone, also was not a true threat. *Id.* However, the second e-mail and the third e-mail, considered together, did constitute a true threat because "[t]he menace of the communication was ... heightened by is specificity," and the defendant "had no preexisting relationship or communication with the Governor from which he might have an expectation that she would not take his statements seriously." *Id.* at 792-93.

"Speech is protected, even though it may advocate action which is highly alarming to the target of the communication, unless it fits under the narrow category of a 'true threat." *Williams*, 144 Wn.2d at 209 (citations omitted). Here, in the absence of proof beyond a reasonable doubt that a reasonable person in Mr. McClure's position would foresee that his statement would be taken out of context and deemed a serious expression of intent to kill Ms. Hawley, his statement was not a true threat and his conviction for harassment by a threat to kill must be reversed. *See Kilburn*, 151 Wn.2d at 54.

c. The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Ms. Hawley reasonably feared that Mr. McClure would kill her.

As charged, the crime of harassment was elevated to a felony on the grounds the threat to cause bodily injury was a threat "to kill the person threatened or any other person." CP 54-55; RCW 9A.46.020(2)(b). Thus, the State was required to prove beyond a reasonable doubt that Ms. Hawley was placed in reasonable fear that Mr. McClure would actually carry out his purported threat to kill her. *See State v.Mills*, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005) (State must prove victim was placed in reasonable fear that the threat made, *i.e.*, a threat to kill, would be carried out).

Both Lieutenant Hawley and Ms. Hawley testified that they feared Mr. McClure would do "something," but not that they feared he would actually kill Ms. Hawley. Ms. Hawley testified that her husband told her that 911 received a call in which their lives and the lives of their children was threatened, and the caller knew where they lived, harassed a dispatcher, and left a package at the dispatch center that was mistakenly assumed to be a bomb. 5/14/13 RP 124-26, 134-35. She relied on her husband's assessment of the seriousness of the purported threat. 5/14/13 RP 140. According to Ms. Hawley, her husband characterized the call as a "very serious threat," he said "it was very credible that this person was capable of doing what he said he was going to do," and she was "very concerned" for her safety." 5/14/13 RP 127. "[H]e wouldn't want me to worry about something unless it was extremely serious and very *possible for this individual to do something*." 5/14/13 RP 128 (emphasis added). One week before trial, Lieutenant and Ms. Hawley met with the prosecutor and she learned more details about Mr. McClure, specifically, the confiscated guns four years earlier, and his presumed alcohol use, which made her more nervous, and she applied for a concealed weapons permit. 5/14/13 RP 130, 132.

Lieutenant Hawley testified that he interpreted Mr.McClure's phrase "smoking hole" to mean "blow someone away," and his reference

to "Black Ops helicopter" and "mini .30 caliber machine guns" meant he was going to "blast my place apart and kill everyone." 5/14/13 RP 75, 106. He took the statements seriously because his wife worked out of their home, and he believed Mr. McClure must have taken some steps to learn where he lived, Mr. McClure seemed to be "spiraling out of control," and he was "going mobile", that is, he was frequently away from home. 5/14/13 RP 76, 79. Regardless of Lieutenant Hawley's interpretation of Mr. McClure's phraseology, however, he testified, "Again, he's making a threat. *I – who knows? He could show up at our front door with a package. I don't know. But, again, he has a history of – doing odd things. He's actually assaulted a police officer once.*" 5/14/13 RP 97 (emphasis added). He further testified, "And *I believe his intent was at some point he would come out and do something – I'm not sure what – but something that would harm our family and property.*" 5/14/13 RP 114 (emphasis added).

In *State v. C.G.*, the juvenile defendant was convicted of harassment by threats to kill based on her statement, "I'll kill you, Mr. Haney, I'll kill you," while she was being disciplined by the school vice principal. 150 Wn.2d 604, 606-07, 80 P.3d 594 (2003). The vice principal testified that the purported threat made him concerned that C.G. might try to harm him or someone else in the future. *Id.* at 607. On

appeal, her adjudication was reversed on the grounds that there was no evidence the vice principal was placed in reasonable fear C.G. would actually kill him. *Id.* at 610. The Court reasoned that the greater punishment for felony harassment by threats to kill than for misdemeanor harassment by threats to inflict bodily injury reflected the Legislature's recognition that a person placed in fear of being killed suffers greater harm than does a person threatened with bodily injury. *Id.*

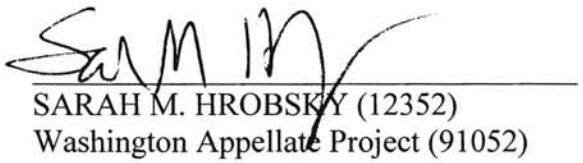
Here, as in *C.G.*, the State established only that Ms. Hawley was concerned Mr. McClure might do "something," but the State did not prove that she was placed in reasonable fear Mr. McClure would actually kill her, regardless of his phraseology. Mr. McClure's conviction for felony harassment by a threat to kill must be reversed.

E. CONCLUSION

The unexplained excusal of two jurors prior to voir dire during closed proceedings violated the constitutional guarantee of open and public trials, as well as Mr. McClure's right to be present at all critical stages of the trial against him. The State failed to produce sufficient evidence to establish beyond a reasonable doubt that Mr. McClure uttered a true threat or that Ms. Hawley was in reasonable fear that Mr. McClure actually would carry out his purported threat to kill her. For the foregoing reasons, Mr. McClure requests this court reverse his conviction for harassment by a threat to kill.

DATED this 4th day of February 2014.

Respectfully submitted,



SARAH M. HROBSKY (12352)
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Attorneys for Appellant

APPENDIX A

MR. CARMAN: Your Honor, at this time the State would move to admit State's Exhibit 4.

MR. SIMPSON: No objection.

THE COURT: State's Exhibit 4 is admitted.

MR. CARMAN: Your Honor, the State would move to publish.

THE COURT: Go ahead.

MR. CARMAN: Okay.

(State's Exhibit 4, CD, played for the jury.)

JAMES McCLURE: "This is a message for whoever the senior bastard is, you have a Hawley that used to be sheriff."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "I had to sign a letter that said I would not talk about, discuss or release any press releases for 20 years after I got out of the Navy. And I got out of the Navy on the 31st of May, 1993. But due to Internet technology and everything else, it's leaking out.

"So I'm kind of fuzzy a little bit. So I cleared it with three Navy captains and an admiral."

Q (By Mr. Carman) Lieutenant Hawley, can you hear that recording?

A Yes.

Q Are you able to recognize the male voice that's on

that recording?

A That's Mr. McClure.

(State's Exhibit 4, CD, played for the jury.)

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Lives right here on Whidbey Island. They're all retired."

ERIN PETERSEN: "So you weren't supposed to do-- You're weren't supposed to talk about what? I'm sorry."

Q (By Mr. Carman) Can you recognize that female voice?

A Yes, that's the dispatcher. Erin Petersen.

Q And are you able to discern what Mr. McClure is saying?

Is the recording clear enough?

A Yes.

(State's Exhibit 4, CD, played for the jury.)

JAMES McCLURE: "Everything I did in the Navy."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Okay. And my Navy references are: VO-67, Albadron-67 (phonetic), VAH-21, Heavy 21."

ERIN PETERSEN: "Mm-hmm."

JAMES McCLURE: "And I had an Ace of Diamonds and a Queen of Spades painted on my tail. Yes, ma'am. I put 'em up there myself."

ERIN PETERSEN: "Mm-hmm."

JAMES McCLURE: "Pretty thing. Pretty thing.

"Gun ships, ma'am. Gun ships.

"And after I talked to captain-- Well, I talked to the Master Chief first. He's here, too. He talked with Captain. Captain called me. Captain called the Admiral. Admiral approved it.

"He says, 'Forget about that last five months, Chief. Go ahead and let him have it.'"

ERIN PETERSEN: "Okay."

JAMES McCLURE: "You know what the Admiral wants to see happen to Mike Hawley?"

ERIN PETERSEN: "Oh. I don't know."

JAMES McCLURE: "Smoking hole (indiscernible)."

Q (By Mr. Carman) Is that the threat you described?

A That's the first one, yes.

Q What does the term, "smoking hole," mean to you?

A Blow someone away.

(State's Exhibit 4, CD, played for the jury.)

JAMES McCLURE: "I don't know what he did to piss the admiral off, but the admiral said, 'Chief, you're flying tonight in a black airplane. We're all going to bed with their wives, you poor E7 son of a bitch. Now, go get 'em!"

Q (By Mr. Carman) What does a "black airplane" mean to you?

A It could be it's like an undercover type of

operation. Something like that.

Q Is this one of the metaphors that you talked about?

A Correct.

(State's Exhibit 4, CD, played for the jury.)

ERIN PETERSEN: "Mmm."

JAMES McCLURE: "Ahhh! That was terrifying!"

ERIN PETERSEN: "Goodness."

JAMES McCLURE: "So I had another little-- Ma'am, I had another little drink of scotch."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Put all the switches up. Turned all the knobs to the right. Push all the levers all the way forward."

Q (By Mr. Carman) Do you know what it means to put all the switches up, turn all the knobs to the right, and push all the levers all the way forward?

A It sounds like he's preparing to take off in a - in a, you know, an airplane or something like that.

Q Lieutenant Hawley, do you know where Mr. McClure lives at this time?

A Off of West Beach Road on Barque Street.

Q Barque Street?

(State's Exhibit 4, CD, played for the jury.)

JAMES McCLURE: "U.S.S. Barque Road is ready for combat."

Q (By Mr. Carman) Barque Street or Barque Road?
A Barque Road.
(State's Exhibit 4, CD, played for the jury.)
ERIN PETERSEN: "Okay."
JAMES McCLURE: "And so is Navy 902 circling overhead. And them 30-caliber mini guns, they're so heavy my wings are tipping down. And when I blast, there's nothing left.
I'll take out that filbert or walnut farm, his wife, his kids. And you know what? I'll feel no sorrow tomorrow.
ERIN PETERSEN: "You would" --
JAMES McCLURE: "Because the admiral told me to do it."
ERIN PETERSEN: "Okay."
JAMES McCLURE: "And I love it! That's why I got 31 years, six months and 17 days as an E7."
Q (By Mr. Carman) What kind of farm do you live on?
A Hazelnut, filbert farm, walnuts.
(State's Exhibit 4, CD, played for the jury.)
ERIN PETERSEN: "Okay."
JAMES McCLURE: "Yeah. Because they just send me the shit like this."
ERIN PETERSEN: "Oh.
JAMES McCLURE: "I think they (indiscernible).

Because I'm a Cherokee outlaw. They look through the windows to see if they can find me my buffalo graves."

ERIN PETERSEN: "Uh-huh."

JAMES McCLURE: "Yeah. The Vietnamese didn't like me at all. Black pajamas were history." (Laughing.)

ERIN PETERSEN: (Indiscernible)..."a minute.

JAMES McCLURE: "I blew 'em all away." (Indiscernible.)

"But around Christmastime it always bothered me. You know, we lost three crews in just less than ten days."

ERIN PETERSEN: (Indiscernible.)

JAMES McCLURE: "Less than ten days. Dillard (phonetic), Jesus and Ogden (phonetic), their little bones and shit are all in one hole (indiscernible).

"Never mind. You wouldn't care. They all had families. They all had kids."

ERIN PETERSEN: "Mm-hmm."

JAMES McCLURE: "Pretty sad."

ERIN PETERSEN: "'kay.

JAMES McCLURE: "So when ya' celebrate the New Year, dance to Creedence Clearwater Revival and listen to those words."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Yeah. And think about that. That's a classic song. John Fogerty wrote it after he

talked to me --

ERIN PETERSEN: "Mm-hmm."

JAMES McCLURE: -- in 1975."

ERIN PETERSEN: "Hmm."

JAMES McCLURE: "Mm-hmm. Yes, ma'am. Yes, ma'am. Yes, ma'am. Yes, ma'am."

ERIN PETERSEN: "Well, I have" --

JAMES McCLURE: "And wear skinny panties. And if your husband is in the Navy, that's probably what he's fighting for."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "And me and my wife's been married for 49 years coming up. And if you ever meet her, she's not as mean as she looks."

ERIN PETERSEN: "Okay. Jimmy --"

JAMES McCLURE: "Yes, ma'am."

ERIN PETERSEN: "-- I'm going to have to hang up. But I --

JAMES McCLURE: "Oh, yeah. Any time when you're talking to Jimmy, I can understand (indiscernible). I can understand this-- I can understand all the circuits are busy.

"My wife can understand, 'Your husband was killed at night.'"

"She goes, 'Oh, fuck you.'"

ERIN PETERSEN: (Chuckles.)

JAMES McCLURE: (Laughs.)

"And he goes, 'What did you say?'"

"She says, 'Fuck you.'"

"And then he goes, 'I can't believe that. Well, yeah. That's unbelievable. Unbelievable!"

"UFB! If my husband was killed at night, he would have called me and told me about it!"

(Laughing.)

ERIN PETERSEN: "Well, have a good night. Okay?"

JAMES McCLURE: "All nights are good when you get to be my age."

ERIN PETERSEN: "That's right."

JAMES McCLURE: "MiGs. They're all around us. They're all around us. Greathouse (phonetic) shot down a MiG with a goddam AD (phonetic)in 1942 model Navy airplane. Shot down a jet in 1967. He flew for the (indiscernible)."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "Yeah. Greathouse (phonetic). Yeah. We got Lundstrom (phonetic). You got Brian Too-tall(phonetic) McGinnis (phonetic).

"They're all-- Listen to Creedence!

"'When will we see the rain?'.

"Well, we've seen it. And it won't quit. Because it's winter. (Laughing.)

"I mean, it ain't real hot and it ain't real cold." (Indiscernible.)

ERIN PETERSEN: "I mean, I've got to go. I'm sorry. I going to hang up."

JAMES McCLURE: "That's fine, ma'am."

ERIN PETERSEN: "Okay."

JAMES McCLURE: "But it's been a pleasure talking to you!"

ERIN PETERSEN: "You, too! Thanks, Jimmy.

JAMES McCLURE: "Hey! Good night, ma'am. Good night. Good night. (Indiscernible singing) 9-0-2."

ERIN PETERSEN: "Good night."

JAMES McCLURE: "We're - we're armed and dangerous." (Laughing.)

ERIN PETERSEN: "Okay. Have a good night!"

JAMES McCLURE: "Yes, ma'am."

ERIN PETERSEN: "All right."

JAMES McCLURE: "Good night."

BY MR. CARMAN:

Q So, Lieutenant Hawley, you listened to that entire tape?

A Yes.

Q And during the course of that tape he talks about

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

STATE OF WASHINGTON, Respondent, v. JAMES MCCLURE, Appellant.	)))))))))	NO. 70516-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID CARMAN, DPA ISLAND COUNTY PROSECUTOR'S OFFICE P.O. BOX 5000 COUPEVILLE, WA 98239	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] JAMES MCCLURE PO BOX 2328 OAK HARBOR, WA 98277	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF FEBRUARY, 2014.

X_____

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