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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. The unexplained excusal of two potential jurors during closed proceedings and outside the presence of Mr. McClure violated both the right to open courtroom and the right to be present.

The federal and state constitutions guarantee the public and a defendant the right to open and public trials and further guarantee a defendant the right to be present at all critical stages of a trial. U.S. Const. amend. VI, XIV; Wash. Const. art I, §§ 10, 22; *Presley v. Georgia*, 558 U.S. 209, 212, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010); *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Lormor*, 172 Wn.2d 85, 90-91, 257 P.3d 624 (2011); *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). These rights extend to jury selection. *Presley*, 558 U.S. at 212; *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); *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012); *Irby*, 170 Wn.2d at 883.

Here, in violation of these rights, immediately prior to voir dire and without explanation, the court informed the parties that two potential jurors were excused from jury service. 5/14/13 RP 30. Although neither party objected at the time, 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); RAP 2.5(a)(3). 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. *State v. Wise*, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *Strode*, 167 Wn.2d at 231. Moreover, an objection would have been futile as the jurors had already been excused by the time the parties were notified of the excusals. Thus, this issue is properly before this Court.

The State repeatedly characterizes the excusals as "administrative." Br. of Resp. at 4, 5, 6, 7, 8, 9, 10. This characterization is pure speculation. A trial court *must* disqualify a juror who does not meet the basic statutory qualifications or who the court 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). In addition, 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). Here, however, the record does not indicate who excused the jurors, when they were excused, why they were excused,

whether they had been placed under oath, whether they had been informed of the charges, whether they had filled out a questionnaire, or even whether Mr. McClure was offered an opportunity to question them. On this scant record, the State's characterization is unfounded and should be disregarded.

The State contends the excused jurors did not report for jury service, the jurors were not questioned about Mr. McClure's case, and the excusals were not equivalent to for-cause or preemptory challenges. Br. of Resp. 7, 8, 9, 10. These contentions are also speculative. By contrast, in *State v. Wilson*, even though the court clerk excused two potential jurors prior to voir dire due to illness, the court offered to bring the excused jurors into the courtroom for voir dire in the defendant's presence. 174 Wn. App. 328, 332, 298 P.3d 148 (2013). Here, the record is silent as to the reason for the excusals and Mr. McClure was not offered an opportunity to voir dire the excused jurors. The State's comparison of the present case to *Wilson* is inapt.

The record establishes that two jurors were excused behind closed doors and outside the presence of Mr. McClure. Reversal is required. *See Irby*, 170 Wn.2d at 887; *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995).

2. A reasonable person would not have foreseen that Mr. McClure's statements would be interpreted as a serious expression of intention to kill Ms. Hawley.

Mr. McClure did not make a "true threat." Regardless of the actual wording, a statement is not a "true threat" unless a reasonable person would foresee the statement would be interpreted as a serious express of intention to inflict bodily harm or to kill another person. *State v. Kilburn*, 151 Wn.2d 36, 43-44, 84 P.3d 1215 (2004). 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, Mr. McClure's statements were no more than idle talk and hyperbole. He had a history of repeated, long, and disjointed conversations with dispatchers, especially with Ms. Petersen, which were frequently crude and inappropriate, and 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. In context and under the circumstances, a reasonable person in Mr. McClure's position would not foresee that his statements would be interpreted as a serious express of intent to kill Ms. Hawley.

The State compares the instant to case to *State v. Locke*, 175 Wn. App. 779, 785, 307 P.3d 881 (2013), in which the defendant sent three e-mails over a four-minute period of time to Governor Gregoire's government web site. Br. of Resp. at 15-17. In the first e-mail, the defendant 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 was crude, hyperbolic political speech and the second e-mail, standing alone, also was not a true threat. *Id.* at 791. 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 its specificity," 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," and the statements were made only days after a highly publicized shooting of a politician. *Id.* at 792-93. Here, however, Mr. McClure had a preexisting relationship with Ms. Petersen, his purportedly threatening statements were made only one time and were part of a longer conversation with Ms. Petersen, and the statements did not coincide with any publicized attack on a law enforcement officer. The State's comparison of the present case to *Locke* is inapt.

The State assigns significance in the fact that Mr. McClure delivered a package to the dispatch center nine days prior to the conversation in question. Br. of Resp. at 17, 18. However, the package was addressed to Ms. Petersen, and not to Ms. Hawley, there was no evidence that Mr. McClure was aware of the concern caused by the package, and, by the time of the conversation in question, all parties knew that the package was innocuous and contained only playing cards, a book about poker, and some notes. 5/14/13 RP 68, 70. Given the banal nature of the contents of the package addressed to Ms. Petersen, the package has no bearing on whether Mr. McClure made a "true threat" to Ms. Hawley.

In the absence of sufficient evidence Mr. McClure made a "true threat," his conviction for harassment by a threat to kill must be reversed. *See Kilburn*, 151 Wn.2d at 54.

3. The State failed to prove beyond a reasonable doubt that Ms. Hawley was placed in reasonable fear that Mr. McClure would kill her.

To establish harassment by a threat to kill, the State was required to prove beyond a reasonable doubt that Ms. Hawley was placed in reasonable fear that Mr. McClure would kill her. RCW 9A.46.020(2)(b); *State v. Mills*, 154 Wn.2d 1, 10-11, 109 P.3d 415 (2005); *State v. J.M.*, 144 Wn.2d 472, 488, 28 P.3d 720 (2001). Here, however, although Lieutenant and Ms. Hawley testified that they took Mr. McClure's statements seriously, neither testified they feared Mr. McClure would actually kill Ms. Hawley. Rather, they feared Mr. McClure would do "something" that would harm them or their property. 5/14/13 RP 97, 114, 128. Therefore, the State failed to prove an essential element of harassment as charged.

The State fails to address the similarities of the present case to *State v. C.G.*, in which Washington Supreme Court reversed a juvenile's conviction for 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, 610, 80 P.3d 594 (2003). In reversing her conviction, the Court reasoned the vice principal's testimony that the purported threat concerned him that C.G. might try to harm him or someone else insufficient to establish he was placed in reasonable fear C.G. would actually kill him. *Id.* at 607, 610.

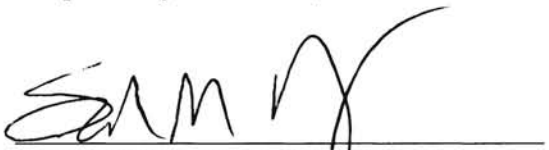
Here, as in *C.G.*, the State established only that Ms. Hawley was concerned Mr. McClure might do "something," but not that she was placed in reasonable fear Mr. McClure would actually kill her, regardless of his phraseology. Reversal is required. *See C.G.*, 150 Wn.2d at 610.

B. CONCLUSION

For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. McClure requests this Court reverse his conviction for harassment by a threat to kill.

DATED this 2nd day of May 2014.

Respectfully submitted,



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DIVISION ONE

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	)	
JAMES MCCLURE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MAY, 2014, I CAUSED THE ORIGINAL **REPLY 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		
ISLAND COUNTY PROSECUTOR'S OFFICE	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 2ND DAY OF MAY, 2014.

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