NO. 96611-7

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DYMON LEE WILLIAMS,
Appellant/Petitioner.

ANSWER TO PETITION FOR REVIEW BY YAKIMA COUNTY

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A. INTRODUCTION.

This case was affirmed by the Court of Appeals, Division III. The court found the evidence presented by the State was sufficient to support the jury's determination that Williams had burglarized the victim's home, that the protection order did not allow Williams to be at that location and that while in the residence Williams assaulted the victim.

The Court of Appeals opinion cited well settled case law regarding sufficiency claims. The court dismissed Williams' allegations ruling there was no basis to reverse the underlying conviction.

ISSUES PRESENTED BY PETITION

1. This Court should grant review because the Court of Appeals' opinion is in conflict with other decisions of the Court of Appeals.
   a. The State presented insufficient evidence.
   b. The Court of Appeals' decision is in conflict with previous decisions.
   c. Review should be granted because the trial court failed to inquire into the defendant's ability to pay LFO's considering his known mental health history.

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals' opinion does not merit review. Williams has not met the standards set forth in the Rules of Appellate Procedure 13.4, which determines whether a matter should be reviewed.

   a. The Court of Appeals correctly determined that there was sufficient evidence presented.

   b. The opinion in this case does not conflict with other opinion of this court or any division of the Court of Appeals.

c. There is no record to support defendant's allegation that he has a mental health issue which should have been reviewed by the trial court.

The Court of Appeals opinion does not merit review under any circumstance and specifically not under RAP 13.4

A. STATEMENT OF THE CASE

Set forth below is the Statement of the Case from the State's opening brief and that set forth in Court of Appeals opinion.

Mr. Williams chose to stand by his right not to take the stand and he did not testify in his trail.

Mr. Williams was charged in the Yakima County Superior Court with the noted offenses. The VPO charges all arose from an order of protection that prevented Mr. Williams from coming within 1,000 feet of Yolanda Caldera or her home. Williams is the father of two of Ms. Caldera's three children and had briefly lived at her residence in the past.

Despite the protection order, Mr. Williams was present at a birthday party held at Ms. Caldera's home on June 23, 2016. He spent the ensuing night with her. Two nights later, around 2:00 a.m., he broke into the house through a bedroom window while Ms. Caldera was in the bathroom.

On June 25, 2016 Ms. Yolanda Caldera arrived at her home after working at her aunt's restaurant and picking up her children. This was between 2:00 and 3:00 AM. Ms. Caldera had been in the home for a while

before Williams climbed through the window. Ms. Caldera did not know that Williams was in the house until he walked in on her as she was literally sitting on the toilet in the bathroom. Williams appeared and confronted Ms. Caldera. RP 67 Williams confronted Caldera and ripped her underwear off her legs in a manner that resulted in her having marks and scratches on the back of her legs. RP 66-67, 85.

Ms. Caldera testified that when she left the bathroom she went into the bedroom and Williams followed her, the argument they were having continued into that room. RP 67-8. She testified that they argued from the time he broke into her home until around 7:00 AM. RP 69. During this period Ms. Caldera wanted to call the police but the defendant had removed the "SIM" card from her phone. Ms. Caldera retrieved her son's iPad and was able to use an "app" on that device to call a friend who in turn called the police. RP 69-70. Ms. Caldera testified the reason that she called her friend to contact the police was because "Dymon was there and he wouldn't leave." RP 70. The police did arrive at her home but is was several hours later, she estimated that it was 9:30 when they finally arrived. RP 71-2.

Ms. Calera's children were present in the home during this burglary. RP 68. Ms. Caldera testified that Williams did not have a key and that she asked him to leave. RP 84-85

The jury was shown pictures, which Ms. Caldera authenticated, of the injuries to the back of Ms. Caldera's legs caused when Williams ripped her underwear off as well as a picture of her cellphone without the SIM card. RP 70-1.

Ms. Caldera was questioned on cross examination regarding whether the defendant had lived at the 3405 Clinton Way address. She indicated that he did "only for a bit…like March of 2015." The date of this burglary was June 25, 2016. RP 80 CP 157

Ms. Caldera was extensively cross examined regarding the method of entry. She was very specific that she had changed the locks on her home after the defendant had moved out, that he did not have a key to that home and that all of the windows, except one, were shut in a manner that would not have allowed the defendant to enter. She testified "Because all the other windows were -- well, I had obviously changed the locks already, and all the other windows had sticks and stuff. He couldn't enter." RP 82-3, 88.

She testified on cross and on redirect that the reason the locks were changed was "in part because of Dymon." She was also very specific that "[h]e didn't have a key…" She repeated this more than once. PR 84. When defense counsel pushed Ms. Caldera to "change (her) answer to line of inquiry regarding whether she was upset that Williams was "drunk or

high" she stated "Change my answer what? I mean, was I upset? Yeah, probably. I think I was more upset that he was in the house." PR 86

The jury returned guilty verdicts on all four charges and also entered special findings in each case that Williams and Caldera were members of the same household.

The court calculated the offender score at 13 for the burglary and 11 for the VPO counts. The court imposed an exceptional sentence of 140 months on the burglary count due to the high offender score resulting in the additional crimes going unpunished.

ARGUMENT

This petition is governed by RAP 13.4 (b), which sets forth the standard an appellant must meet before their case will be accepted for review. Williams claims that his petition meets the criterion of RAP 13.4(b) (3) and (4), this is patently incorrect.

This case does not meet any of the criterion set forth in RAP 13.4(b). RAP 13.4(b) Considerations Governing Acceptance of Review; **3**) The decision of the Court of Appeals in this case does not raise a significant question under either the State or Federal Constitution; the ruling merely reiterates the standard that has been applied for years and **4**) The issues raised in this petition for review do not involve an issue of substantial public interest which would merit review by this court.

Insufficient evidence.

Williams claims the Court of Appeals opinion regarding the sufficiency of the State's is a significant question under either the State or the Federal Constitution. Not to discount the impact of Williams criminal acts but this was "just" a burglary. As Judge Korsmo wrote in the first line of the first paragraph of the portion of this opinion that is sub- headed "Sufficiency of the Evidence" - "Review of this issue is in accord with long settled standards."

Not one single word of the opinion issued in this case "raises a significant question of law" nor is any issue one of "substantial public interest." While clearly the actions of the jury, the trial court and the Court of Appeals in affirming this conviction raises issues of significance and that are of great interest to Williams, however that this not the standard that is contemplated by the RAP. His defense and the "fact" he relies on herein is that he had some sort of implied right to be inside the victim's home. This is not a defense, it does not somehow allow this defendant to evade the valid court order that was in place at the time he was in the victim's home.

A person commits the crime of burglary when he enters a building with the intent to commit a crime therein. RCW 9A.52.030(1).

Even if the victim had given some form of consent on a prior

occasion, which still did not "legally" allow Williams to be within 1000 feet, the victim testified that on the date and time of this crime she did not give Williams permission to enter her home and most certainly not entry through the window. Burglary can also foment if a party "…remains illegally, with intent to commit a crime against a person or property therein. For the sake of argument if this court were to accept that Williams could enter the home through the front door as would any other invitee, he did not enter this home through the window with the victim's permission, nor did he "remain" lawfully when he accosted her while she was in the bathroom.

Here the defendant; after being served with a no contact order and knowing it was in place, while doors were locked and the windows, supposedly secured, still managed to get into the victim's home in the very early morning hours. After he climbed through the window he confronted the victim while she was in the most personal and vulnerable place in a home, sitting on the toilet in her bathroom. He then literally ripped her underwear off of her person in a manner so violent that the fabric of her underwear left scratches and marks on her body.

Quoting from Judge Korsmo's opinion:

> As charged in this case, a person commits the crime of first degree burglary if he enters or remains unlawfully in a building and assaults a person therein.

RCW 9A.52.020(1)(b); Clerk's Papers at 157. Mr. Williams argues that the protection order did not expressly exclude him from Ms. Caldera's residence, thereby preventing his entry from being unlawful. He also claims that he had Ms. Caldera's implicit permission to be in the building because of his visit two days earlier.

However, because the court order excluded him from the building, she was unable to grant him consent to enter. See State v. Sanchez, 166 Wn. App. 304, 308, 271 P.3d 264 (2012).

Thus, the only remaining question is whether the protection order excluded Mr. Williams from the building. It did. The provision in question reads:

> Do not knowingly enter, remain, or come within _____ (1,000 feet if no distance entered) of the protected person's residence, school, workplace, other: ☒ person ☐ children's school or daycare ☐ _____

Ex. 3.

The terms of the order expressly prohibit Mr. Williams from coming within 1,000 feet "of the protected person's residence." Inside the residence is certainly within 1,000 feet of it. The building also was protected while Ms. Caldera was inside since he also could not get within 1,000 feet of her. For both reasons, his entry into her home was unlawful.

There is nothing in the record other than the testimony of the State's witnesses. There is nothing in this record that would indicate that the no contact order had been extinguished, modified or rescinded. Therefore, this defendant could not come within 1000 feet of protected person and the protected person's residence. The order set forth above states "residence" and in addition the court at the time of the entry of that order **also** indicated by "checking a box" that he was not allowed to be

physically near the "person" of the named victim.

Once again while clearly this case is of great import to Williams and the issues he sees are significant to him, they are not the type of issue that is significant to court

State v. Ortiz, 77 Wn.App. 790, 895 P.2d 845 (Div. 3 1995), "Mr. Ortiz argues the evidence does not establish he entered or remained unlawfully in the home. If not licensed, invited or otherwise privileged to do so, a person who enters a residence or remains there does so unlawfully. RCW 9A.52.010(3); State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988). Under RCW 9A.52.040, a jury may infer the necessary element of intent to commit a crime from the fact of unlawful entry. State v. Jackson, 112 Wash.2d 867, 774 P.2d 1211 (1989)."

A homeowner can expressly or impliedly revoke the right of a guest to enter or reside within his dwelling. State v. Howe. 57 Wn. App. 63, 71-72, 786 P.2d 824 (1990), rev'd on other grounds, 116 Wn.2d 466, 805 P.2d 806 (1991); see State v. Collins, 110 Wn.2d 253, 261-62, 751 P.2d 837 (1988). Permission may also expire once the purpose for which permission was granted is accomplished. Howe, 57 Wn.App. at 72.

Even if William's argument that the no contact order somehow would allow him into the residence, it is misplaced. He states "…the no contact order did not prohibit Mr. Williams from Caldera Lazo's

residence, and he had implied permission to be inside her home."

However, in the statement of the case in his opening brief he states;

> State's Ex. 3, p. 1; RP 32, vol. II. The order also contains the following language: C. **Do not knowingly enter, remain, or come within . . . [1,000 feet] . . . of the protected person's residence, school, workplace**, other: ☒person children's school or daycare _____.
> State's Ex. 3, p. 1; RP 32, vol. II. (Apps Brief at 5) (Emphasis added)

This order allowed for the victim to be protected no matter where her "residence" was and also protected her throughout her daily life and activities by giving her a 1000-foot area where this defendant was legally, by court order, could not enter. This type of order allows the protection to follow the victim if they must move or if they seek shelter elsewhere. For a defendant to claim that a specific address for the protected person be listed would be counter intuitive of what is needed from this type of order. The victim needs the security of anonymity, the security of having a safe space no matter where she goes. And further, requires that the excluded person know that there is this area, this sphere of protection.

The order informed the Petitioner that he was not allowed into the residence that he knew the victim occupied. Williams knew it was a protected place because at the time of its issuance, or so Williams claims, he was an occupant of the home.

What happened before Williams crawled through the victim's window has no bearing on this case unless the act was an extinguishment of the protection order. The facts are Ms. Caldera came home with her children in the early morning hours and locked herself into her home.

At some time later in the night Petitioner forced his way into her home, into her bedroom, her bathroom and literally ripped her underwear from her body. There is no stretch of the facts that can turn these uncontested facts into an "implied license" to do what Williams did.

Williams cites State v. Wilson, 136 Wn. App. 596, 606, 150 P.3d 144 (2007), Wilson is factually and legally distinguishable. There is absolutely no comparison between the facts in Wilson and the facts in this case. Ms. Caldera lived in the home at the time of the offense with her children, she testified that Williams did not live there, he did not have a key and she had changed the locks and secured the windows in part just to keep him from the home. Again, the protection order specifically ordered Williams to stay away from Ms. Caldera; "Do not knowingly enter, remain, or come within . . . [1,000 feet] . . . of the protected person's residence, school, workplace, other: ☒person" Williams also claims that he had belongings in Ms. Caldera's home. The sections he refers to are testimony of Ms. Caldera, once again Williams did not take the stand, she states: "He was going through the house getting his stuff supposedly….

He didn't have a key, no…. it was not really -- just a backpack and maybe some old shoes, stuff like that that he had left behind from… He didn't have clothes there. He had taken it already…" RP 70

The court in Wilson differentiated cases cited by the State and Wilson, the court addressed a case that the State cited which is factually similar to Williams' case. The court of appeals in Wilson found it was distinguishable. Footnote 5 in Wilson states:

> [5] The State relies primarily on our decision in *State v. Jacobs,* 101 Wn.App. 80, 2 P.3d 974 (2000). We dismissed Jacobs' Fourth Amendment suppression claim when the police found him at a residence, the owner of which a court had prohibited him from contacting. 101 Wn.App. at 83-84, 2 P.3d 974. We reasoned that Jacobs' presence at the residence was unlawful and, therefore, he had no privacy interest in the residence even though the no-contact order did not explicitly bar him from the residence. 101 Wash App at 87-88, 2 P.3d 974.
>
> *Jacobs,* however, is distinguishable from the case here because, unlike Wilson, Jacobs did not live at the residence where he contacted the subject of the no-contact order: Instead, he lived separately with friends or in a park. 101 Wash App. at 86-88, 2 P.3d 974. Therefore, we reasoned that, in addition to the no-contact order, Jacobs had no expectation of privacy at the residence because he did not live there.

That case, State v. Jacobs, 101 Wn.App. 80, 2 P.3d 974 (2000) addressed protection orders and the effect of those orders concluding that because Jacobs was excluded from the residence he had no legal standing to challenge a search warrant. Jacobs not Wilson sets out the law that is

applicable to the facts in this present case.

Even if for the sake of argument, it was agreed that the defendant was given permission to climb through the window in the middle of the night, the testimony from Ms. Caldera that Williams entered her bathroom while she was sitting on the toilet and violently ripped her underwear off and that she told him to leave would have revoked any invitation.

"A person's entry into the dwelling house of another need not be unlawful, except insofar as the entry may become unlawful due to the intent to commit a crime." State v. Gregor, 11 Wn. App. 95, 521 P.2d 960, review denied, 84 Wn.2d 1005 (1974), modified on other grounds, State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988).

State v. Thomson, 71 Wn. App. 634, 638, 861 P.2d 492 (1993) "Although felonious entry was not in issue, felonious remaining was. According to numerous authorities, *Annot., Maintainability of Burglary Charge, Where Entry Into Building Is Made With Consent*, 58 A.L.R.4th 335 subsection 2, 4-5, 11-12 (1987), a defendant's invitation to enter a building can be expressly or impliedly limited as to place or time, and a defendant who exceeds either type of limit, with intent to commit a crime in the building, engages in conduct that is both burglarious and felonious."

The State presented overwhelming evidence that Williams both entered and remained unlawfully in Ms. Caldera's home. There was no

legal or factual basis for the Court of Appeals to overturn Williams' conviction, just as there is no basis under RAP 13.4 for this court to accept review of the issues disposed of by that court.

Even if Ms. Caldera had given Williams permission, or had the legal ability to give permission to enter her home, Williams still committed a burglary. The law states that a person commits the crime of burglary when he enters or **remains** unlawfully in a dwelling with the intent to commit a crime therein. This court has ruled that entry is unlawful when made in violation of a court order, even when the violator acts with the permission of the protected person. State v. Sanchez, 166 Wn.App. 304, 307-312, 271 P.3d 264 (2012) See also, State v. Stinton, 121 Wn.App. 569, 573, 89 P.3d 717 (2004)

The "public" referred to in RAP while inclusive of Williams does not by his inclusion make this case one which would warrant review under 13.4. An example would be a decision that has the potential to affect a number of proceedings in the lower courts, in that instance a case *may* warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. See State v. Watson, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

Once again this is a very simple case, the allegation is sufficiency of unrefuted testimony and exhibits, this not an issue of substantial ***public***

interest.

Issues of witness credibility are to be determined by the trier of fact and cannot be reconsidered by an appellate court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Here the Court of Appeals considered the evidence in a light most favorable to the prosecution. Id. It also must defer to the finder of fact in resolving conflicting evidence and credibility determinations. Camarillo, 115 Wn.2d at 71. A challenge to the sufficiency of the evidence requires that the defendant address the evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.

A mere challenge to the sufficiency of evidence and a court of review upholding that sufficiency does not violate a defendant's due process rights nor is it an issue of significance to the public.

D. CONCLUSION

The Court of Appeals opinion does not merit review by this court

under RAP 13.4 and therefore this court should deny review.

Respectfully submitted this 17th day of January 2019,

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DECLARATION OF SERVICE

I, David B. Trefry, state that on January 17, 2019 I emailed a copy of the State's Answer to: Kristina M. Nichols, Laura M. Chuang, at admin@ewalaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 19th day of January, 2019 at Spokane, Washington.

s/ David B. Trefry
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YAKIMA COUNTY PROSECUTORS OFFICE

January 17, 2019 - 10:02 AM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Dymon Lee Williams
Superior Court Case Number:	16-1-01201-4

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