Supreme Court No. 103082-7

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

MITCHELL EUGENE CRANE,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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A. Is the decision in conflict with another decision of the Court of Appeals regarding whether Unlawful Possession of a Firearm and Possession of an Unlawful Firearm are the same criminal conduct?

B. Is it a significant question under either the State or Federal Constitution whether the defendant's threat to kill the person who reported him to the authorities constituted a threat to a *prospective* witness . . . that *may be offered* by a witness in an official proceeding?

C. Is it a significant question under either the State or Federal Constitution whether a "to-convict" instruction reading, "the defendant knowingly . . . had a firearm in his possession or control, to wit: (specific model and serial number of the firearm)" whether the "to-wit" means something other than "namely"?

II. STATEMENT OF THE CASE

A. Facts regarding Issue Number 1 (conflict with a published decision of the Court of Appeals):

The defendant is correct. *State v. Hatt*, 11 Wn. App. 2d 113, 452 P.3d 577 (2019) is in conflict with this decision. In *Hatt*, a murder case, the defendant was charged with Unlawful Possession of a Firearm and Possession of an Unlawful Firearm. The *Hatt* court determined that both charges were in the same course of criminal conduct and the decision herein was opposite.

B. Facts regarding Issue Number 2 (the intimidation of a witness charge):

Officers from the Department of Fish and Wildlife executed a search warrant at the defendant's residence on February 4, 2020. RP[1] at 197. They found in the master bedroom of the main residence 27 firearms. RP at 271.

[1] Unless otherwise indicated, "RP" refers to the verbatim report of proceedings Volume I, beginning 08/03/2020, prepared by Renee Munoz, CPR, RPR, CRR, CRC.

The search warrant was concerning an investigation into the defendant poaching two deer in January 2020. RP at 19. Andrew Kienholz and his father, James Kienholz, had spoken to the Department of Fish and Wildlife concerning the defendant's activities. RP at 183, 185-86. Andrew asked the Department not to use his name in the search warrant affidavit. RP at 185-86.

After the Department of Fish and Wildlife had executed the search warrant, the defendant drove to their residence at about 7:00 to 7:30 P.M. RP at 184, 191. Andrew Kienholz was a high-school friend with the defendant's son, and the defendant and his son had stopped by the Kienholz residence a couple of times. RP at 183, 188. James Kienholz said he had a couple of interactions with the defendant. RP at 192. He was not asked if the defendant had ever been to his house before. However, on this occasion the defendant first contacted James Kienholz, Andrew's father, and said he wanted to talk to Andrew in his car. RP at 185, 191-92. James knew they had talked to the Department of Fish and Wildlife about the defendant, so he was concerned about

the defendant showing up at his residence. RP at 194. He was concerned for his son's safety as well as his own. RP at 193. Against his better judgment, he let Andrew go to the defendant's car. RP at 194.

The defendant told Andrew to get in his car. RP at 186. Once Andrew got inside the defendant's vehicle, he was "very, very aggressive." RP at 185. The defendant had a piece of paper with highlights, which was possibly the search warrant affidavit. RP at 185. He slammed the paperwork down on the dashboard and said, "I want you to read that now." RP at 186-87. The defendant continued being aggressive with Andrew and asked him if Andrew reported him to Fish and Wildlife. RP at 185. Andrew said no. The defendant said, "[I]f we had any problems we could go out in the front yard and duke it out right now." RP at 185. The defendant again asked Andrew if he had turned him in. Andrew falsely said he had not, and the defendant told him when he found out who turned him in, that he was going to kill them. RP at 185.

James Kienholz said that his son was visibly shaken after getting out of the defendant's truck. RP at 193.

C. Facts regarding issue number 3 (to-convict jury instruction stating "the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control, to wit: [specific make and model of firearm and serial number]):

The defendant was charged with 26 counts of Unlawful Possession of a Firearm in the First Degree. To differentiate the various firearms, the State used this form for the to-convict instructions:

"(1) That on or about February 4, 2020, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control, to wit: H&R 1871 45-70 cal break action rifle Serial #H260932." CP 60.

"(1) That on or about February 4, 2020, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control, to wit: CVA Hunter Bolt .50 cal. black muzzleloader Serial #61-13-208623-02." CP 59.

"(1) That on or about February 4, 2020, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control, to wit: Rossi 12 gauge break action shotgun Serial #S12SP037702." CP 58.

III. ARGUMENT

A. Review should be granted because the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals.

The State assumes that it will have the opportunity to argue this decision is correct. If not, the State will rely on its brief filed with the Court of Appeals and the Court of Appeals decision.

Briefly, not all firearms are equal. There are legal firearm and illegal firearms. The reason is that some firearms are illegal, under RCW 9.41.190. The reason the legislature made some firearms illegal is that they are more dangerous and easier to conceal than a legal firearm. The defendant wanted to have a shotgun that was easy to conceal. His objective intent was not to have a firearm available at a gun store. His objective intent was

to possess a firearm more dangerous and easier to hide than a normal firearm.

The Court of Appeals decision was correct. Nevertheless, this Court should accept review because there is a conflict between the divisions of the Court of Appeals.

B. This is not a significant question under either the State or Federal Constitutions: A rational jury could reasonably conclude that Andrew Kienholz was a prospective witness in an official proceeding.

The defendant has not explained why the jury's conclusion that he intimidated a witness, namely Andrew Kienholz by attempting to influence his testimony, is a constitutional question. In any event, the Court of Appeals decision is correct on this point.

The defendant's citations to *State v. Savaria,* 82 Wn. App. 832, 919 P.2d 1263 (1996) and to *State v. Brown,* 162 Wn.2d 422, 173 P.3d 245 (2007) are not on point. In *Savaria*, the defendant was charged with intimidation of a witness by the alternative means of "attempting to influence" the witness's

testimony and "inducing the witness to absent herself" prongs in RCW 9A.72.110 (1)(a) and (c). *Id.* at 840. The defendant, in a telephone call the night before the trial, asked the victim to drop the case. When she said she would appear, he became angry, said he would get revenge, and threatened to kill her with a gun. *Id.* at 835. The next day both the victim and Mr. Savaria appeared at the courthouse. *Id.* When he saw the victim talking to a police officer at the courthouse, Mr. Savaria flipped her off and glared at her. *Id.*

The *Savaria* court held there was no issue about the "induce the witness to absent herself" prong. But there was no evidence that the defendant intended to influence the victim's testimony. The context of the defendant's statements in *Savaria* was to get the victim to drop the charges. *Id.* When she said she would appear at trial, the defendant threatened her and said he would get revenge. The victim testified that she was unsure the defendant would kill her but was afraid he might hurt her. *Id.* at 840. There was no effort to try to influence the witness's

testimony; rather, the effort by Mr. Savaria was to have the victim fail to appear for trial.

In contrast, in this case the defendant was angry about the ongoing investigation about his illegal hunting activities and threatened to kill or fight with Andrew Kienholz if he was the source of information about his poaching. At the point that the defendant demanded to see Andrew in his car, slapped the search warrant in front of him and threatened him, the defendant knew there was an ongoing investigation into his illegal hunting. He knew that there was a witness to his activities. He knew it might be Andrew. The defendant's intent was not to literally kill Andrew but tell him that if he continued cooperating with the authorities and if he ever testified at a trial, there would be hell to pay. A jury could reasonably conclude that the threat was an attempt to influence Andrew's eventual testimony.

The statute, RCW 9A.72.110 (1)(a), does not require that the defendant refer to a specific "official proceeding" and *Brown* and *Savaria* do not hold that the defendant is not guilty unless he

refers to a specific "official proceeding." In fact, a person may be convicted of intimidating a witness if the threat relied upon by the prosecution was made before the investigation is pending. *State v. James,* 88 Wn. App. 812, 817, 946 P.2d 1205 (1997).

In *Brown,* the defendant told a third person, Melissa Hill, who overheard the defendant talking about a burglary, that she would "pay" if she spoke to the police. *Brown,* 162 Wn.2d at 426. He was charged under a former version of RCW 9A.72.110 with directing a threat to Ms. Hill, "*a person that the defendant had reason to believe was about to be called as a witness in an official proceeding." Id.* at 429. The *Brown* court held that the threat ("if you go to the police, you will pay") was to prevent Ms. Hill from going to the police, not to influence her testimony if she went to the police. *Id.* at 430. Here, Andrew Kienholz had already gone to the police and the criminal investigation for Illegal Hunting was underway and a jury could conclude that Andrew would be called as a witness on case. The State argued this in closing: "[T]he only reason the defendant went there (to

the Kienholz residence) was to intimidate. To attempt to influence any future cooperation with law enforcement." RP at 406.

C. The format for the to-convict instructions is not a constitutional question and the instructions merely specified what the firearms were in all 26 charges.

The State will rely on its brief to the Court of Appeals and the Court of Appeals decision. "To wit" means "namely," according to Black's Law Dictionary. *To wit*, BLACK'S LAW DICTIONARY (11th ed, 2019). So, the to-convict instruction could be read as:

> (1) That on or about February 4, 2020, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control, ~~to wit~~ namely: H&R 1871 45-70 cal break action rifle Serial #H260932. CP 60.

This interpretation is consistent with caselaw, see *State v. Munoz-Rivera*, 190 Wn. App. 870, 361 P.3d 182 (2015). Exhibits 4-6 and 23-49 identified each firearm by their make, model and serial number. The decision by the Court of Appeals is correct.

Whether "to-wit" is defined as "namely" is not a constitutional issue.

IV. CONCLUSION

Accordingly, the petition for review should be accepted as to the conflict with a published case regarding whether Unlawful Possession of a Firearm and Possession of an Unlawful Firearm are in the same course of criminal conduct. The petition for review should be denied on the other two issues.

This document contains 1,999 words, excluding parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of June, 2024.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Kate Benward Washington Appellate Project 1511 3rd Ave. Ste. 610 Seattle, WA 98101	☒ E-mail service by agreement was made to the following parties: wapofficemail@washapp.org

Signed at Kennewick, Washington on June 17, 2024.

Demetra Murphy
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

June 17, 2024 - 11:18 AM

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