SUPREME COURT No. 103369-9
COA No. 86180-8-I
Cowlitz Co. Superior Court No. 21-1-00456-08

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADAM JUDAH DIGGINS,
Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals' decision does not conflict with another decision of this Court or a published decision of the Court of Appeals. The Respondent respectfully requests this Court deny review of *State of Washington v. Adam Diggins*, Court of Appeals No. 86180-8-I.

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals' decision conflict with a prior decision of this Court or a published decision of the Court of Appeals by finding:

(1) An error in the jury instructions was harmless beyond a reasonable doubt?

(2) Sufficient evidence for the jury to find a "substantial step" toward the crime of murder in the first degree?

(3) Diggins waived his claim of misconduct when he did not object to the prosecutor's passing reference during closing argument?

IV. STATEMENT OF THE CASE

Denise Geer and Adam Diggins had a 15-year relationship that ended between 2008-2009. RP 168-69. In March of 2021, Geer moved into Mark Deszendeffy's home at 246 St. James Place in Longview. RP 167-68. Diggins lived in Happy Valley, Oregon. RP 170-71.

On May 6th, 2021, Geer messaged Diggins thanking him for money he had sent. RP 172, 239-40. Becoming jealous, Diggins asked multiple times if she was still talking to Deszendeffy. RP 240. Geer told Diggins they had not been in a relationship for years, and it was none of his business. RP 240. Diggins complained she had "used" him. RP 241. Geer told Diggins she had not used him and was turning off her phone. RP 242.

Diggins sent Geer a long series of messages without receiving a response, threatening to murder Deszendeffy and commit suicide:

- I might kill myself or Mark and I'm serious as cancer.

- You need to call me right now and clarify before I do something stupid.

- Well today's the day I'm not going to go alone. I am going to take that f*** out with me. The one who destroyed my life and defiled my f***ing beautiful wife. I'm going to kill him and I will never forgive you.

- You better call me and talk some sense into me because I'm going straight there now. Hopefully I'll get killed.

- I'm in Woodland and I'm not stopping. You have no capacity to even imagine my passion and that I would truly die for love.

RP 242-49.

Diggins then sent Geer a photo of a loaded Glock 26 pistol inside his vehicle. RP 182, 212, 245. Diggins messaged Geer: "I know you think it's another bluff, but don't worry. This time

I am for real." RP 245. Diggins continually sent messages berating Geer and threatening Deszendeffy:

> F*** you. I'll never forgive you. I don't think I could ever be with you (sic) f***ing whore ass anyways. I could never forgive you. You disgust me. You're evil. You destroyed our family. This man is going to die because you betrayed what was right[.]

RP 247.

During this timeframe, Geer and Diggins' adult daughter, Madison Diggins, sent messages to Diggins asking him to return home. RP 251. Diggins expressed hatred for Deszendeffy: "I can't stop this. I hate that piece of sh** for everything he took from me, then he doesn't even cherish it, treats her like sh** and still has her[.]" RP 253. Madison told Diggins to return home because his current girlfriend needed the car for work. RP 253. Diggins informed her that he would never return, stating: "She can pick up my car in Longview right on St. James Place." RP 253.

After Madison pleaded with him to return home, Diggins sent her a picture of the Glock 26 pistol inside his car and messaged: "This is bye bye time." RP 254-55. Diggins told Madison: "Once I see him I won't be able to not shoot and that will get me shot." RP 256-57. Madison did not reply. RP 257.

When Geer activated her phone, she observed the messages and panicked. RP 179, 183. She forwarded the messages to Deszendeffy, who was at work, and he called the police. RP 179, 183, 200.

The next morning, on May 7th, Diggins began texting again. RP 292. At 8:39 a.m., he messaged Madison: "Madi get your mom on the phone or this sh** is going to get real crazy! I'm serious!" RP 258. At 8:51 a.m., Diggins texted Geer:

- [W]ake up and call me before I escalate. You need to call me before I start driving back to Longview like I did yesterday. I'll start there and Halfway. I swear to God you need to face this situation you let happen.

- ...You think you can take my money and play my friend and there wouldn't be consequences? Now I know why you're scared of me, because of your lies and actions. You should be.

- I don't know either one of you. You are both wicked people that need to come before God and ask forgiveness. These are not little things. These lies and deceit can cost people their lives.

RP 294-95.

Two hours later at 10:46 a.m., Diggins suggested to Geer that they should "hookup" and sent her a winking emoji. RP 296. Diggins texted Geer:

- So save me a little time and headache do I go to St. James Place or Cornucopia? I guess I try St. James first and have a little chit chat with Mark. I'll be cool, don't worry.

- Okay. I am taking off now to 246 St. James Place, Longview, Washington, 98632-9548. I'll see ya or Mark in 45[.]

- I hope you are not there.

RP 296-97.

Geer did not immediately observe these texts, because her phone battery died. RP 185. Upon observing them, Geer showed

Deszendeffy. RP 202-03. Because Diggins was headed to his home and knew his address, Deszendeffy called the police, equipped himself with two loaded guns, then waited in his front bedroom, where he could observe Diggins arriving in his driveway. RP 203.

Deputy Corey Parker arrived, and Geer activated her phone to show him the messages. RP 185, 269. While Parker was speaking with Deszendeffy, Geer exclaimed, "[O]h, my God, he's here." RP 269. On her phone was a picture sent by Diggins showing he was less than 500 feet from Deszendeffy's house at the corner of St. James Place and West Beacon Hill. RP 269.

Parker rapidly responded to Diggins' location. RP 269. Parker observed Diggins in a vehicle with Oregon license plates. RP 271. Parker parked behind Diggins, activated his overhead lights, approached with his firearm out, and ordered: "Show me your hands." RP 271. Diggins refused to show both hands. RP 271. Diggins put his left hand up, however he dipped down to

the right and was moving his right arm. RP 272. Parker could not see what Diggins was doing with his right hand. RP 272. Diggins refused to show both hands for 10-15 seconds. RP 405. Again, Parker ordered Diggins to show both his hands. RP 272. Diggins delayed before finally raising his right hand. RP 272.

Diggins was ordered out of the vehicle. RP 272. Diggins claimed he had not made any threats. RP 274. When Parker told Diggins he had threatened to kill Deszendeffy with the gun, Diggins admitted, "I did that." RP 274. Diggins admitted to having a firearm and then claimed it was being "legally transported." RP 275. Consistent with having thrown the gun from his person, when asked the gun's location, Diggins said it was either on the passenger floorboard or under the passenger seat. RP 275.

In the center console, Parker located a loaded magazine that had been dropped down into a holster with the bullets up. RP 276. Diggins admitted to removing the magazine from the

gun after arriving at St. James Place. RP 277. Under the front passenger seat, Parker located the Glock 26 handgun. RP 277.

Diggins was charged with attempted murder, felony harassment, cyberstalking, and use of drug paraphernalia. At trial, Diggins testified his purpose in sending the messages was "[t]o shock her and scare her, make her call me." RP 383. He also said he apologized, "given the magnitude of the messages that I sent." RP 385-86. The jury found Diggins guilty of all charges except attempted murder, where it could not reach a unanimous verdict. RP 522-23.

On August 4th, the case again proceeded to trial on attempted murder in the first degree. RP 919, 929. Diggins did not testify. RP 1247. In addition to the above-described evidence, the jury also heard voicemails discovered through a later search warrant of Geer's phone. RP 1208-09, 1212-18. On May 6th, Diggins sent the following voice mails to Geer:

- …I will go kill that bastard, I'm not exaggerating at all. You don't understand how much this means to me…. You don't realize what you're doing. I'm probably going to go up there and probably f***ing shoot that guy in the head.

- …I have to do this. This is what it is, and I don't know if you knew it, but it is. And I absolutely am going to kill him, and I'm absolutely going to kill myself. I am absolutely going to do this. I have a hard time because I don't have the ability to do it myself, but I'm going to be able to kill him, and that will kill me.

RP 1213-14.

He also left voice mails before driving up on May 7th:

- [Y]ou need to face this right now. I'm serious. This is not going to end well….You need to call me because I'm going to be driving all the way there and it's not going to be good once I get there.

- You're going to have to face me at one time or another….You know I'm going to escalate, things worse and worse and worse…..

RP 1215-18.

Using another prisoner's PIN, Diggins called his daughter from the jail and admitted his plan in driving to Longview was to kill Deszendeffy and himself. RP 1222-25; Ex. 38. He said:

"I don't even have a defense[.]" RP 1223. Referring to the messages he had sent Madison, Diggins said the State had a message "from me to you that it's stating that I was going to go do that." RP 1223. Diggins admitted the messages about killing Deszendeffy made things look "really bad" for him. RP 1223.

Diggins read his daughter a statement, claiming he abandoned his murder plan:

> ...The threats always included murder-suicide, or suicide, but never murder alone. I got cold feet...and never exited the car, because I was not ready to die that day because of the only thing I had left, my four-year-old son. That's all I have. That's all I got. I mean, that's all the defense I have that I didn't want to die that day, and I wasn't ready to die that day so I wasn't gonna kill him[.]

RP 1224.

After reading his statement, Diggins continued: "[T]hat's all I got, Maddie. It's a tough sell to the jury man. I was up there, and it's f***ed up, dude....That's the honest truth. I got cold feet. I wasn't gonna go through with it because I didn't want to die. I didn't want to kill myself. I mean, how could I do that? I

mean, I would go to prison forever. There was no ever, any way that that was ever on the table for me." RP 1225. He also said: "I decided not to kill myself, and I didn't go through with hurting him." RP 1225.

In voir dire, Diggins' attorney had suggested an attempted crime could be abandoned and assault was necessary to commit attempted murder. RP 970-75. During closing argument, the prosecutor directed the jury to the proper definition of a substantial step: conduct that strongly indicates a criminal purpose. RP 1271. Rebutting Diggins' attorney's minimization of driving to a home with a gun to kill the resident, the prosecutor stated: "[H]e did an act that strongly indicates a criminal purpose. Just like recently, an individual drove to a Supreme Court Justice's house to shoot him." RP 1272. No objection or motion for a mistrial was made. RP 1272. No further reference to Supreme Court Justice was made. RP 1272. The prosecutor again argued that by driving 60 miles with a gun to shoot

Deszendeffy, Diggins took a substantial step, because his conduct strongly indicated a criminal purpose. RP 1272.

The jury found Diggins guilty of attempted murder in the first degree. RP 1291. The Court of Appeals affirmed. Slip Opinion at 1-2. Diggins now petitions for review.

V. THIS COURT SHOULD DENY REVIEW BECAUSE THE PETITION FAILS TO RAISE GROUNDS UNDER RAP 13.4(B).

Because Diggins' petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Diggins claims the Court of Appeals' decision conflicts with prior decisions of this Court and the Court of Appeals. However, the Court of Appeals applied existing authority in rendering its decision. Therefore, there is no conflict with any prior decision. Diggins does not claim grounds for review under RAP 13.4(b)(3)(4). Because Diggins fails to raise grounds under RAP 13.4(b), review should not be granted.

A. THE COURT OF APPEALS' DECISION THAT AN ERROR IN THE JURY INSTRUCTIONS WAS HARMLESS BEYOND A REASONABLE DOUBT DOES NOT RAISE GROUNDS FOR REVIEW UNDER RAP 13.4(B)(1)(2).

Because there was overwhelming, undisputed evidence of Diggins' subjective intent to instill fear in the victims, the court's finding of harmless error does not conflict with any prior case of this Court or the Court of Appeals. "An erroneous instruction is harmless if, from the record in a given case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). Because there was uncontroverted evidence

of Diggins' subjective intent, the Court of Appeals found an erroneous jury instruction was harmless error. The court applied the constitutional standard for harmless error. Diggins' petition does not cite any authority showing this to be an inappropriate standard or an incorrect application of that standard.

Recently, the United States Supreme Court found that in a threat prosecution, the First Amendment requires "proof that the defendant had some subjective understanding of the threatening nature of his statements." *Counterman v. Colorado*, -- U.S --, 143 S.Ct. 2106, 2111, 216 L.Ed.2d 775 (2023). "The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another." *Id.* at 2111-12.

The issue of a true threat is for the trier of fact. *State v. Johnson*, 156 Wn.2d 355, 365, 127 P.3d 707 (2006). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have

reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). When a jury instruction fails to specifically instruct on a fact that must be proved beyond a reasonable doubt, if there is overwhelming evidence of that fact and it was not at issue in a case, this constitutes harmless error beyond a reasonable doubt. *See State v. Ammlung*, 31 Wn. App. 696, 701, 644 P.2d 717 (1982). "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *State v. Brown*, 147 Wn.2d at 341 (citing *Neder v. United States*, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

In *State v. Calloway*, --- Wn. App. 2d ---, 550 P.3d 77, 87 (2024), the jury was not instructed on the subjective intent requirement set forth in *Counterman*. The standard of review for this omission was harmless error beyond a reasonable doubt. *Id.* at 88. Due to the severity of Calloway's threats, and the jury's disbelief of his claim of not making threats, the jury instruction

error was harmless beyond a reasonable doubt. *Id.* at 89. Under the circumstances, no reasonable jury would have found Calloway did not at least consciously disregard a substantial risk his communications would be viewed as threatening violence. *Id.*

Here, in the first trial, the jury found Diggins guilty of felony harassment and cyberstalking. Because the trial occurred before *Counterman* was decided, the jury was not instructed on the subjective standard. However, from the record it can be shown beyond a reasonable doubt that failing to instruct the jury on the subjective standard did not contribute to the verdict obtained. There was uncontroverted evidence that Diggins subjectively intended his statements to be threatening in nature, exceeding *Counterman's* subjective *mens rea* requirement.

Diggins sent numerous messages telling Geer and Madison he would kill Deszendeffy. He said he was driving to Longview to shoot Deszendeffy and himself. He sent pictures to Geer and Madison of his loaded Glock 26 handgun inside his

vehicle. He expressed his hatred for Deszendeffy, saying he had already worked it out in his mind and had no other choice. He emphasized multiple times how serious he was, and that he was not bluffing. His threats continued for over 20 hours.

As in *Calloway*, no evidence was presented that these statements were in jest. Rather, Diggins testified at trial his purpose in sending the messages was "[t]o shock her and scare her, make her call me." RP 383. He also claimed to have apologized, "given the magnitude of the messages that I sent." RP 385-86. Thus, it was undisputed that Diggins' subjectively intended the threats to shock and frighten.

Had the jury been instructed on a definition of the lesser subjective mental state required by *Counterman*, the verdicts would have remained the same. Because there was overwhelming, undisputed evidence that Diggins subjectively understood the threatening nature of his statements, the omission of a subjective definition of a threat in the jury instructions was harmless beyond a reasonable doubt.

The Court of Appeals reviewed the record and noted by his own testimony Diggins admitted he "actually intended" for the victims to interpret his messages as threatening violence. Slip Opinion at 26. The "evidence was uncontroverted from the defendant's own testimony as to his thought process in making the threats and his understanding of how others would perceive them." Slip Opinion at 26. Thus, the instructional error was harmless. Slip Opinion at 26. Diggins cites no authority that conflicts with this holding; and therefore, fails to raise grounds for review under RAP 13.4(b)(1)(2).

B. THE COURT OF APPEALS' DECISION THAT THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DIGGINS TOOK A SUBSTANTIAL STEP TOWARD THE CRIME OF MURDER IN THE FIRST DEGREE DOES NOT RAISE GROUNDS UNDER RAP 13.4(B)(1)(2).

The court's decision regarding the sufficiency of the evidence does not create a conflict with another case of this Court or the Court of Appeals. "[W]henever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute attempt." *State v. Lewis*, 69 Wn.2d

120, 125, 417 P.2d 618 (1966). Diggins maintains the evidence showed mere preparation to murder Deszendeffy. However, driving over 60 miles to Deszendeffy's home with a loaded gun to shoot him was sufficient evidence of a substantial step.

"When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A substantial step is an act strongly corroborative of the actor's criminal purpose[.]" *State v. Newbern*, 95 Wn. App. 277, 1046, 975 P.2d 1041 (1999). "The question of what constitutes a 'substantial step' under the particular facts of the case is clearly for the trier of fact." *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). "Once a substantial step is taken, and the crime of attempt is accomplished, the crime cannot be abandoned." *Id.* A substantial step "need not be the last act necessary to the consummation of the intended crime[.]" *Lewis*, 69 Wn.2d at 124.

Certain evidence of a substantial step, "if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law[.]" *Workman,* 90 Wn.2d at 451, n.2. Such evidence includes: "Possessing materials to be employed in the commission of the crime at or near the place contemplated for its commission which can serve no lawful purpose under the circumstances." *Id.* "This broad 'substantial step' definition gives police the flexibility to prevent a crime when the defendant's criminal intent becomes apparent." *Newbern*, 95 Wn. App at 1046.

With regard to attempted murder, "the defendant must take a substantial step toward committing the murder, but that step does not necessarily require the defendant to commit an assault[.]" *State v. Boswell*, 185 Wn. App. 321, 340 P.3d 971 (2014) (citing *State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993)). The act of reaching quickly toward a loaded, cocked, concealed gun during traffic stop was sufficient evidence of a substantial step for the attempted murder of a police officer.

See State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Driving to the location where a crime is intended while bringing materials to further that crime has also been found sufficient for a substantial step. *See State v. Canter*, 17 Wn. App. 2d 728, 740, 487 P.3d 916 (2021) (substantial step taken toward sexual contact with a child, by communicating intentions, bringing requested materials, then driving to the child's house).

Here, when Diggins acted in furtherance of the crime of murder, this constituted a substantial step. After announcing his intent to drive to Deszendeffy's home to shoot him with his Glock handgun, Diggins drove over 60 miles to his home with that loaded gun. Thus, he brought the loaded gun to the place the contemplated crime would be committed, and under the circumstances, had no lawful purpose for doing so. Further, he admitted on his jail call his purpose in driving there was to shoot Deszendeffy and himself. These actions were strongly corroborative of his criminal purpose. When all reasonable

inferences are drawn in favor of the State, there was sufficient evidence for the jury to find he took a substantial step.

The Court of Appeals found there was sufficient evidence to support the jury's determination that Diggins took a substantial step toward murder in the first degree. Slip Opinion at 18. The Court of Appeals noted that the evidence of a substantial step was similar in nature to *State v. Wilson*, 158 Wn. App. 305, 316, 242 P.3d 19 (2010), where a defendant emailed a plan to meet a 13-year-old girl in a specific parking lot and pay her $300 for sex acts and was subsequently found in that parking lot with $300. Slip Opinion at 18.

In his petition, Diggins claims two cases are more analogous to the facts of his case than *Wilson*. Neither of these cases are from Washington, but rather California and Indiana. Petition at 21-23. Diggins fails to cite any case of the Washington Court of Appeals or Supreme Court in conflict with the Court of Appeals' decision. Thus, he fails to raise grounds for review under RAP 13.4(b)(1)(2).

C. THE COURT OF APPEALS' DECISION THAT DIGGINS WAIVED HIS CLAIM OF PROSECUTOR MISCONDUCT DOES NOT RAISE GROUNDS UNDER RAP 13.4(B)(1)(2).

The decision that Diggins waived his claim of misconduct when he did not object does not raise grounds for review. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). During closing argument, the prosecutor made a passing reference to a current event of a similar nature as an illustration of a substantial step. Diggins did not object and waived his claim of misconduct.

If a defendant, who failed to object, establishes that misconduct occurred, that defendant must also show: "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v.*

Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

During closing argument, the prosecutor is permitted to respond to defense attacks on the State's case at an earlier stage. *See State v. Mireles*, 16 Wn. App. 641, 482 P.3d 942 (2021). Use of an analogy when arguing an inference from the evidence is not improper. *See State v. Millante*, 80 Wn. App. 237, 251, 908 P.2d 374 (1995). A prosecutor's "remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and

statements[.]" *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.3d 1105 (1995).

Here, the Court of Appeals found it was irrelevant and therefore improper for the prosecutor to reference another unrelated case.[1] Slip Opinion at 28. Because Diggins did not object, the court explained the proper standard of review was whether the statement was so flagrant and ill-intentioned that any resulting prejudice could not have been cured. Slip Opinion at 28. The court applied the Supreme Court's guidance for determining whether comments were flagrant and ill-intentioned, explaining they should be found "in a narrow set of cases where we were concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an

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[1]Other than the prosecutor's isolated comment, no further reference was made regarding the Supreme Court Justice. In his petition, Diggins speculates extensively about the case involving Justice Kavanaugh. None of those claims are in the record.

inflammatory manner." Slip Opinion at 28 (quoting *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 170, 401 P.3d 1142 (2018)).

The Court of Appeals considered *State v. Teas*, 10 Wn. App. 2d 111, 126, 447 P.3d 606 (2019), where in closing argument a prosecutor had compared a defendant's pocketknife to the weapons used by terrorists on September 11, 2001. Slip Opinion at 28. Although improper, the comment was made in the context of explaining the definition of deadly weapon. Slip Opinion at 28. Because the 9/11 attacks were not a "central theme" of the prosecutor's closing argument, the comment was not so flagrant and ill-intentioned that the resulting prejudice could not have been cured if there had been an objection. Slip Opinion at 28. The court explained: "Here, the comment was similarly a passing comment in an attempt to explain the definition of a substantial step and was not referenced again nor made a central theme in closing or rebuttal." Slip Opinion at 28. Accordingly, the comment was not so flagrant and ill-intentioned that it could not be cured. Slip Opinion at 28-29.

Diggins' petition fails to show the Court of Appeals application of existing case law to be in conflict with any case of this Court or published case of the Court of Appeals. He only cites the unpublished opinion in *State v. Ellis*, 19 Wn. App. 2d 1006 (2021), which involved a prosecutor referencing, even after objection, the O.J. Simpson case and introducing negative racial stereotypes into a trial. Nothing about the prosecutor's comment here related to a negative racial stereotype, and unlike *Ellis*, there was no objection. Further, even if there had been a conflict, *Ellis* is unpublished. Because Diggins fails to show the Court of Appeals' decision conflicts with another decision of this Court or a published decision of the Court of Appeals, he fails to raise grounds under RAP 13.4(b)(1)(2).

VI. CONCLUSION

Because the petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

CERTIFICATE OF COMPLIANCE

I certify under RAP 18.17(b) that excluding appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, the word count of this document is 4,898 words, as calculated by the word processing software used.

Respectfully submitted this 14th day of October 2024.

Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I, Jacqueline Renny, do hereby certify that the RESPONSE TO PETITION FOR REVIEW was filed electronically through the Supreme Court Portal to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 14, 2024.

Jacqueline Renny

Jacqueline Renny

COWLITZ COUNTY PROSECUTORS OFFICE

October 14, 2024 - 3:45 PM

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