No. 47876-5-II
Lewis County Superior Court No. 15-1-00008-4

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

RYAN MICHAEL JOHNSON,
Defendant-Appellant.

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

The Honorable Nelson Hunt, Judge

APPELLANT'S OPENING BRIEF

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I.
ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict Johnson of residential burglary.

2. The trial court erred in failing to give lesser included offense instructions.

II.
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the crime of felony harassment was completed before Johnson entered Costi's home and where there was no evidence that he intended to commit further crimes once he was inside, was the evidence insufficient to prove residential burglary?

2. Where there was conflicting evidence about whether Johnson threatened to kill Costi or threatened her with bodily injury, did the trial judge err in failing to instruct the jury on the lesser included offense of misdemeanor harassment?

III.
STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Ryan Johnson was charged with residential burglary and felony harassment. CP 3-8. He proceeded to a jury trial and was convicted as charged. This timely appeal followed.

B. TESTIMONY AT TRIAL

On January 4, 2015, Reba J. Costi, age 80, was at home in Toledo. CP 47-50. At 2:30 a.m., she heard a racket at her door. RP 52. The person outside told Costi that if she did not open the door, "when he got in there he was going to break my fucking neck." RP 53. She then called 911 and that recording was admitted as evidence. RP 54. Her testimony was not clear as to whether she opened the door and Johnson entered or whether he actually broke in. RP 58. Johnson said "uh-oh" as soon as he entered. RP 61. When Johnson realized his mistake, he begged Costi not to call the police. RP 58.

He also told Costi he was an Eagle Scout. RP 61. He said he had just graduated college and was working for "Fish and Game." RP 61-62. Costi left the house and then reentered while Johnson was there. RP 64. She stated she had not been assaulted. RP 64-65.

While she was talking to the 911 operator, Johnson said, "give me the phone." RP 59. Johnson then spoke to the 911 operator. Police officers arrived and arrested Johnson. RP 59-69. They described Johnson as "impaired." RP 93, 111.

Brian Wieser, Johnson's coworker, said that he and Johnson lived at 410 St. Helens Street in Toledo. RP 120-21. On the afternoon of January 3, 2015, he and Johnson went to the Tap House Bar and Grill in Toledo to drink beer and watch football. RP 121. Ian Brauner and Neil Schoenfelder accompanied them.

Id. They began drinking at noon. They drank from noon to midnight. RP 122. Johnson drank an unusually large amount of alcohol. He had both beer and a shot of tequila. RP 124. He became intoxicated and was asked to leave. *Id.* When asked on a scale of 1-10 how drunk Johnson was, Wieser said: "13." RP 126. Wieser tried to walk Johnson home, but Johnson ran off. RP 130.

Similarly, Ian Brauner testified that Johnson was drunk. RP 159. He described Johnson as "sent over a cliff." *Id.* Ryan told one bar patron that he had a daughter who drowned and he began crying. RP 163. But the story was completely untrue. He said Johnson was a completely different person than he knew. RP 168.

Johnson testified that he was a WSU graduate. RP 179. He got a job at the Department of Fish and Wildlife. On January 3, he worked in the morning. RP 182. Then he went down to the St. Helens Tap House to drink beer and watch football. *Id.* He drank the entire evening. RP 184. He did not remember anything after the tequila shot. *Id.* The next thing he remembered was being in custody. RP 185. He denied intending to harm Ms. Costi or "take over Ms. Costi's house." RP 191.

Dr. Mark Whitehill, a forensic psychologist, stated that based upon his testing and examination of Johnson, on January 4, Johnson was "so impaired via intoxication that he was unable to form the requisite mental states of intent and knowledge." RP 231.

C. JURY INSTRUCTIONS

At the close of the evidence, Johnson proposed a burglary instruction that specified that Johnson's "entering or remaining was with intent to commit the crime of harassment or attempted theft." CP 58. Defense counsel pointed out that before trial he had requested a bill of particulars. In the response, the State said these were the two crimes the State believed Johnson intended to commit once he entered Costi's home. RP 265. The State submitted an instruction that did not identify the intended crimes and objected to the specified crimes. *Id.* The trial court declined to give the defense instruction. RP 266.

Johnson also asked for lesser included offense instructions regarding the felony harassment. CP 83-84; RP 281. He argued that there was conflicting evidence on this point. The 911 tape indicated a threat to kill but the in-court testimony from the victim indicated a threat to do bodily harm. RP 280. The trial judge said:

> Well, "I'm going to break your fucking neck" means that's a fatal injury or she's going to be paralyzed for the rest of her life.

RP 280. Despite this recognition, he declined to give the lesser included offense instructions. *Id.*

D. CLOSING ARGUMENT

In closing the State argued that Johnson's statement outside Costi's door, whether it was to break her neck or to kill her, was intended to gain access

to the home. RP 302. She argued the crime that Johnson intended to commit was the "threat." RP 307. In the alternative, she argued that when Johnson asked Costi to give him the phone while she was talking to the 911 operator, Johnson committed a theft. RP 310. The prosecutor told the jury that "it's theft to take somebody's property with the intent to deprive them and to take their property." RP 309-310. She continued:

> So when he demanded her phone, he was taking property away from another person. He was intending to deprive her of the phone so that he could talk to the 911 operator.

RP 310-311. In rebuttal, the prosecutor argued that Johnson was "intending to do whatever he wanted to once he got inside that house, which included whatever criminal acts, you know that probably would come to mind to him. " RP 328.

IV.
ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT TO CONVICT JOHNSON OF BURGLARY

A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3, 22; *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403, *reh'g denied*, 542 U.S. 961, 125 S.Ct. 21, 159 L.Ed.2d 851 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25

L.Ed.2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

With regard to the burglary count, the State was required to prove that "with intent to commit a crime against a person or a property therein," Mr. Johnson "entere[ed] or remain[ed] unlawfully" in the home and assaulted Costi during entry, flight or while in the building. RCW 9A.52.020(1). That intent to commit a crime must be formed before entering Costi's home.

As to whether Johnson's threats made outside the house would support a burglary conviction, this case is closely analogous to two published cases where the appellate courts have found the evidence insufficient evidence of an intent to commit a crime before entering. In *State v. Sandoval*, 123 Wn. App. 1, 3, 94 P.3d 323, 324-25 (2004), the defendant kicked in the front door of a stranger's home. The homeowner confronted Sandoval and demanded, "What are you doing in my house?" Sandoval responded by asking, "Who are you?" Sandoval shoved the homeowner in the chest, knocking him back a few steps. The homeowner punched Mr. Sandoval in the head, took him down to the floor, and

restrained him until police arrived. The Court held that there was no fact, alone or in conjunction with others, from which entering with intent to commit a crime more likely than not could flow.

In *State v. Woods*, 63 Wn. App. 588, 821 P.2d 1235 (1991), the defendant and his friend Jeff kicked in a door at Jeff's mother's home, from which Jeff had been generally denied permission to enter. *Id.* at 589. Despite living elsewhere, Jeff still had possessions in his mother's home. *Id.* at 591-92. The defendant testified they entered the home to get a jacket and evidence arguably demonstrated the two were also looking for bus fare. *Id.* at 589-92. However, the evidence was insufficient to prove intent to commit a crime because Jeff had belongings in his mother's home and it was not clear from the unlawful entry or flight (upon seeing Jeff's mother) that the defendant intended to commit any offense inside. *Id.* at 591-92.

The felony harassment was complete when Johnson gained entry. There was no evidence that, once inside he intended to commit the crime of harassment. He simply used the threat to gain entry. Johnson was clearly in the wrong home. He immediately recognized his error. He was drunk. It was a stranger's home. He did not further assault Ms. Costi. His actions were all intended to extricate himself from his horrible mistake.

Likewise, the prosecutor's argument that Johnson formed intent to commit a theft fails. Theft is defined as "to wrongfully obtain or exert

unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). Under the statute, the word "deprive" is given its common meaning. *State v. Komok*, 113 Wn.2d 810, 814-15, 783 P.2d 1061 (1989). In *Komok*, the Supreme Court noted that the common meaning of "deprive" is "'[t]o take something away from,'" or "'[t]o keep from having or enjoying.'" *Komok*, 113 Wn.2d at 815 n. 4. The common meaning of "deprive" does not include asking someone to hand over the phone so that you can engage in conversation.

Because the evidence regarding residential burglary was insufficient, but the jury was instructed on the lesser included offense (which Johnson conceded), this Court should reverse and direct the superior court to enter a judgment on the lesser included offense. *In re Heidari*, 174 Wn.2d 288, 291, 274 P.3d 366, 368 (2012).

B. THE TRIAL COURT ERRED IN FAILING TO GIVE LESSER INCLUDED OFFENSE INSTRUCTIONS IN REGARD TO THE HARASSMENT CHARGE

A threat to kill, as opposed to a threat of bodily injury, provides the critical distinction in this case between felony harassment and the gross misdemeanor of harassment. Compare RCW 9A.46.020(2)(a) with (2)(b)(ii). Because this is the critical distinction, the threat must state that the defendant seeks to end the victim's life. According to the testimony, Johnson's precise

threat was to "break" the victim's "fucking neck." But there was no evidence from the 911 tape of a threat to kill. The trial judge acknowledged these two statements were different but nonetheless refused to give the lesser included offense instructions. This was error.

In criminal trials, juries are given the option of convicting defendants of lesser included offenses when warranted by the evidence. Giving juries this option is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207, 1208 (2015).

A jury must be allowed to consider a lesser included offense if the evidence, when viewed in the light most favorable to the defendant, raises an inference that the defendant committed the lesser crime instead of the greater crime. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense. *Id.* at 456.

The jury should have been allowed to consider the lesser included charge in this case. Even the trial judge recognized that the evidence raised two possibilities. The first was that Johnson threated to kill Costi. The second was that he only threatened to inflict bodily injury. Thus, there was no legal justification for denying Johnson the opportunity to argue his theory of the case.

V.
CONCLUSION

For the reasons stated above, this Court should reverse the burglary conviction and remand for entry of a judgement on the lesser included offense. Further, the Court should reverse the felony harassment conviction and remand for further proceedings.

DATED this 21st day of December, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email and First Class United States Mail, postage prepaid, one copy of this brief on the following:

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Comments:

Appellant's Opening Brief

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