

No. 47876-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RYAN MICHAEL JOHNSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Supplemental Brief

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I. ISSUES

- A. Did the State present sufficient evidence to sustain both alternative means for Johnson's conviction for Residential Burglary?
- B. If the State did not present sufficient evidence to sustain the conviction for both alternative means for Residential Burglary was Johnson's right to a unanimous jury verdict violated?

II. STATEMENT OF THE CASE

The State provided a factual statement of the case in its response brief filed with this Court. The State's brief responded to two issues, a sufficiency of evidence argument for the Residential Burglary charge and a jury instruction argument regarding the appropriateness of failing to give a lesser included instruction of misdemeanor Harassment.

On June 24, 2016 this Court issued an order requesting supplemental briefing to address two issues:

- 1) Was there sufficient evidence to support both means for committing residential burglary in this case?; and
- 2) If not, was Johnson's right to a unanimous jury verdict violated?

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT JOHNSON COMMITTED RESIDENTIAL BURGLARY BY BOTH OF THE ALTERNATIVE MEANS.

The State presented sufficient evidence to sustain the jury's guilty verdict for Residential Burglary by either of alternative means to commit the crime, entering or remaining within, the residence with the intent to commit a crime. In Johnson's case the State must have proven, beyond a reasonable doubt that he both entered the house with the intent to commit felony harassment and remained in the house with the intent to commit theft. The State met its burden for both, and therefore, this Court should affirm Johnson's conviction.

As argued in the original response brief, there was sufficient evidence, to prove, beyond a reasonable doubt that Johnson was committing the crime of Felony Harassment while he was entering Ms. Costi's home. The evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Johnson necessarily is admitting the truth of the State's evidence when levying a sufficiency of evidence claim. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). The State also

receives the benefit that all reasonable inferences drawn from the evidence admitted is drawn in favor of the State. *Goodman*, 150 Wn.2d at 781. Further, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The State stands by its analysis of the evidence as presented in the response brief. Not only must a threat be communicated to Ms. Costi, she must be placed in reasonable fear that the communicated threat be carried out. RCW 9A.46.010(1)(b). The State acknowledges, the initial verbal portion of the threat to kill occurred while Johnson was outside the residence. RP 53. The act of harassment was not over with the initial verbal threat. The act was ongoing as Johnson told Ms. Costi to open the door or he would break her neck, and entered the house by breaking down the door. RP 53, Ex. 2, page 1. The action of breaking down the door and entering Ms. Costi's house was part of the threat and it is the conduct that made the threat credible and reasonable to Ms. Costi. Johnson entered Ms. Costi's house with the intent to threaten to kill her, which was why he broke down the door. This is sufficient evidence to prove Residential Burglary, entering the residence with the intent to commit the crime of Felony Harassment, beyond a reasonable doubt.

Once inside the house the State proved beyond a reasonable doubt Johnson remained with the intent to commit theft. See RCW 9A.56.020(1)(a). Johnson took Ms. Costi's phone from her while she was trying to speak to the 911 operator. RP 59. Johnson only disputes that he deprived Ms. Costi of her property. Deprive only means to take something away from, there is nothing in the definition that requires it to be a permanent transfer. *State v. Komok*, 113 Wn.2d 810, 815, 783 P.2d 1061 (1989). Ms. Costi was deprived of her property, she was not allowed the use of her phone to speak to the 911 operator once it was in Johnson's possession. It was Johnson's intent to take the phone, he demanded Ms. Costi give him the phone. See RP 59, 66; Ex. 2, page 6. In the light most favorable to the State, with all reasonable inferences drawn in favor of the State, there is sufficient evidence to prove beyond a reasonable doubt that Johnson remained in the residence with the intent to commit the crime of theft.

Therefore, as argued in its response brief, in the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Johnson committed Residential Burglary, by both alternative means, and this Court should confirm his conviction.

B. IF THIS COURT FINDS INSUFFICIENT EVIDENCE WAS PRESENTED TO SUSTAIN THE RESIDENTIAL BURGLARY CONVICTION ON BOTH ALTERNATIVE MEANS, JOHNSON'S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED.

The State maintains sufficient evidence was presented to sustain Johnson's conviction for Residential Burglary on both alternative means. Arguendo, absent sufficient a finding of sufficient evidence for both alternative means of committing Residential Burglary, Johnson's right to a unanimous jury verdict was violated.

A criminal defendant has the right to have a jury unanimously agree on a verdict finding him or her guilty. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (citations omitted). This right applies to the single crime charged not the means in which the crime was carried out. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). If there are alternative means in which the charged crime may have been committed, absent a special interrogatory as to which mean or means the jury unanimously agreed upon, there must be sufficient evidence to support each alternative mean submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994).

If the reviewing court determines one of the alternative means is not supported by sufficient evidence the court will reverse the

conviction. *Ortega-Martinez*, 124 Wn.2d at 708. The case will be remanded back to the trial court and the State may elect to retry the defendant on the remaining alternative means that were not invalidated by the appellate court. *State v. Ramos*, 163 Wn.2d 654, 660-61, 184 P.3d 1256 (2008).

There was no special interrogatory presented to the jury in Johnson's case. See CP. The State did not elect only one of the alternative means. CP 95. Therefore, if this Court finds one of the alternative means was not sufficiently proven beyond a reasonable doubt, this Court should remand the case back to the trial court for retrial on the remaining alternative mean.

IV. CONCLUSION

The State presented sufficient evidence to sustain Johnson's convictions for Residential Burglary on both alternative means. If this Court finds insufficient evidence as to one of the alternative means, this Court should remand Johnson's case back to the trial court for retrial on the remaining alternative mean.

RESPECTFULLY submitted this 7th day of July, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



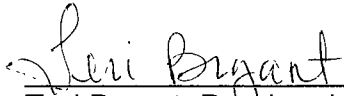
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**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. RYAN MICHAEL JOHNSON, Appellant.	No. 47876-5-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 8, 2016, the appellant was served with a copy of the **Respondent's Supplemental Brief** by email via the COA electronic filing portal to Suzanne Elliott, attorney for appellant, at the following email address: Suzanne-elliott@msn.com.

DATED this 8th day of July, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

July 08, 2016 - 8:42 AM

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