Supreme Court No. 93861-0
Court of Appeals No. 47876-5-II

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

STATE OF WASHINGTON,
Respondent,

v.

RYAN MICHAEL JOHNSON,
Petitioner.

PETITION FOR REVIEW

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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?

IV.
STATEMENT OF THE CASE

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

A. 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 to 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.* Johnson 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.

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 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.

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.

B. COURT OF APPEALS OPINION

In the Court of Appeals, Johnson argued that there was insufficient evidence to support his conviction for residential burglary.[1] He again argued that there was insufficient proof that he intended to commit a crime inside Costi's home.

Two of the judges rejected that argument. However, Judge Maxa disagreed. Slip Opinion at 9-10. He found that there was insufficient evidence that Johnson intended to permanently deprive Costi of her telephone. Thus, he would hold that Johnson was entitled to reversal on the burglary charge as well.

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[1] The Court reversed Johnson's conviction for felony harassment and Johnson does not seek review of that portion of the Court's opinion.

V.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH THE OPINIONS IN *STATE V. SANDOVAL*[2] AND *STATE V. WOODS.*[3] RAP 13.4(B)(2).

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 Johnson entered 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 insufficient evidence of intent to commit a crime before entering. In *Sandoval*, 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

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[2] *State v. Sandoval*, 123 Wn. App. 1, 94 P.3d 323 (2004).

[3] *State v. Woods*, 63 Wn. App. 588, 821 P.2d 1235 (1991).

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*, 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.

The Court of Appeals' opinion makes no mention of *Sandoval* or *Woods*. Instead, the Court said that Johnson's conduct outside could

reasonably be considered by the jury as a "continuation of his threat to kill." But that conclusion directly conflicts with *Sandoval* and *Woods*. Thus, this Court should grant review.

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.

Two of the judges held that a rational jury could have found that Johnson remained inside with an intent to take Costi's phone. In this regard the dissenting position of Judge Maxa is correct. There was simply no evidence in this case that Johnson intended to take Costi's phone from her or that he deprived her of any services. See Slip Opinion at 9-10.

Because the evidence regarding residential burglary was insufficient, but the jury was instructed on the lesser included offense

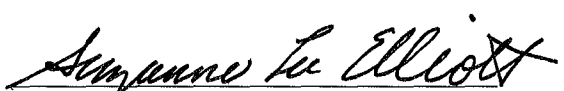
(which Johnson conceded), this Court should reverse and direct the superior court to enter a judgment on the lesser included offense. *In re Heidari*, 174 Wn.2d 288, 291, 274 P.3d 366, 368 (2012).

VI.
CONCLUSION

For these reasons, the Court should accept review and reverse Johnson's conviction for residential burglary.

DATED this 21st day of November, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of this brief on:

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Filed
Washington State
Court of Appeals
Division Two

October 25, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RYAN MICHAEL JOHNSON, Appellant.	No. 47876-5-II UNPUBLISHED OPINION

WORSWICK, J. — Ryan Johnson appeals his convictions for one count each of residential burglary and felony harassment. He argues that the State presented insufficient evidence of his intent to commit a crime within a dwelling, as required for burglary. He also argues that the trial court erred by refusing to give a lesser included offense instruction for the felony harassment charge. We affirm Johnson's conviction for residential burglary because sufficient evidence supports his conviction. We reverse his conviction for felony harassment because Johnson was entitled to a lesser included instruction on misdemeanor harassment, and we remand for a new trial on that charge.

FACTS

Eighty-year-old Reba Costi lived alone. At 2:30 on a January morning, she awoke to the sounds of someone attempting to break into her house through a side door. The would-be intruder yelled at her to "open the f[***]ing door," threatening that if she did not, "when he got in there he was going to break [her] f[***]ing neck." 1 Verbatim Report of Proceedings (VRP) at 53. Scared, while barefoot and in her pajamas, Costi ran outside to call 911.

App. A

While on the phone with the 911 operator, Costi reported that a stranger was breaking in and told the operator "that he is gonna to [sic] come in here and he's gonna kill me." Ex. 2 at 1. Meanwhile, Johnson succeeded in forcibly entering the house, damaging the doorframe.

Although Costi was afraid that the intruder would hurt her, she felt too cold to stay outside and decided to reenter the house. This brought her within arm's reach of the intruder, Ryan Johnson. Johnson was extremely drunk. Costi told him to leave her house, and he refused. He demanded: "Give me the phone," and Costi complied out of fear that Johnson would "get maybe violent." 1 VRP at 59. After taking the phone away from Costi, Johnson began to speak with the 911 operator. While Johnson continued to talk to the 911 operator, police arrived and arrested him.

The State charged Johnson with one count of residential burglary[1] with the aggravating factor that the victim was present during the burglary.[2] It further charged him with one count of felony harassment for threatening to kill Costi.[3] In a bill of particulars, the State specified that it believed Johnson committed burglary either by entering unlawfully with the intent to commit felony harassment in Costi's residence or by remaining unlawfully with the intent to commit theft.

At trial, witnesses testified to the above facts. Johnson proposed a special verdict form and corresponding instruction directing the jury to find him guilty of the lesser included offense

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[1] RCW 9A.52.025(1).

[2] RCW 9.94A.535(3) (u).

[3] RCW 9A.46.020(1)(a)(i), (2)(b).

of misdemeanor harassment if it found him not guilty of felony harassment. The trial court declined to instruct the jury on the lesser included offense of misdemeanor harassment despite recognizing that "'I'm gonna break your f[***]ing neck' means that's a fatal injury *or* she's going to be paralyzed for the rest of her life." 3 VRP at 280 (emphasis added). Johnson did not request, and the trial court did not give, an instruction that the jury must be unanimous on the crime Johnson intended to commit when he entered or remained in Costi's residence.

The jury convicted Johnson of residential burglary and felony harassment. It also found the aggravating circumstance that Costi was present during the burglary. Johnson appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Johnson argues that insufficient evidence supports his conviction for residential burglary. We disagree.

A. *Standard of Review*

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). An evidence sufficiency challenge "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the jury's assessment of conflicting testimony, witness credibility, and evidence weight. *State v. Carver*, 113 Wn.2d 591, 604, 789 P.2d 306(1989).

B. *Unanimity Instruction*

As an initial matter, Johnson argues, and the State concedes, that because the trial court did not give a unanimity instruction, sufficient evidence must support both of the State's burglary theories. Residential burglary is an alternative means crime; accordingly, the jury must unanimously express the means by which the defendant committed burglary unless sufficient evidence supports both alternative means. *State v. Allen*, 127 Wn. App. 125, 130, 110 P.3d 849 (2005). Thus, we examine both alternative means for sufficient evidence.

C. *Evidence of Intent To Commit a Crime Inside*

To convict Johnson of residential burglary as charged here, the State had to prove beyond a reasonable doubt that he (1) entered or remained unlawfully in a dwelling without authorization and (2) intended to commit a crime within that dwelling. *State v. Grimes*, 92 Wn. App. 973, 977-78, 966 P.2d 394 (1998) (citing RCW 9A.52.025(1)). "The intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises." *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). The State presented two theories of Johnson's criminal intent: that he (1) entered unlawfully with intent to commit felony harassment or (2) remained unlawfully with intent to commit theft of Costi's phone. We examine these theories in turn, holding that sufficient evidence supports both.

1. *Sufficient Evidence of Intent To Commit Felony Harassment Inside*

Felony harassment requires proof (1) that the defendant threatened to kill a person and (2) that, by the defendant's words or conduct, the person was placed in reasonable fear that the threat to kill him would be carried out. RCW 9A.46.020(2)(b). Johnson argues that there is insufficient evidence of his intent to commit felony harassment while he entered the dwelling

because he had already completed the felony harassment by threatening Costi outside the door. But after making the verbal threat to break Costi's neck unless she opened the door, Johnson forcibly broke through Costi's door to enter her dwelling. This conduct, occurring just moments after Johnson made the verbal threat, could reasonably be interpreted as a continuation of his threat to kill her.

Taking all inferences in the light most favorable to the State, a rational jury could conclude that Johnson continued to harass Costi by breaking into her dwelling shortly after threatening to break her neck unless she let him in. Therefore, sufficient evidence exists that Johnson entered unlawfully with the intent to commit felony harassment by further putting Costi in reasonable fear that he would kill her.

2. *Sufficient Evidence of Intent To Commit Theft Inside*

Theft occurs when a person "wrongfully obtain[s] or exert[s] 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). The intent to "permanently" deprive the victim of the stolen property is not an element of theft. *State v. Komok*, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989).

Viewing all evidence here in the light most favorable to the State, a rational jury could have found that Johnson remained unlawfully in Costi's residence with the intent to commit theft of her phone. After she told him to leave, he refused to do so and instead demanded she give him her phone. She complied out of fear that he would hurt her. Then, he talked on the phone with the 911 operator, and while he did so, Costi could not use the phone. This evidence supports a finding that Johnson wrongfully obtained Costi's phone with the intent to deprive her

of it. *See Komok*, 113 Wn.2d at 816 n.4. Thus, sufficient evidence supports this theory of burglary.

II. LESSER INCLUDED OFFENSE INSTRUCTION

Johnson argues that the trial court erred by refusing to give his requested instruction on the lesser included offense of misdemeanor harassment. We agree.

A. *Standard of Review*

Where the evidence supports it, both the State and the defendant have a statutory right to present an instruction to the jury on lesser included offenses. *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). If the trial court fails to give a lesser included instruction when the defendant is entitled to one, it commits reversible error. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005). We apply the *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), test to determine whether a defendant is entitled to a lesser included offense instruction. *State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004).

A defendant is entitled to a lesser included offense instruction if the two prongs of the *Workman* test are met. *Workman*, 90 Wn.2d at 447. First, under the *Workman* test's legal prong, each element of the lesser included offense must be a necessary element of the charged offense. 90 Wn.2d at 447-48. Second, to meet the *Workman* test's factual prong, evidence presented in a case "must raise an inference that *only* the lesser included[] . . . offense was committed to the exclusion of the charged offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). When analyzing the factual prong, we view the evidence that purports to support a requested instruction in the light most favorable to the party who requested the instruction at trial. 141 Wn.2d at 455-56.

The parties agree that *Workman*'s legal prong is met here. Where only the factual prong is in dispute, we review the trial court's determination for an abuse of discretion. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

To determine whether the factual prong of the *Workman* test is satisfied, we determine whether the evidence "'affirmatively establish[es] the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.'" *Porter*, 150 Wn.2d at 737 (quoting *Fernandez-Medina*, 141 Wn.2d at 456). If the evidence would permit a jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense, a lesser included instruction should be given. *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997).

B. *Misdemeanor Harassment Instruction*

A person commits misdemeanor harassment if, without lawful authority, he or she knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1). The distinction between felony and misdemeanor harassment lies in the type of threat: "[t]he offense of harassment is elevated from a misdemeanor to a felony when the threat is a threat to kill." *State v. Mills*, 154 Wn.2d 1, 12, 109 P.3d 415 (2005).

At trial, Costi testified that Johnson threatened to break her neck before forcibly entering her home. Costi told the 911 operator that she believed Johnson would kill her, and she testified

at trial that she thought Johnson might hurt her. Johnson later requested an instruction on the lesser included offense of misdemeanor harassment. The trial court denied Johnson's requested instruction despite stating, "'I'm gonna break your f[***]ing neck' means that's a fatal injury or she's going to be paralyzed for the rest of her life." 3 VRP at 280.

The evidence presented at trial, viewed in a light most favorable to Johnson, raises the inference that Johnson committed only misdemeanor harassment. As the trial court recognized, the threat to break another's neck is not necessarily a threat to kill. Rather, the jury could infer from these facts that Johnson threatened only to injure Costi. Therefore, the trial court abused its discretion by not instructing the jury on the lesser included offense.

We affirm Johnson's conviction for residential burglary but reverse his conviction for felony harassment and remand for a new trial on that charge.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

I concur:

Melnick, J.

MAXA, A.C.J. (dissenting in part) – I agree that the trial court erred in failing to give a lesser included instruction on misdemeanor harassment and therefore that Ryan Johnson's felony harassment conviction must be reversed. I also agree that sufficient evidence existed to support Johnson's residential burglary conviction based on his intent to commit harassment in Reba Costi's residence. However, I disagree that there was sufficient evidence to support the residential burglary conviction based on Johnson's intent to commit theft of Costi's telephone.

RCW 9A.56.020(1) provides that theft includes the unauthorized control over the property of another. Johnson demanded that Costi give him her telephone. But there is no evidence that Johnson intended to *take* the phone. His only intent was to *use* the phone. Johnson wanted to – and did – talk to the 911 operator who was already on the line. Under the circumstances here, I do not believe that Johnson's use of Costi's telephone to talk with the 911 operator constituted a theft of that telephone.

RCW 9A.56.020(1) provides that theft also includes the unauthorized control over the "services" of another. In certain situations, the unauthorized use of a telephone might constitute the theft of services. *See State v. Brunson*, 76 Wn. App. 24, 31, 877 P.2d 1289 (1994) (suggesting that an unpermitted use of the telephone would amount to a theft of services). But here, Johnson did not use the phone to initiate a call. Costi was already talking on the phone. He simply wanted to join the conversation. Under the circumstances here, I do not believe that Johnson's use of Costi's telephone to join a conversation with the 911 operator already on the line constituted a theft of services.

I would reverse Johnson's residential burglary conviction because the evidence does not support one of the alternative means of the crime – that Johnson entered or remained in Costi's residence with the intent to commit theft of her telephone.

Maxa, A.C.J.

MAXA, A.C.J.

SUZANNE LEE ELLIOTT LAW OFFICE

November 21, 2016 - 4:08 PM

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