

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-Respondent,

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 SUPPLEMENTAL BRIEF

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I.
SUPPLEMENTAL ARGUMENT

A. IF THE EVIDENCE WAS INSUFFICIENT TO CONVICT JOHNSON OF ENTERING THE HOUSE TO COMMIT FELONY HARASSMENT, OR REMAINING IN THE HOUSE TO COMMIT A THEFT, THIS COURT MUST REVERSE JOHNSON'S BURGLARY CONVICTION

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).

In his opening brief, Johnson argued that the evidence was insufficient under either of the State's theories regarding the burglary. Johnson's threats made outside the house would not support the burglary

conviction. The State never argued that he entered Costi's house to commit the crime of felony harassment. Moreover, if Johnson committed that crime, it was completed before entry.

Likewise, any argument that Johnson remained in the house with the intent to commit theft by taking Costi's phone also fails. Johnson did not remain in the house to commit a theft because he never formed intent to permanently deprive Costi of her phone.

If there is insufficient evidence of both means, double jeopardy bars retrial. Johnson has conceded, however, that this Court could remand for a directed verdict on the lesser included offense of criminal trespass.

To the extent, this Court might conclude Johnson is only partially correct and that in this case one of these means is not supported by substantial evidence. This implicates Johnson's right to a unanimous jury. As the order entered on June 24, 2016, correctly notes, residential burglary is an alternative means crime because it can be committed by entering unlawfully with intent to commit a crime or remaining unlawfully with intent to commit a crime. RCW 9A.52.030(1); *State v. Allen*, 127 Wn. App. 125, 131, 110 P.3d 849 (2005).

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the

evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because the appellate courts infer that the jury rested its decision on a unanimous finding as to the means. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231, 234-35 (1994). On the other hand, if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by one of the means submitted to the jury, the conviction must be reversed. *Id.* That is because this Court cannot be certain that all 12 jurors agreed on the means that was supported by sufficient evidence.

If this Court reverses on this basis, it appears the remedy is different. Where this Court cannot be certain that the jury relied solely on the alternative for which there was sufficient evidence, the remedy is reversal and remand for a new trial. *Allen*, 127 Wn. App. at 137.

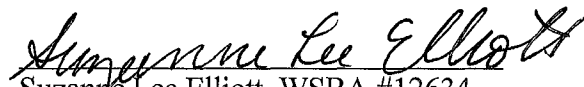
II. CONCLUSION

Johnson continues to maintain that there is insufficient evidence for either alternative means and this Court should reverse the burglary conviction and remand for entry of a judgment on the lesser included

offense. If there is insufficient evidence for only one means, however, the matter should be reversed and remanded for a new trial.

DATED this 7th day of July, 2016.

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 Supplemental Brief

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