

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 REPLY BRIEF

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I.
REPLY ARGUMENTS

A. THIS CASE IS INDISTINGUISHABLE FROM *STATE V. SANDOVAL*
AND *STATE V. WOODS*

The State fails to demonstrate that this case is distinguishable from the two published cases where the appellate courts have found insufficient evidence of 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 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.

Here, 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.

B. NO REASONABLE JUROR WOULD FIND THAT JOHNSON
"DEPRIVED" COSTI OF HER PHONE

The State agrees that in *State v. Komok*, 113 Wn.2d 810, 814-15, 783 P.2d 1061 (1989), 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. While proof of intent to permanently deprive is not necessary, the duration and circumstances of the "taking" still matter. Thus, in context of taking a motion vehicle without permission as opposed to theft, the duration of the possession matters. *State v. Walker*, 75 Wn. App. 101, 107-08, 879 P.2d 957, 960 (1994), *review denied*, 125 Wn.2d 1015, 890 P.2d 20 (1995). The same is true here. While Johnson

may have taken the phone from Costi, the circumstances clearly do not support a finding that he intended to criminally deprive her of her phone.

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).

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

When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. *See State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994). The evidence must raise an *inference* that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150, 1154 (2000) (emphasis added). The Court said:

We believe that the jury's ability to separate the wheat from the chaff deserves more deference than was afforded by the courts below, and we are loathe to allow expansion of the trial judge's authority into the fact-finding province of the jury. To avoid this courtroom hegemony, we approve of the approach . . . to the effect that, when substantial evidence in the record supports a rational inference that the defendant committed only the lesser

included or inferior degree offense to the exclusion of the greater offense, the factual component of the test for entitlement to an inferior degree offense instruction is satisfied.

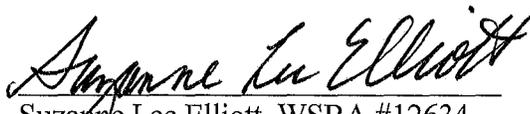
In this case the trial judge admitted that there was substantial evidence in the record to support the giving of a lesser included offense instruction. But the judge simply decided not to do what the law required. Moreover, accepting the State's argument would trivialize the jury's function and permit trial judges to improperly decide factual issues.

II. CONCLUSION

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

DATED this 13th day of April, 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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