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

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Washington Statutes

Constitutional Provisions

Other Rules or Authorities

I. ISSUES

A. Did the State present insufficient evidence to sustain Johnson's conviction for Residential Burglary?

B. Did the trial court err when it refused to give Johnson's proposed jury instruction for the lesser included offense of gross misdemeanor Harassment?

II. STATEMENT OF THE CASE

On January 4, 2015, at approximately 2:30 a.m., 80 year old Reba Costi was jostled awake to the sound of the barking of her little dog. RP[1] 47, 51-52. Ms. Costi heard pounding on her door. RP 51. Ms. Costi lives alone in Toledo, Washington, with her little dog, Brutus. RP 48, 50. Ms. Costi went out to the living room and the person on the other side of the door told her to "open the fucking door" or he was going to break Ms. Costi's neck. RP 53. Ms. Costi was very scared and believed the man would do what he was threatening to do. RP 53.

Ms. Costi called 911. Ex. 2.[2] The 911 operator asked Ms. Costi if her door was locked. Ms. Costi replied, "Yes, but he's breaking it down. He's coming through the front door and he told me that he is gonna come in here and he's gonna kill me. I don't know who he is." Ex. 2, page 1. The man, later identified as the

[1] The State will cite to the transcript of the jury trial, which is in consecutive paginated volumes as RP.

[2] The State will be filing a supplemental designation of Clerk's papers.

appellant, Ryan Johnson, continued to break down the door, eventually gaining access into Ms. Costi's house. RP 55-57; Ex. 2, page 2.

Ms. Costi exited the house, and stayed on the phone with the 911 operator as she stood there outside cold, in her pajamas and bare feet. RP 57; Ex. 2, pages 2-8. Ms. Costi eventually went back into the house and had an exchange with Johnson. RP 58. Ms. Costi was afraid but told Johnson to get out of her house. RP 58. Johnson told Ms. Costi to call the police back so they would not come. RP 58. Johnson then told Ms. Costi how he had a job, had gone to school and learned things. RP 58.

Johnson next demanded Ms. Costi give the phone to him, which she initially refused. RP 59; Ex. 2, page 6. Ms. Costi eventually gave Johnson the phone because she did not want him to get violent with her. RP 59. Johnson took the phone from Ms. Costi and began speaking with the 911 operator. RP 59; Ex. 2, page 6-7.

Johnson told the 911 operator, "This is the fucking dude that took charge of this trailer park." Ex. 2, page 7. "I'm at the trailer park, where this nice lady called you." *Id*. Johnson then told the 911 operator that there are two other people with him and the "nice

lady." *Id*. Johnson told the operator he did not live at the residence. *Id*.

The police arrived on the scene and had to force entry into the house because Johnson was holding the door shut. RP 71. Once inside the residence Toledo Police Officer Patrick ordered Johnson to the ground. RP 72. Johnson resisted and had to be physically taken to the ground and handcuffed. RP 72.

Johnson was originally charged with Residential Burglary. CP 1. The State later amended Johnson's charges to include one count of Residential Burglary and one count of Harassment – Threats to Kill. CP 6-7. Johnson elected to have his case tried to a jury. *See* RP. At trial Johnson's friends, Brian Wieser and Ian Brauner, who were also Johnson's roommates, explained that the men had been out with Johnson and another roommate drinking at a local bar all day. RP 120-21, 121-24, 151-54. The men both testified that Johnson drank to the point where he appeared intoxicated and was acting out of character. RP 124, 126, 130-31,159, 167. Johnson's friends had to physically remove him from the bar because he got in a bit of trouble and the people at the bar wanted him removed from the bar. RP 124-25.

After leaving the bar the men continued to struggle with Johnson and there was an altercation in front of the police station in downtown Toledo. RP 128-29. Officer Patrick came outside the police station to see what the commotion was. RP 85. Johnson went running off through a field. RP 86. Officer Patrick inquired of the other two men, Mr. Wieser and Mr. Brauner, what was going on and they explained how they were trying to get Johnson home from the bar. RP 87-88.

Johnson testified on his own behalf. RP 178. Johnson explained that they drank beers while watching the NFL playoff games. RP 181-83. Johnson said he is not a big drinker and felt intoxicated. RP 184. Johnson added that he felt his level of intoxication was higher after he consumed a shot of tequila. RP 184. According to Johnson, after consuming the tequila shot, the next thing he remembered was being handcuffed in the back of the police car. RP 185.

Johnson called Dr. Mark Bennet, a licensed clinical psychologist, to offer an expert opinion regarding his mental state at the time of this incident. RP 203-34. Dr. Bennet reviewed some of the materials, but acknowledged not all of them prior to making his conclusion. RP 239. According to Dr. Bennet, Johnson was so

intoxicated he could not form the requisite mental state to commit either Harassment or Residential Burglary. RP 258.

The jury convicted Johnson of both counts. CP 112-13. In addition, the jury found that the burglary was committed while the victim was present in the residence. CP 114. Johnson was sentenced to nine months in jail for Count I and three months for Count II, to run concurrently. CP 118. Johnson timely appeals his convictions. CP 126-51.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT JOHNSON COMMITTED RESIDENTIAL BURGLARY.

Johnson argues the State did not present sufficient evidence to sustain the jury's verdict of guilty in regards to Count I: Residential Burglary. Brief of Appellant. The State presented sufficient evidence to sustain the jury's guilty verdict for Residential Burglary.

1. Standard Of Review.

Sufficiency of 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).

2. The State Is Required To Prove Each Element Beyond A Reasonable Doubt And The State Did Such, Therefore, Presenting Sufficient Evidence To Sustain The Jury's Verdict For Residential Burglary.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221,

616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Johnson of Residential Burglary the State was required to prove, beyond a reasonable doubt, that Johnson, on or about January 4, 2015, with intent to commit a crime against a person or property therein, entered or remained unlawfully in the dwelling of another. RCW 9A.52.025(1); CP 6. Johnson argues that there was insufficient to show that once he entered the residence that he intended to commit a crime against person or property therein. That he was drunk, he immediately recognized his error, did not further assault Ms. Costi and the taking of her phone did not amount to theft. Brief of Appellant 7-8.

In a burglary charge the intent required is the intent to commit **any** crime inside the premises that are burglarized. *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). "The intent to

commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." *State v. Woods*, 63 Wn. App. 588, 821 P.2d 1235 (1991), *citing State v. Bergeron, supra at 4*; *See also* RCW 9A.52.040. The evidence of intent may only be inferred from unequivocal evidence. *Bergeron*, 105 Wn.2d at 20.

Johnson equates his case with that of *State v. Woods*, and *State v. Sandoval*, 123 Wn. App. 1, 94 P.3d 323 (2004). The facts and circumstances in both cases are distinct from Johnson's. In *Sandoval*, it is true Sandoval kicked in the front door of a stranger's home after consuming too much alcohol. *Sandoval,* 123 Wn. App. at 2. Sandoval was confronted by the home owner who asked Sandoval what he was doing in the home owner's house, to which Sandoval replied, "Who are you?" *Id.* Then there was a scuffle between Sandoval and the homeowner. *Id.* The Court of Appeals found insufficient evidence of Sandoval's intent to enter or remain with the intent to commit a crime, as he did not assault the homeowner until confronted, he was not in a hurry to leave and did not attempt to take any property. *Id.* at 4-7.

In *Woods* the defendant and his friend, Jeff, who was the 15 year old son of the homeowner, kicked in the door of a residence.

Woods, 63 Wn. App. at 589 Jeff had his permission to enter the residence restricted to when his mother was present, but Jeff still had belongings inside the residence. *Id.* The testimony was that the boys went to the residence to get Jeff's jacket, so while their entry was not appropriate, there was no intent to commit a crime therein. *Id.* at 6-7.

In the present case, Johnson beat on the door of Ms. Costi and when confronted by her from the other side of the closed door, told Ms. Costi if she did not open the door he would break her fucking neck. Then when Ms. Costi refused to open the door, Johnson broke it down.

Part of the crime of Harassment requires a threat. In this case, a Threat to Kill. The person communicating the threat must, "by words or conduct places the person threatened in **reasonable fear** that the threat would be carried out." RCW 9A.46.010(1)(b). Johnson was still committing the crime of Harassment – Threat to Kill when he broke down the door and entered into Ms. Costi's home. Just because he said the words; that he would break her fucking neck on the other side of the door, does not mean the entire crime was completed. It is the act of actually breaking into her home and coming into the house and entering into a dwelling and

confronting Ms. Costi satisfies an element of Harassment – Threat to Kill. His conduct placed Ms. Costi in fear that he would actually carry out his threat, which was if she did not open the door for him, he would come in and kill her. The completion of the crime of Harassment – Threat to Kill was inside the dwelling.

In regards to the theft, contrary to Johnson's argument, the facts are clear, under the common definition of "deprive" Johnson did deprive Ms. Costi of her phone when he demanded it from her, she gave it to him out of fear of harm, and he spoke to the 911 operator. To commit theft, Johnson must "wrongfully obtain or exert unauthorized control over property or services of another or the value thereof, with intent to deprive him or her of such property of services." RCW 9A.56.020(1)(a). Johnson does not dispute that he did not have authorization to take the phone from Ms. Costi. Brief of Appellant 7-8; See RP 59, 66; Ex. 2. Johnson's sole dispute with the theory that he committed a theft is that he deprived Ms. Costi of her property, her phone.

In *State v. Komok*, the Washington State Supreme Court noted that deprive is not defined and thereby given its common meaning. *State v. Komok*, 113 Wn.2d 810, 814-15, 783, 783 P.2d 1061 (1989). In a footnote the Supreme Court defines deprive:

> *See Webster's II New Riverside University Dictionary* which defines "deprive" as: "1. To take something away from. 2. To keep from having or enjoying." *Webster's II New Riverside University Dictionary* 365 (1984). *See also* Black's Law Dictionary, which in simple terms merely defines "deprive" as "[t]o take." Black's Law Dictionary 529 (4th ed. 1968).

Komok, 113 Wn.2d at 815. Johnson took the phone away from Ms. Costi. This meets the definition of deprive, even if it is temporary. This is sufficient for Johnson to commit the crime of theft of Ms. Johnson's phone.

In the light most favorable to the State, the State sufficiently proved, beyond a reasonable doubt, that Johnson committed Residential Burglary and this Court should confirm his conviction.

B. JOHNSON WAS NOT ENTITLED TO A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF GROSS MISDEMEANOR HARASSMENT.

Johnson asserts that the trial court erred when it refused to give his proposed jury instruction for the inferior degree offense of gross misdemeanor Harassment. Brief of Appellant 8-9. Johnson argues the trial court erred when it refused to give the lesser Harassment instruction when there was evidence of merely threatening bodily harm. Brief of Appellant 8-9. The State respectfully disagrees with Johnson's interpretation of the evidence. The trial court did not err because the evidence does not support

the inference that Johnson only committed the gross misdemeanor Harassment, threatening bodily harm, to the exclusion of the charged crime of Harassment – Threats to Kill.

1. Standard Of Review.

This Court reviews refusals to give lesser or inferior offense instructions based upon the factual inquiry prong under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotations and citation omitted).

2. Johnson Was Not Entitled To Have The Trial Court Instruct On His Proposed Lesser Included Jury Instruction For Gross Misdemeanor Harassment.

Johnson requested the trial court give a lesser included instruction of gross misdemeanor Harassment. CP 80, citing WPIC 36.06; CP 81, citing WPIC 36.07. Johnson argued the evidence supported he committed only lesser offense by threatening bodily

harm. RP 280. The trial court disagreed and refused to give the instructions. RP 280-81.

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense or an inferior degree offense. RCW 10.61.003; RCW 10.61.006; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). This right is established by statute and case but it is not absolute. *Gamble,* 154 Wn.2d at 462-63. The party seeking the inclusion of an instruction on a lesser included or inferior degree offense must satisfy a factual and legal inquiry by the trial court regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

The analysis regarding whether a trial court properly denied a party's request to include a jury instruction for a lesser included offense or an inferior degree offense is broken into two inquiries, one legal and one factual. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).The analysis whether an offense is an inferior charged offense as applied to the law is:

> (1) The statutes for both the charged offense and proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense…

Fernandez-Medina, 141 Wn.2d at 454 (citations and internal quotations omitted). When dealing with a crime such as Harassment – Threat to Kill, which is a class C felony, it is clear that the gross misdemeanor of Harassment, where a person threatens bodily injury, meets the legal prong of the analysis for an inferior charged offense, therefore the only necessary analysis is factual. RCW 9A.46.020(2)(a); RCW 9A.46.020(2)(b)(ii); *Fernandez-Medina*, 141 Wn.2d at 454-55.

The factual prong of the analysis for an inferior degree offense requires, "there is evidence that the defendant committed **only** the inferior offense." *Id.* at 454 (emphasis added). This necessitates that the inference must be that inferior or lesser offense was the only crime committed to the exclusion of the crime charged by the State. *Fernandez-Medina*, 141 Wn.2d at 455. This standard is more particularized than the factual showing required for other jury instructions. *Id.*

The reviewing court evaluates the sufficiency of the evidence in support of the lessor included or inferior degree offense in the light most favorable to the party that requested the jury instruction. *Id.* at 455-56. The evidence is not sufficient if it simply shows the jury may disbelieve the State's evidence that points towards guilty.

Id. at 456. "The evidence must firmly establish the defendant's theory of the case." *Id.* If the trial court errs by failing to give a properly requested lesser or inferior included offense instruction, such an error is never harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The question in this case is simple, could Johnson's statement, which he told Ms. Costi that he was going to break her fucking neck be consistent with only threatening to commit bodily harm against Ms. Costi? RP 53. The State does acknowledge that the trial court did state that breaking a neck could mean to paralyze. RP 280. In common language, threatening to "break a person's neck" does not mean "I am threatening to do you bodily harm by paralyzing you for life." Further, in these circumstances, where Johnson is beating on Ms. Costi's door, in the early morning hours, and tells her, "to open the fucking door, and if I didn't open the fucking door, when he got in there he was going to break my fucking neck." See RP 53.That is clearly an expression of a threat to kill. Not an expression of a threat to commit bodily harm, taken in the light most favorable to Johnson, who proposed the instruction.

The trial court did not abuse its discretion when it refused to give Johnson's proposed instruction. The trial court's decision is not

based on manifestly unreasonable or untenable grounds. *C.J.,* 148 Wn.2d at 701. Another judge would have reached the same conclusion that a threat to "break my fucking neck" coupled with breaking a door down to get at inside, presumably at the time to get at the person inside, is a threat to kill and not a threat to commit bodily harm. This Court should affirm the trial court's ruling and Johnson's convictions.

IV. CONCLUSION

The State presented sufficient evidence to sustain Johnson's convictions for Residential Burglary. The trial court did not err when it refused to give Johnson's proposed jury instruction for the lesser included offense of misdemeanor Harassment. This Court should affirm Johnson's convictions.

RESPECTFULLY submitted this 15th day of March, 2016.

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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

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 March 15, 2016, the appellant was served with a copy of the **Respondent's 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 15th day of March, 2016, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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