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NO. 67649-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
DAVID COPELAND,
Appellant.

2012 JUL -3 AM 10:15
COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE LEROY MCCULLOUGH

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An instruction on a lesser included offense should be given if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. A person is guilty of misdemeanor harassment if the person knowingly threatens to cause bodily injury to the person threatened, and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. A person is guilty of felony harassment if the person harasses a person by threatening to kill the person threatened. Copeland was charged with felony harassment after he strangled the victim in their home, returned a short time later and kicked through a dead-bolted door, and then ran toward the victim in a rage threatening her. Did the trial court properly exercise its discretion by granting the State's request to instruct the jury on the lesser included offense of misdemeanor harassment?

2. A trial court should only grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. Only errors affecting the outcome of a trial will be deemed prejudicial. The trial court granted a pretrial motion excluding evidence of Copeland's

incarceration prior to the charged offense of felony harassment. However, the court clarified that the State could “find a way to say he was living out of the home or away from the home.” During the trial, the victim’s seven-year-old daughter inadvertently referred to a time when the defendant “came back from jail.” No other reference was made to Copeland’s incarceration. Did the trial court properly exercise its discretion by denying Copeland’s motion for a mistrial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

David Copeland (“Copeland”) was charged by Information in King County Superior Court with assault in the second degree – domestic violence and felony harassment – domestic violence. CP 11-13. At the first trial, the jury acquitted Copeland of assault in the second degree; however, the jury could not reach a unanimous verdict on felony harassment. CP 36, 41. At the second trial, the jury acquitted Copeland of assault in the second degree and felony harassment but found him guilty of the lesser included offense of misdemeanor harassment. CP 94, 95.

2. SUBSTANTIVE FACTS

Shawna McCormack (McCormack) started dating Copeland in 2007. 3RP 119. McCormack described the relationship as being "really good" at first, and Copeland treated her "like a princess." 3RP 122-23.

However, over the next few years the relationship was marred by several incidents of domestic violence.¹ 3RP 152-60. In 2008, Copeland slammed McCormack around in the bathroom and grabbed her by the throat. 3RP 153-54. In 2009, Copeland banged McCormack's head against the dashboard of his Suburban and kept hitting her all over. 3RP 156. Afterward, McCormack felt like she had "been in a car accident" and had bruises everywhere. Id. She was in so much pain that she just stayed in bed. Id.

After their daughter, Mary Margaret, was born in January 2010, the relationship deteriorated. 3RP 124. In December 2010, McCormack and Copeland were arguing about him not being home every night. 3RP 158. Copeland kicked McCormack so hard in the ribs that she flew off the bed. Id.

¹ The trial court allowed evidence of Copeland's prior bad acts under ER 404(b). 1RP 32-52. The jury was instructed that it could consider these incidents "for the limited purposes of (1) whether the alleged victim was placed in reasonable fear that the alleged threat would be carried out; and (2) the alleged victim's state of mind and her credibility." CP 63.

McCormack did not tell her family about any of these assaults over the years, and she never reported the abuse to the police.

3RP 152-60.

During the evening of February 16, 2011, several King County Sheriff's Office Deputies were dispatched to a 911 call at the residence of McCormack and Copeland. 2RP 29. As Detective Skaar approached, he heard a male screaming in a very angry tone inside of the residence. Id. It was a very loud and deep voice, almost a guttural, growling animal-type of yelling. 2RP 30. He could hear a female yelling for the male to stop. 2RP 29-30.

The deputies knocked loudly on the door. 2RP 31. After approximately 30 seconds, Copeland answered and was detained in handcuffs. 2RP 31-33. Detective Skaar found McCormack in the bedroom where he had heard the voices. 2RP 32.

Detective Skaar described McCormack as "very, very upset and scared looking." Id. She was shaking and trembling, and it looked like she had been crying for some time. 2RP 33. Deputy Mandella described McCormack as "sobbing, crying, and her breathing was irregular, and her speech was choked." 3RP 32.

McCormack told the deputies that Copeland had choked her to the point where she had difficulty breathing and trouble speaking

while it was happening. 2RP 33; 1RP 33, 41, 51. While he was strangling her, Copeland threatened that he would "end her." 2RP 33.

McCormack's seven-year-old daughter, Riley McCormack (Riley), was home that night, and she testified at trial. 3RP 101. Toward the beginning of Riley's testimony, the following exchange occurred:

PROSECUTOR: Now earlier this year, back in February, was David Copeland living there?

RILEY: Yes.

PROSECUTOR: Okay. And how do you know Dave, is that -- what did you call him?

RILEY: I called him -- well, I usually just called him Dave. And then when he came back from jail, I just called him dad.

PROSECUTOR: And so you just call him dad?

DEFENSE COUNSEL: Objection. May we approach?

During pretrial motions, the court had granted Copeland's motion in limine to exclude testimony that Copeland was incarcerated prior to the charged incident. 1RP 83.² In granting

² Copeland had been incarcerated for 60 days on a criminal case that was in Drug Diversion Court. CP 77; 5RP 45-46. Copeland was released on February 14, 2011 -- two days before the charged incident. CP 77.

Copeland's motion, the trial court stated that the State "can find a way to say he was living out of the home or away from the home or something like that." Id.

Defense counsel argued that this violation of the motion in limine by Riley referencing Copeland's incarceration warranted a mistrial. The trial court denied the motion, stating:

This court does not believe that this inadvertent expression by the 7-year old witness so pollutes or contaminates the trial that a mistrial should be granted. I cannot conclude based on the context that the jury will assume that the defendant was in jail on this matter, nor that every person that's in jail is necessarily guilty of some crime or misconduct.

3RP 93. The trial court instructed the jury to "completely disregard the witness's last answer." 3RP 99.

Riley continued with her testimony. Id. She described how Copeland was "just yelling and yelling and yelling and yelling and yelling." 3RP 104. Riley testified that she called her Aunt Carol for help after she saw Copeland "strangling my mom." 3RP 101, 113.

Riley testified that after Copeland strangled McCormack, he left to take the dog for a walk. 3RP 107. They locked all the doors. 3RP 112. When Copeland came back, he broke the door down and started "running and yelling" at McCormack. 3RP 108. Riley could not remember what Copeland was yelling at McCormack.

Shawna McCormack also testified. RP 115-94. McCormack described her relationship with Copeland in February 2011 as, "it was still like -- we planned on maybe some day being married." 3RP 119. McCormack acknowledged that Copeland had not been living with her "in the couple months, say, before February 15th." 3RP 124. She also acknowledged that Copeland had not been at her house for Christmas or New Year's. 3RP 125.

McCormack testified that she had not seen Copeland in person over the last couple of months. Id. She had talked with him on the phone in early December; however, "all he did was yell at me and so I stopped taking the phone calls." Id. Toward the end of the discussion, the following exchange occurred:

PROSECUTOR: Okay. So you talked to him a little bit in December, but you hadn't talked to him in late December or January or beginning of February?

MCCORMACK: The very beginning of the time that he started being gone, that he was gone ---

DEFENSE COUNSEL: Your Honor, can we approach?

3RP 125-26.

Later in McCormack's testimony, she began to describe threats that Copeland had made to her that she was able to record on her sister Julie's voicemail. 3RP 128. McCormack described

how Copeland had threatened to "leave me in a ditch" and that "he was going to kill my family." Id. Toward the end of this discussion, the following exchange occurred:

PROSECUTOR: Okay. So, on these -- on these cases, it was threats to kill you, put you in a ditch, and/or to kill your family?

MCCORMACK: Oh yeah, yeah --

PROSECUTOR: And why did you --

MCCORMACK: -- I did that.

PROSECUTOR: Why leave the message for your sister?

MCCORMACK: Because during the 60 days in which he -- he was not there, I started to just kind of realizing that I was not -- I didn't just kind of, I realized that I was in a situation and living in a life, I was able to clear my mind because he wasn't there yelling at me all the time. And I was able to realize that I knew better because I was brought up in a different environment and I knew that was wrong, and I just -- so I told my family more than --

DEFENSE COUNSEL: Your honor, objection, non-responsive. And I think now would be a good time for an instruction that I requested.

3RP 128-29. During a subsequent sidebar, defense counsel requested a mistrial because McCormack "was just talking about the 60 days when Mr. Copeland was not there." 3RP 130.

Defense counsel chose not to request a curative instruction.

3RP 136.

The court denied the motion for a mistrial. 3RP 134, 140-41.

The court rejected the proposition that Copeland had "been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly." 3RP 140. To hold otherwise, the court explained...

...I would have to conclude the jury was more likely to believe that his defendant was guilty of felony harassment because this person was not available for 60 days, and we'd have to assume that the jury knew that the 60 days was associated with detention with this case or something worse, and it would be supposition on top of supposition, I'm not prepared to do that.

3RP 141. In reaching this decision, the court noted that "only errors affecting the outcome of the trial will be deemed prejudicial."

3RP 140. The court also considered facts such as "seriousness, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it." Id.

McCormack went on to testify about the charged incident.

3RP 161. McCormack, her daughter Riley, their infant daughter Mary Margaret, and Copeland all had dinner together around 5:00 p.m. Id. Later that night at 9:00 p.m., McCormack asked

Copeland if he was going to a meeting, and he became upset. Id. He began yelling at McCormack and accusing her of calling him a liar. Id. McCormack was sitting on a recliner in the living room with their daughter Mary Margaret on her lap. Id. Copeland "flew over" and started strangling her. 3RP 161-65. He kept squeezing her neck and pushing harder until McCormack and the recliner fell over backwards. 3RP 165-66.

McCormack pleaded with Copeland to allow her to put the baby down, but he started strangling her again. 3RP 166. Finally, Copeland stopped strangling her, laughed, and left the house. Id. As soon as he left, McCormack locked all of the doors to the house. Id. She was concerned for her safety, and she felt he needed time to cool off. 3RP 166, 169.

Copeland returned sooner than McCormack expected, while she was on the phone with her sister Julie McCormack. 3RP 171. Julie McCormack testified that McCormack was "crying and frantic" and that McCormack said she was "scared because David's trying to break down the door." 4RP 28-29. McCormack testified that Copeland was outside banging on all of the doors and saying, "Open the door, I'll kick in the door." 3RP 172-73. McCormack described him as "very, very angry." 3RP 173.

McCormack heard Copeland kick in the back door of the house. Id. Within seconds, he was in the bedroom with McCormack. Id. He picked up a pillow and threatened, "I'll take your last breath." Id. McCormack described his face was "all red" and that one eye was "twitching." 3RP 174. He was screaming and yelling at her when the police knocked on the front door. 3RP 175-76.

During closing argument, the prosecutor reviewed several of Copeland's previous assaults on McCormack that had occurred during their relationship. 5RP 25-27. The prosecutor discussed a recent assault as follows:

You also heard that in early December 2010, they got into another argument. This argument was because Shawna was upset that the defendant wasn't around the house enough, not being enough of a family, and that he wasn't trying hard enough on their relationship. So the defendant responded by kicking her in the ribs with such force that he knocked her off the bed and she's still feeling pain from this months later. If there's anything good that came out of this last assault, it's that they lived apart for a couple months after that.

5RP 26-27. Copeland did not object. The prosecutor went on to describe how:

There was a roughly couple month period up until...February 14th, February 15th, where they didn't have any contact in person with each other. They talked a little bit at the beginning on the phone, but

the defendant became aggressive, he became abusive on the phone, and Shawna just stopped taking his calls.

5RP 27. The prosecutor explained that “during this time...Shawna began to realize that this relationship was no good.” Id. However:

She didn't have the strength to do it alone, but at least she was starting to think about maybe my family can help me get out of this, maybe there is hope. But as we heard, that didn't happen. February 15th came around, the defendant was back, they were living together, and we heard the phone messages.

Id. Copeland objected, and the court overruled the objection. Id. The prosecutor went on to describe how “[t]hey'd been living apart for a couple months” and “[a]s soon as they get back together, trying to patch things up, he loses it.” Id.

Copeland subsequently made a motion for a mistrial and argued (1) the State improperly suggested that there was a connection between the charged incident and the incident in December 2010 where Copeland kicked McCormack in the ribs; and (2) the State “invit[ed] the jury to draw a conclusion that he was arrested and in jail for a prior incident” by talking about them being “being apart for 60 days.” 5RP 45-46. However, in reality, the prosecutor never referred to a specific time period of “60 days” in the entire closing argument. 5RP 23-44.

The court denied Copeland's motion for a mistrial. 5RP 27, 48-49. In denying Copeland's motion, the court referred to "the standard from...State v. Johnson" and concluded:

I do not believe the information regarding the parties being apart necessarily connects this defendant with jail. And secondly, I don't believe that the inference could be drawn concerning confinement is so prejudicial that this would – deprives the defendant of a fair trial.

5RP 49.

The court instructed the jury on the lesser-included offense of misdemeanor harassment over Copeland's objection.

5RP 17-18. The court concluded that sufficient evidence was admitted at trial to support both felony harassment and misdemeanor harassment. 5RP 18.

C. ARGUMENT

- 1. THE COURT PROPERLY EXERCISED ITS DISCRETION BY INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF MISDEMEANOR HARASSMENT BECAUSE THE EVIDENCE PERMITTED THE JURY TO RATIONALLY FIND COPELAND GUILTY OF MISDEMEANOR HARASSMENT AND ACQUIT HIM OF FELONY HARASSMENT.**

A defendant may be found guilty of an offense which is necessarily included within the charged offense. RCW 10.61.006.

Washington Courts have long applied the two-pronged Workman test to determine whether a lesser offense is included within the charged offense. State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the offense charged. State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000). Second, the evidence in the case must support an inference that only the lesser crime was committed. Id.

The first part of the test is referred to as the “legal prong,” and is based on the requirement that one could not commit the greater offense without also committing the lesser offense. State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). The second part of the test is referred to as the “factual prong,” which incorporates the rule that each side may have instructions embodying its theory of the case, if there is evidence to support that theory. Id.

A jury instruction on a lesser included offense should be given “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” Fernandez-Medina, 141 Wn.2d at 456, citing State v. Fowler, 114

Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). A trial court must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given. Fernandez-Medina, 141 Wn.2d at 456. In addition, the appellate court must view the supporting evidence in the light most favorable to the party that requested the instruction. Id. at 455-56.

If a trial court's decision to give an instruction is based on a factual dispute, then it is reviewed for an abuse of discretion. State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). Here, Copeland is arguing that the "factual prong" of the lesser-included offense test was not met. That is, Copeland is challenging the court's factual conclusion that the evidence could show that McCormack was placed in reasonable fear that he would carry out his threat to cause bodily injury (instead of killing her).

Therefore, the trial court's decision to instruct the jury on the lesser included offense of misdemeanor harassment is reviewable only for an abuse of discretion. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing that it was manifestly unreasonable, or

exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A person is guilty of misdemeanor harassment if the person knowingly threatens to cause bodily injury immediately or in the future to the person threatened and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1)(a)(i) and (1)(b) (emphasis added); CP 61-62. "Bodily injury" means any physical pain or injury, illness, or an impairment of physical condition.

RCW 9A.04.110(4)(a); CP 59. A person is guilty of felony harassment if the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened. RCW 9A.46.020(2)(b); CP 55-56.

Here, the trial court did not abuse its discretion by instructing the jury on misdemeanor harassment. The evidence of Copeland's previous assaults over the last several years and his threatening words and conduct on the night of February 16, 2011, permitted the jury to conclude that McCormack reasonably feared bodily injury, but not death, when he threatened to "end her" and "take your last breath."

There was ample testimony at trial for the jury to conclude that McCormack reasonably feared bodily injury from Copeland's threats. Over the course of the single evening, Copeland flew into a rage and strangled McCormack while she was sitting with their young daughter and threatened to "end her." Copeland's attack on McCormack was so violent that he knocked her over backwards in the recliner, and he still proceeded to grab her again and start strangling her. A short time later, Copeland returned to the house very angry, kicked through a dead-bolted door, ran at McCormack yelling and screaming, and threatening to "take your last breath."

Copeland's argument that his threats to "end her" and "take your last breath" can only support a jury instruction on felony harassment fails, particularly when one considers all of the evidence presented at trial about the abusive relationship. Copeland has a long history of threatening behavior and violence toward McCormack. Copeland has slammed McCormack around their bathroom by her throat, smashed her head against the dashboard of his car, beat her to the point where she had bruises everywhere and was in so much pain that she just stayed in bed, and violently kicked her in the ribs. But the violence was not homicidal.

Given Copeland's long history of physical abuse toward McCormack and his violent attack on her that night by repeatedly strangling her, McCormack reasonably believed that his subsequent threat to "take your last breath" meant that he was going to cause her physical pain or injury. When Copeland made the threat, he was very angry, his face was all red, and one eye was twitching. McCormack knew that he was going to attack her and hurt her, but luckily the knock at the front door by the deputies interrupted him.

Copeland's reliance on Fowler for the proposition that the "[t]he fact that the jury may not have entirely believed McCormack's account is not sufficient to show the lesser rather than the greater"³ is misplaced. In Fowler, the court denied the defense request for an instruction on the lesser included offense of unlawful display of a firearm⁴ because "Fowler did not offer evidence at trial which would support a theory he intended to intimidate the [victims] with his gun..." State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990),

³ Brief of Appellant, page 13.

⁴ RCW 9.41.270(1) defines unlawful display of a firearm as follows: It shall be unlawful for anyone to carry, exhibit, display or draw any firearm...in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). Instead, Fowler's testimony only addressed "whether he had a gun at all" and "this testimony served merely to discredit the [victim's] testimony rather than support an instruction on the lesser included offense." Id. Here, whether or not the jury believed McCormack's account is not part of the analysis on the lesser included instruction. Unlike Fowler, the testimony of McCormack and the other witnesses in Copeland's case provides a factual basis to conclude that Copeland threatened McCormack and that she feared bodily injury.

Similarly, the holding in Wright is distinguishable. In Wright, the trial court erred in instructing the jury on the lesser degree offense of third degree rape⁵ in a second degree rape⁶ prosecution. State v. Wright, 152 Wn. App. 64, 214 P.3d 968 (2009). In concluding that "neither the victim's testimony nor the defendants' evidence supported an unforced, non-consensual rape," the Court of Appeals (Division II) noted that the victim testified:

⁵ A person is guilty of rape in the third degree when...such person engages in sexual intercourse with another person...where the victim did not consent...to sexual intercourse and such consent was clearly expressed by the victim's words or conduct. RCW 9A.44.060(1)(a).

⁶ A person is guilty of rape in the second degree when...the person engages in sexual intercourse with another person...by forcible compulsion. RCW 9A.44.050(1)(a).

(1) she was pushed or pulled into the room; (2) she did not willingly lay down on the bed; (3) someone pulled her clothes off of her body; she did not willingly remove them; (4) she was held down on the bed by the body weight of one man while another man penetrated her; (5) something on her left side was holding her shoulder back so that she could not get up; and (6) she told them to stop.

Id. at 73. The court went on to hold that the record did not show that either rape in the second degree or rape in the third degree occurred; the State presented evidence only of forcible compulsion.

Id. at 74. In contrast to the lack of evidence for the lesser degree crime of third degree rape in Wright, the evidence of threats, previous assaults, and McCormack's fear for her safety that was presented at Copeland's trial supported the lesser included crime of misdemeanor harassment. Although Copeland's threat could be construed as a threat to kill, the jury could also reasonably conclude that McCormack only reasonably feared bodily injury in light of the fact that Copeland had not previously tried to kill McCormack.

Here, the trial court did not abuse its discretion by instructing on the lesser included offense of misdemeanor harassment because the evidence permitted the jury to rationally find Copeland guilty of misdemeanor harassment and acquit him of felony

harassment. In making this decision, the trial court considered all of the evidence that was presented at trial, and in this case, the appellate court must view the supporting evidence for misdemeanor harassment in the light most favorable to the State as the party requesting the instruction.

2. THE COURT PROPERLY EXERCISED ITS DISCRETION BY DENYING COPELAND'S MOTION FOR A MISTRIAL BECAUSE COPELAND WAS NOT SO PREJUDICED THAT NOTHING SHORT OF A NEW TRIAL COULD ENSURE THAT HE WOULD BE TRIED FAIRLY.

In determining whether a trial court abused its discretion in denying a motion for mistrial, an appellate court will find abuse only "when no reasonable judge would have reached the same conclusion." State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. Id. Only errors affecting the outcome of the trial will be deemed prejudicial. Id. In determining the effect of an irregularity, the court examines (1) its seriousness; (2) whether it involved cumulative evidence; and

(3) whether the trial court properly instructed the jury to disregard it. Id.; State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989).

Here, the trial court properly exercised its discretion by denying Copeland's motion for a mistrial, and the court consistently applied the factors outlined in State v. Johnson. First, the court correctly concluded that Riley McCormack's inadvertent reference to "when he came back from jail" was not serious enough to warrant a mistrial because based on the context, the jury would not have concluded that Copeland was in jail on this matter or necessarily guilty of some crime. In addition, the court properly instructed the jury to disregard the statement.

Similarly, the court did not abuse its discretion by concluding that McCormack's reference to "60 days" when Copeland "was not there" could not unfairly affect the outcome of the trial. Significantly, McCormack never testified that Copeland was in jail. In fact, McCormack simply said that Copeland had not been living with her "in the couple months...before February 15th". McCormack also testified she talked to Copeland on the phone during that time, but she stopped taking the calls because all he did was yell at her. In denying Copeland's motion for mistrial, the court correctly

identified the lack of any nexus between “60 days” and Copeland being in jail. The court stated Copeland’s theory for a mistrial would require “supposition on top of supposition” and that the court was “not prepared to do that.” 3RP 141.

Finally, the court did not err by denying Copeland’s motion for a mistrial after closing arguments. In closing, the prosecutor described an argument in early December 2010 that resulted from McCormack feeling that Copeland was not home enough and was not trying hard enough to maintain their relationship. Copeland kicked McCormack in the ribs, and the prosecutor stated “if there is anything good that came out of this last assault, it’s that they lived apart for a couple months.”

McCormack had testified she never reported any of Copeland’s previous assaults to her family or the police, so there was no reason for the jury to infer that Copeland was arrested or incarcerated due to this assault. The trial court acknowledged this by stating, “I do not believe the information regarding the parties being apart necessarily connects this defendant with jail.” In addition, the court did not believe “that the inference could be

drawn concerning confinement is so prejudicial that this would – deprives the defendant of a fair trial.” Moreover, the prosecutor never argued Copeland was incarcerated. Instead, the prosecutor explained that “they’d been living apart for a couple months” and that McCormack stopped talking to Copeland on the phone because he started being aggressive and abusive during their calls.

Throughout this trial, the trial court consistently and correctly applied the factors outlined in State v. Johnson in ruling on Copeland’s motions for mistrial. Copeland’s motions for mistrial lacked merit, and the court did not abuse its discretion by denying the motions.

D. CONCLUSION

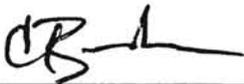
The trial court properly exercised its discretion by instructing the jury on the lesser included offense of misdemeanor harassment because there was sufficient evidence for the jury to find Copeland guilty of the misdemeanor harassment and acquit him of the felony harassment. In addition, the trial court properly exercised its discretion by denying Copeland’s motion for mistrial because any

alleged trial irregularities were not prejudicial because they did not affect the outcome of the trial. The conviction should be affirmed.

DATED this 2nd day of July, 2012.

Respectfully submitted,

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