 73544-6

FILED
Deember 17, 2015
Court of Appeals
Division I
State of Washington

NO. 73544-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ABDIQAHAR ADAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA INVEEN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONALD J. PORTER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

A. ISSUES 1

B. STATEMENT OF THE CASE 2

1. PROCEDURAL FACTS 2

2. SUBSTANTIVE FACTS 3

C. ARGUMENT 8

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF ADAN'S PRIOR MISCONDUCT TOWARD HIS VICTIM 8

a. Relevant Facts 8

b. Evidence Of Adan's Prior Sexual Assault Of Mohamed Was Properly Admitted To Show That Mohamed Reasonably Feared That Adan Would Carry Out His Threat To Kill Her 10

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT ADAN'S CONVICTION FOR MISDEMEANOR HARASSMENT 17

a. Adan's Claim That There Was Insufficient Evidence To Support His Conviction Of Misdemeanor Harassment Should Be Precluded Under The Invited Error Doctrine 18

b. Assuming The Evidence Presented By The State To Be True, A Rational Trier Of Fact Could Have Found That Adan Committed Misdemeanor Harassment 20

D. CONCLUSION 24

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Jackson v. Virginia, 443 U.S. 307,
99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 21

Washington State:

In re Dependency of K.R., 128 Wn.2d 129,
904 P.2d 1132 (1995) 18

State v. Alvarez, 74 Wn. App. 250,
872 P.2d 1123 (1994) 12

State v. Berlin, 133 Wn.2d 541,
947 P.2d 700 (1997) 19

State v. Binkin, 79 Wn. App. 284,
902 P.2d 673 (1995) 12, 15

State v. C.G., 150 Wn.2d 604,
80 P.3d 594 (2013) 21, 22, 23

State v. Fernandez-Medina, 141 Wn.2d 448,
6 P.3d 1150 (2000) 20

State v. Foxhoven, 161 Wn.2d 168,
163 P.3d 786 (2007) 10

State v. Fualaau, 155 Wn. App. 347,
228 P.3d 771, review denied,
169 Wn.2d 1023 (2010) 10

State v. Green, 94 Wn.2d 216,
616 P.2d 628 (1980) 21

State v. Henderson, 114 Wn.2d 867,
792 P.2d 514 (1990) 18

State v. Johnson, 172 Wn. App. 112,
297 P.3d 710 (2012)..... 11, 12, 13, 15, 16

State v. Johnson, 180 Wn.2d 295,
325 P.3d 135 (2014)..... 11

State v. Kilgore, 147 Wn.2d 288,
53 P.3d 974 (2002)..... 12

State v. Kirkman, 159 Wn.2d 918,
155 P.3d 125 (2007)..... 16

State v. Luvene, 127 Wn.2d 690,
903 P.2d 960 (1995)..... 21

State v. Magers, 164 Wn.2d 174,
189 P.3d 126 (2008)..... 10

State v. Momah, 167 Wn.2d 140,
217 P.3d 321 (2008)..... 18

State v. Ragin, 94 Wn. App. 407,
972 P.2d 519 (1999)..... 12

State v. Salinas, 119 Wn.2d 192,
829 P.2d 1068 (1992)..... 21

State v. Workman, 90 Wn.2d 443,
584 P.2d 382 (1978)..... 19

Statutes

Washington State:

RCW 9A.46.020..... 11

RCW 10.61.006 19

Rules and Regulations

Washington State:

ER 404 ..... 8, 10

A. ISSUES

1. Evidence of prior crimes, wrongs, and acts is not admissible to prove that a person acted in conformity with a propensity to commit wrongful acts. However, evidence of prior acts may be admissible for other reasons, including as proof of an essential element of a charged offense. Has Adan failed to establish that the trial court abused its discretion by admitting evidence of Adan's prior rape of his victim when the victim's fearful state of mind is an element of harassment?

2. A party requesting inclusion of a lesser included offense asserts that there is both a legal and factual basis for the requested offense. Adan requested that the jury be instructed on Misdemeanor Harassment as a lesser included offense of the crime charged, Felony Harassment. Should Adan be precluded under the invited error doctrine from arguing on appeal that there was insufficient evidence to support his conviction of Misdemeanor Harassment?

3. Misdemeanor Harassment requires proof that the victim reasonably feared the defendant's threat to inflict bodily injury. A sufficiency of the evidence challenge requires that the admitted evidence be assumed to be true and considered in the light most favorable to the State. Adan's victim testified that he threatened to kill her and that she believed he would carry out his threat to kill. Has Adan failed to establish

that there was insufficient evidence to support his conviction of Misdemeanor Harassment?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Abdiqahar Adan was charged with Assault in the Second Degree (Count 1), Felony Harassment (Count 2), and Unlawful Imprisonment (Count 3). CP 1-2. All three offenses stemmed from incidents alleged to have occurred on October 24-25, 2014, with Marian Mohamed as the named victim. CP 1-7. The State alleged that all three offenses constituted domestic violence. CP 1-2.

The jury found Adan not guilty of Assault in the Second Degree and Felony Harassment. CP 77-78. He was found guilty of the lesser included offense of Misdemeanor Harassment. CP 79. He was also found guilty as charged of Unlawful Imprisonment. CP 80. The jury found that both were crimes of domestic violence. CP 81-82.

Adan was sentenced to six months in custody on the Unlawful Imprisonment conviction. CP 126-31. He was given a suspended sentence of 364 days on the Misdemeanor Harassment conviction. CP 132-34.

2. SUBSTANTIVE FACTS

Marian Mohamed emigrated from Somalia when she was nine. RP[1] 413. At the time of trial she was 32, and was living in Renton with her mother and her own two children. RP 412. She has been divorced since 2012. RP 414. Mohamed knew Adan from the neighborhood and had dated him for about a year and a half at the time of the incident that resulted in the charges. RP 415. Right after her divorce Adan had one of the neighborhood kids give her his phone number, which he had written on a piece of paper. RP 416. They texted for a month or two before they started seeing each other. RP 416.

Mohamed's family wouldn't have approved of Adan, because of different family backgrounds, so the two hung out in her car once they started seeing each other. RP 416. They would go to parks and talk. RP 416-17. The relationship became sexual. RP 417-18. They couldn't go to each other's houses, so the sex occurred in her car. RP 418.

One night in the spring of 2014, Mohamed agreed to meet Adan at a park after her children were in bed. RP 419, 449. She had to get up early the next morning and didn't want to stay out late. RP 419. When she said she wanted to leave he got upset and started screaming at her.

---

[1] The verbatim report of proceedings comprises six volumes that are consecutively paginated. Citations to the verbatim report of proceedings in this brief will be in this format: RP ___.

RP 419-20. His screaming scared her. RP 420. He started banging his head in the car. Id. She was petrified. Id. It was the first time she'd ever seen him like that. Id. She tried to calm him down, but he was calling her names and insulting her appearance. Id. He took the car keys out of the ignition and locked all the doors. RP 421. Then he picked her up and put her in the backseat of the car and "forced himself" on her. RP 421-22. She screamed but nobody heard her. Id.

After the rape Mohamed changed her phone number because she didn't want to have anything to do with Adan. RP 422. Adan began sitting in front of her house. RP 422-23. She would look out the windows and see him sitting there. RP 423. A few months later she saw him, and he showed her a piece of paper and told her he'd gone to an anger management class. RP 423. Referring to the incident, he said, "I don't know who that was. The devil took over me." RP 423. She got back together with him because she was "still in love with him." RP 423.

On October 24th, Adan called Mohamed and she agreed to "hang out." RP 423-24. He picked her up at her mother's house in a car he had borrowed. RP 424. He wanted to go to the movies. RP 425. They had never been out in public on a date and she objected that she wasn't dressed well enough. RP 425. He drove to Southcenter Mall. RP 425. In the car, they drank from a bottle of alcohol he had brought. RP 425-26. They

went to the theater to see what movies were playing. Id. He wanted to see "Gone Girl," but she told him it was playing too late. Id. He was annoyed and they went back to the car. RP 426-27. Regarding what happened when next, Mohamed testified:

> That's when he started screaming and hollering and calling me names all over again like she (sic) was doing in the spring. How I'm still ugly. I'm still a lot of things. I'm in the passenger seat. He physically picked me up and just took me out of the car and just dropped me and drove off.

RP 427.

Adan drove away, leaving her in the Southcenter parking lot. RP 427. She got up and gathered herself. Id. She saw people outside other cars looking at her but nobody came to her. Id. Adan then drove back to her and began apologizing. Id. She got back in the car. Id. Adan started screaming at her again and drove a few blocks away and parked in a restaurant parking lot. RP 427. They didn't go there to eat; Adan wanted to have sex. RP 428-29. He got in the backseat and took all his clothes off. RP 428-29. He was still screaming at her. RP 429. She told him she didn't want to have sex and that she wanted him to take her home. RP 429. He didn't want to take her back to Renton; instead, he drove to IHOP on Capitol Hill because he wanted to eat. Id. RP 429.

At IHOP, Mohamed left the table while Adan was eating, went outside, and started walking toward the apartment she had in Seattle.

RP 430. After she had been walking for five to ten minutes, she heard a car braking behind her. RP 431. Adan pulled over, got out of the car, opened the passenger door and physically put her into the car. RP 431. He drove off and was yelling and calling her names and banging his head. RP 432. Mohamed testified:

> He's driving. He's swerving. He started saying, "I'm going to kill you. You know, nobody's going to find you. I'm going to take you to the lake. I'm going to dump your body. Nobody's going to find you."

RP 432.

He drove toward Lake Washington. RP 432. Adan said, "If you were in Africa, nobody would care." RP 432. Mohamed understood him to mean that African women are abused all the time and nobody cares. RP 432. Her response "sent him over the edge." RP 432. When she said, "Well, thank God I'm in America," he punched her twice in the mouth, knocking out two of her teeth. RP 433. He also grabbed her by her hair and banged her head against the passenger window. RP 433. Mohamed admitted that after Adan punched her she may have slapped or bitten him in self-defense, but she didn't remember for sure. RP 436.

When Adan told her that he was going to kill her, she believed him. RP 434. She felt like she was going to die. RP 434. He also told her that he was going to take her to the lake and dump her body. RP 434.

Mohamed was crying and kept saying, "My kids. You know my kids." RP 434. When they got to Lake Washington, Adan dragged her toward the water and tried to put her in the lake. RP 435. As he dragged her, he slapped her across the face and broke her glasses. RP 437. Mohamed testified that as Adan was dragging her toward the lake, "I finally actually accepted the fact that I was going to die at that point." RP 439.

Mohamed then saw a woman walking a small dog. RP 440. The woman called 911. RP 440. She remembers being taken to the hospital in an ambulance, and crying from relief because she knew she was going to be alright after thinking that she was going to be killed. RP 440.

Tracy Janssen was walking her dog at the lake park when a woman approached her "with a very bloody mouth," asking if she could use her phone, or if Janssen would call 911 for her. RP 360-61. A man was walking after the woman screaming at her, and he grabbed her in a hug. Id. Janssen called 911 within a minute of seeing this. RP 360. The jury heard her 911 call. RP 359-65.

Mohamed was treated at Swedish Hospital's emergency department where she told a triage nurse that her boyfriend had punched her in the mouth and banged her head against the window. RP 298. She told the nurse that her boyfriend had said: "I'm going to kill you, and I'm going to take your phone, so no one will find you." RP 298. She was

diagnosed with open tooth fractures and a facial contusion (bruised lower lip) and referred to a dental specialist. RP 294-96.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF ADAN'S PRIOR MISCONDUCT TOWARD HIS VICTIM.

Adan claims that the trial court erroneously admitted evidence of his prior misconduct, an uncharged rape. Adan's claim should be rejected. The victim's reasonable fear is an element of Felony Harassment, and Adan's prior misconduct involving controlling and domineering behavior toward his victim was relevant to prove the victim's state of mind. The evidence was properly admitted pursuant to Evidence Rule 404(b).

a. Relevant Facts.

Before trial, the State moved to admit evidence of Adan's prior sexual assault of Mohamed. RP 26-28. The State argued that the incident was relevant to the charge of Felony Harassment to prove that Mohamed reasonably feared that Adan would carry out his threat to kill her. Id.

The trial court examined two pretrial statements of Mohamed and determined that there was a preponderance of evidence that the prior rape incident had occurred. RP 134. In finding that the rape incident was

relevant to Mohamed's reasonable fear of the death threats, the trial court noted that Mohamed had specifically linked the two incidents.

> In fact, she specifically said on page 56 of the defense interview -- no, excuse me, page 26 of the defense interview she said something to the effect, I'm in -- when she's describing this recent incident -- and I'm in shock because I'm like, this is the same thing all over again. Like, he's not changing. So she clearly didn't (sic) tie in the prior incident.
>
> It is probative to her reasonable fear. And I do find that it outweighs the prejudicial value, provided a limiting instruction is given.

RP 135.

The trial court found that any prejudice in the admission of the evidence was outweighed by its probative value. RP 133-36. Before admitting the evidence at trial, the court orally instructed the jury that they were to consider the evidence of prior acts only for the limited purpose of determining the witness's state of mind at the time of the charged incidents. RP 418. At the close of the evidence, the admonishment was repeated in the court's written instructions. Jurors were directed that they were to consider the evidence "only for the purpose of determining Ms. Mohamed's state of mind between October 24, 2014, and October 25, 2014. You may not consider it for any other purpose." CP 98 (jury instruction 7).

b. Evidence Of Adan's Prior Sexual Assault Of Mohamed Was Properly Admitted To Show That Mohamed Reasonably Feared That Adan Would Carry Out His Threat To Kill Her.

A trial court's ruling on the admissibility of evidence is reviewed for an abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion if it acts on untenable grounds or for untenable reasons. State v. Fualaau, 155 Wn. App. 347, 356, 228 P.3d 771, review denied, 169 Wn.2d 1023 (2010).

Under ER 404(b), a court is prohibited from admitting "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." But such evidence is admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b).

Before admitting ER 404(b) evidence, a trial court must:

> (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The trial court must conduct this analysis on the record. Id.

Here, Adan does not challenge the trial court's finding that the prior misconduct occurred, nor does he argue that the court failed to identify the purpose for which the evidence was admitted. Adan argues that the evidence was not relevant to the purpose for which it was admitted, to establish Mohamed's state of mind; and, in the alternative, he argues that the probative value was outweighed by its prejudicial effect. Adan is incorrect. The evidence of Adan's uncharged rape of Mohamed was relevant and properly admitted.

A person is guilty of harassment if he or she knowingly threatens to "cause bodily injury immediately or in the future to the person threatened or to any other person." RCW 9A.46.020(1)(a)(i). The harassment is a felony if the threat of bodily injury is a threat to kill. RCW 9A.46.020(2)(b). Harassment requires proof that "[t]he person by words or conduct places ***the person threatened in reasonable fear*** that the threat will be carried out." RCW 9A 46.020(b) (emphasis added). Whether the threat created "reasonable fear" is an essential element of the crime of felony harassment. State v. Johnson, 172 Wn. App. 112, 120, 297 P.3d 710 (2012), affirmed in part, reversed in part by State v. Johnson, 180 Wn.2d 295, 325 P.3d 135 (2014). Washington courts allow evidence of prior misconduct to show that the victim's fear was reasonable. Johnson, 172 Wn. App. 120. "The fact finder applies an objective

standard to determine whether the victim's fear that the threat will be carried out is reasonable. This requires the jury to 'consider the defendant's conduct in context and sift out idle threats from threats that warrant the mobilization of penal sanctions.'" State v. Ragin, 94 Wn. App. 407, 411, 972 P.2d 519 (1999) (quoting State v. Alvarez, 74 Wn. App. 250, 261, 872 P.2d 1123 (1994)).

Here, the trial court admitted the evidence of Adan's prior uncharged rape of Mohamed for the limited purpose of determining Mohamed's state of mind at the time of the charged incident. RP 418. As established by precedents, the evidence was appropriately admitted for that purpose. In State v. Johnson, supra, the court of appeals upheld the trial court's admission of the defendant's prior "controlling and domineering behavior" to show the victim's state of mind in a prosecution for multiple counts of assault and harassment. 172 Wn. App. at 123-24. In State v. Binkin, 79 Wn. App. 284, 292-93, 902 P.2d 673 (1995), abrogated on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002), admission of a prior threat to the victim's unborn child was upheld in a prosecution for harassment. Similarly, in Ragin, supra, the admission of numerous prior bad acts was upheld in a prosecution for harassment to show the victim's reasonable fear. 94 Wn. App. at 412-13.

Adan argues that the prior uncharged rape was not relevant to whether Mohamed reasonably feared that Adan would carry out his threat to kill her. He argues that there was not a "nexus" between the two incidents because Mohamed did not expressly testify that she feared Adan would kill her because of the prior rape. Johnson dispensed with that very argument.

> Johnson also argues that [the victim] did not expressly testify that Johnson's controlling and domineering behavior contributed to her fear. But, her testimony, taken as a whole, implicitly shows that it did. For example, [the victim] gave the following testimony: "I'd wake up and he would have the ice pick here like to scare me, threaten me. I didn't know what he was going to do." Thus, this argument is not persuasive.

Johnson, 172 Wn. App. at 124.

While it is true that Mohamed did not expressly testify that the prior rape contributed to her fear, as in Johnson, her testimony, taken as a whole, implicitly shows that it did. In describing the rape incident in the spring of 2014, Mohamed testified that it took place in her car at a park, that Adan repeatedly screamed at her, that he banged his own head, that he called her names, and that he insulted her appearance before he physically forced her into the backseat, got on top of her, and forced sexual intercourse. RP 421-23. In describing the events of October 24-25, 2014, that resulted in the charges, Mohamed described Adan engaging in the

same abusive behaviors. Referring to when they left the movie theater and got back in the car at Southcenter Mall, she testified:

> That's when he started screaming and hollering and calling me names all over again **like she (sic) was doing in the spring**. How I'm still ugly. I'm still a lot of things. I'm in the passenger seat. He physically picked me up and just took me out of the car and just dropped me and drove off.

RP 427 (emphasis added).

Adan then drove from Southcenter to the parking lot of a restaurant. She testified that his behavior at that time included screaming at her and demands for sex, which was similar to the behavior she had described that preceded the earlier rape.

> He took me to the parking lot. We drove around the block, and he was still screaming right after he just said he was sorry about everything and I got back in the car. He started screaming, then got back -- drove around and took me to the parking lot. And he wanted to have sex.

RP 428. Mohamed testified that later, after she had walked away from IHOP and he had caught up to her and forced her into the car, Adan was again engaging in the behaviors that she had described as accompanying the previous rape.

> Back to the name calling. Back to yelling. He's banging his head, like, all over the car. He's driving. He's swerving. He started saying, "I'm going to kill you. You know, nobody's going to find you. I'm going to take you

> to the lake. I'm going to dump your body. Nobody's going to find you."

RP 432.

The behaviors Adan had engaged in immediately prior to raping Mohamed were the same behaviors he engaged in as he threatened her life. Even if Mohamed did not expressly testify to the connection between her fear of his death threats and the prior incident, it was implicit in her testimony.

Adan also claims that the prior rape incident was not relevant to prove Mohamed's reasonable fear of the death threats because, he argues, the rape incident had not been sufficiently violent.[2] Again, this argument was rejected by Johnson. Johnson argued that the prior bad acts admitted by the trial court, including that Johnson had isolated his victim from others, monitored her conversations, and accused her of infidelity, were not relevant to prove her fear of his threat to kill. The court of appeals stated:

> Johnson also argues that the cases cited to support the State's argument are distinguishable because they involved acts of physical violence, not controlling or domineering behavior. This argument is not persuasive.
>
> Controlling or domineering behavior, whether considered alone or in the context of a history of physical

[2] "While rape can be a violent act, unlike in Binkin where Binkin threatened to kill the victim's unborn child and then the victim herself, Mohamed did not testify that Adan threatened to kill her or used 'brute force' during the alleged rape." Brief of Appellant at 20.

> abuse, may also tend to prove the victim's reasonable fear of an abuser. This is particularly true in the context of domestic violence. We reject Johnson's argument that seeks to establish a material distinction between physical violence and controlling or domineering behavior in this domestic violence situation.

Johnson, 172 Wn. App. at 124. Putting aside Adan's failure to recognize the violence involved in Mohamed's description of the earlier sexual assault — that Adan had forced her into the backseat and used his body weight to force intercourse — his argument fails because the conduct was certainly "domineering and controlling behavior," and therefore, admissible in this case of domestic violence.

Finally, Adan argues that "the jury's decision to convict Adan of the unlawful imprisonment and misdemeanor harassment charges was likely an emotional response to the improper rape evidence: That Adan is a bad and immoral person with a propensity for criminality." Brief of Appellant at 25. But the trial court instructed the jury that they were to consider the evidence "only for the purpose of determining Ms. Mohamed's state of mind between October 24, 2014, and October 25, 2014. You may not consider it for any other purpose." CP 98 (jury instruction 7). Jurors are presumed to follow the court's instructions. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Adan's argument that the jurors used the evidence for an improper purpose is

speculative and without merit. It is illogical to conclude that jurors had an improper emotional response to the rape evidence given that they acquitted Adan of Assault in the Second Degree and Felony Harassment.

Evidence of a defendant's prior acts of domineering and controlling behavior is often relevant in domestic violence situations. Here, the evidence of Adan's prior uncharged rape of Mohamed was highly relevant to her reasonable fear that Adan would carry out his threat to kill, an essential element of the charged offense. The trial court did not abuse its discretion in admitting the evidence with a proper limiting instruction.

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT ADAN'S CONVICTION FOR MISDEMEANOR HARASSMENT.

After having requested that the jury be instructed on the lesser included offense of Misdemeanor Harassment, Adan, on appeal, asks this Court to find that his conviction for that offense was not supported by sufficient evidence. Because Adan requested inclusion of the lesser included offense, thereby acknowledging the factual basis for it, under the doctrine of invited error this Court should simply refuse to consider his claim that the evidence was insufficient to support his conviction for Misdemeanor Harassment.

If this Court determines to hear his claim of insufficient evidence, his argument should be rejected. There was, in fact, sufficient evidence supporting Adan's conviction for Misdemeanor Harassment.

a. Adan's Claim That There Was Insufficient Evidence To Support His Conviction Of Misdemeanor Harassment Should Be Precluded Under The Invited Error Doctrine.

Under the invited error doctrine, the appellate courts will not review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2008) (citing State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990)).

At trial, it was Adan, not the State, who asked for the inclusion of the jury instructions on the lesser included offense of Misdemeanor Harassment. RP 500-01, 605. The State did not object to the proposed instructions, and, consequently, the trial court did not question the legal or factual basis for the instructions. Id. The court instructed the jury as requested by Adan. CP 111-13 (jury instructions 20, 21, 22). By asking

for the lesser included offense instructions, Adan implicitly asserted that there was a legal and factual basis to find that he had committed Misdemeanor Harassment. This Court should not now entertain his argument that there was insufficient evidence to support his conviction for Misdemeanor Harassment.

The right to a lesser included offense instruction is statutory, codified at RCW 10.61.006. State v. Berlin, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). In State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), this court set forth a two-prong test to determine whether a party is entitled to an instruction on a lesser included offense under RCW 10.61.006. Under the first prong of the test (the legal prong), the court asks whether the lesser included offense consists solely of elements that are necessary to conviction of the greater, charged offense. Id. Under the second (factual) prong, the court asks whether the evidence presented in the case supports an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense. Id. at 448. The requesting party is entitled to the lesser included offense instruction when the answer to both questions is yes. Id.

When applying Workman's factual prong, a court must view the supporting evidence in the light most favorable to the party requesting the

lesser included offense instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

By asking for the inclusion of the lesser included offense instructions, Adan, at trial, asserted that there was both a legal and factual basis for the lesser included offense of Misdemeanor Harassment. Adan's argument on appeal, that he cannot be found guilty of Misdemeanor Harassment because he did not expressly threaten to inflict bodily injury (separate from the express threat to kill), is a denial that under the circumstances of this case Misdemeanor Harassment is a lesser included offense of Felony Harassment. He should not now be allowed to argue that no rational trier of fact could have found sufficient evidence to convict him of Misdemeanor Harassment.

b. Assuming The Evidence Presented By The State To Be True, A Rational Trier Of Fact Could Have Found That Adan Committed Misdemeanor Harassment.

Should this Court determine to review Adan's claim that there was insufficient evidence to support his conviction for Misdemeanor Harassment, his claim should be rejected. There was sufficient evidence to support the conviction.

In considering a sufficiency of the evidence challenge, a reviewing court must determine "whether, after viewing the evidence in the light

most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Luvene, 127 Wn.2d 690, 712, 903 P.2d 960 (1995) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), quoted in State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). "A claim of insufficiency [of evidence] admits the truth of the State's evidence and all inferences that reasonably can be drawn [from it]." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Adan argues that because there was no evidence that he threatened Mohamed with bodily injury separate from his threats to kill, then there was no evidence that Adan committed Misdemeanor Harassment. His argument should be rejected. Adan ignores the fact that the jury could have found him guilty of Misdemeanor Harassment by determining that although his threats were to kill, it was reasonable for Mohamed, under the circumstances, to fear only that he would inflict bodily injury, not death.

Adan relies heavily on State v. C.G., 150 Wn.2d 604, 80 P.3d 594 (2013). His reliance is misplaced; C.G., in fact, negates his argument. In C.G., the juvenile defendant threatened to kill her high school vice-principal over a disciplinary issue. Id. at 607. The vice-principal testified that because of what he knew of the juvenile defendant, he did not believe she would kill him, but he did believe she might do him bodily harm. Id.

The juvenile was adjudicated guilty of Felony Harassment, but the conviction was reversed by the supreme court because "a conviction of felony harassment based upon a threat to kill requires proof that the person threatened was placed in reasonable fear that the threat to kill would be carried out." Id. at 606.

In reversing C.G.'s conviction, the supreme court noted that a person who threatens to kill could be charged and found guilty of Misdemeanor Harassment if the threat resulted only in a reasonable fear of bodily injury rather than death.

> Finally, we observe that the State will still be able to charge one who threatens to kill with threatening to inflict bodily injury, in the nature of a lesser included offense, thus enabling a misdemeanor charge even if the person threatened was not placed in reasonable fear that the threat to kill would be carried out, but was placed in fear of bodily injury.

C.G., 150 Wn.2d at 611. The State acknowledges the quoted passage as dicta, but the logic is inarguable. C.G. could have been convicted of Misdemeanor Harassment because a threat of death encompasses a threat to do bodily injury. Adan attempts to distinguish C.G. by pointing out that the vice-principal testified that although he didn't fear he would be killed he feared bodily harm, whereas Mohamed testified she feared she would be killed but did not separately say she feared she would be injured but not

killed. This distinction is of no significance, because any threat of death encompasses a threat of bodily harm.

Here, Mohamed testified that Adan threatened to kill her. She also testified that she feared Adan would kill her. She suffered bodily injury during the incident, her fractured teeth, and she was held against her will, as evidenced by the jury finding Adan guilty of Unlawful Imprisonment. It is true that Adan never verbalized a threat to do Mohamed bodily injury separate from the threat to kill. However, under the evidence admitted, the jury may have determined that it was not reasonable for Mohamed to have believed Adan intended to carry out the threat to kill, but instead that it was reasonable for her to believe he would do her bodily injury. In this way, there is sufficient evidence to support the lesser included offense of Misdemeanor Harassment. This is consistent with C.G.'s suggested use of Misdemeanor Harassment as a lesser included offense of Felony Harassment.

Accepting the evidence as true, as is required in examining the sufficiency of the evidence, Mohamed's testimony that she feared she would be killed is also sufficient for a jury's finding that it was reasonable for her to fear bodily injury.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Adan's judgment and sentence.

DATED this 17 day of December, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:
DONALD J. PORTER, WSBA #20164
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Eric J. Nielsen, containing a copy of the Brief of Respondent, in STATE V. ABDIQAHAR ADAN, Cause No. 73544-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date : Dec.17, 2015

Done in Seattle, Washington