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Division Two

October 25, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RYAN MICHAEL JOHNSON, Appellant.	No. 47876-5-II UNPUBLISHED OPINION

WORSWICK, J. — Ryan Johnson appeals his convictions for one count each of residential burglary and felony harassment. He argues that the State presented insufficient evidence of his intent to commit a crime within a dwelling, as required for burglary. He also argues that the trial court erred by refusing to give a lesser included offense instruction for the felony harassment charge. We affirm Johnson's conviction for residential burglary because sufficient evidence supports his conviction. We reverse his conviction for felony harassment because Johnson was entitled to a lesser included instruction on misdemeanor harassment, and we remand for a new trial on that charge.

FACTS

Eighty-year-old Reba Costi lived alone. At 2:30 on a January morning, she awoke to the sounds of someone attempting to break into her house through a side door. The would-be intruder yelled at her to "open the f[***]ing door," threatening that if she did not, "when he got in there he was going to break [her] f[***]ing neck." 1 Verbatim Report of Proceedings (VRP) at 53. Scared, while barefoot and in her pajamas, Costi ran outside to call 911.

While on the phone with the 911 operator, Costi reported that a stranger was breaking in and told the operator "that he is gonna to [sic] come in here and he's gonna kill me." Ex. 2 at 1. Meanwhile, Johnson succeeded in forcibly entering the house, damaging the doorframe.

Although Costi was afraid that the intruder would hurt her, she felt too cold to stay outside and decided to reenter the house. This brought her within arm's reach of the intruder, Ryan Johnson. Johnson was extremely drunk. Costi told him to leave her house, and he refused. He demanded: "Give me the phone," and Costi complied out of fear that Johnson would "get maybe violent." 1 VRP at 59. After taking the phone away from Costi, Johnson began to speak with the 911 operator. While Johnson continued to talk to the 911 operator, police arrived and arrested him.

The State charged Johnson with one count of residential burglary[1] with the aggravating factor that the victim was present during the burglary.[2] It further charged him with one count of felony harassment for threatening to kill Costi.[3] In a bill of particulars, the State specified that it believed Johnson committed burglary either by entering unlawfully with the intent to commit felony harassment in Costi's residence or by remaining unlawfully with the intent to commit theft.

At trial, witnesses testified to the above facts. Johnson proposed a special verdict form and corresponding instruction directing the jury to find him guilty of the lesser included offense

[1] RCW 9A.52.025(1).

[2] RCW 9.94A.535(3) (u).

[3] RCW 9A.46.020(1)(a)(i), (2)(b).

of misdemeanor harassment if it found him not guilty of felony harassment. The trial court declined to instruct the jury on the lesser included offense of misdemeanor harassment despite recognizing that "'I'm gonna break your f[***]ing neck' means that's a fatal injury *or* she's going to be paralyzed for the rest of her life." 3 VRP at 280 (emphasis added). Johnson did not request, and the trial court did not give, an instruction that the jury must be unanimous on the crime Johnson intended to commit when he entered or remained in Costi's residence.

The jury convicted Johnson of residential burglary and felony harassment. It also found the aggravating circumstance that Costi was present during the burglary. Johnson appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Johnson argues that insufficient evidence supports his conviction for residential burglary. We disagree.

A. *Standard of Review*

Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). An evidence sufficiency challenge "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the jury's assessment of conflicting testimony, witness credibility, and evidence weight. *State v. Carver*, 113 Wn.2d 591, 604, 789 P.2d 306(1989).

B. *Unanimity Instruction*

As an initial matter, Johnson argues, and the State concedes, that because the trial court did not give a unanimity instruction, sufficient evidence must support both of the State's burglary theories. Residential burglary is an alternative means crime; accordingly, the jury must unanimously express the means by which the defendant committed burglary unless sufficient evidence supports both alternative means. *State v. Allen*, 127 Wn. App. 125, 130, 110 P.3d 849 (2005). Thus, we examine both alternative means for sufficient evidence.

C. *Evidence of Intent To Commit a Crime Inside*

To convict Johnson of residential burglary as charged here, the State had to prove beyond a reasonable doubt that he (1) entered or remained unlawfully in a dwelling without authorization and (2) intended to commit a crime within that dwelling. *State v. Grimes*, 92 Wn. App. 973, 977-78, 966 P.2d 394 (1998) (citing RCW 9A.52.025(1)). "The intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises." *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). The State presented two theories of Johnson's criminal intent: that he (1) entered unlawfully with intent to commit felony harassment or (2) remained unlawfully with intent to commit theft of Costi's phone. We examine these theories in turn, holding that sufficient evidence supports both.

1. *Sufficient Evidence of Intent To Commit Felony Harassment Inside*

Felony harassment requires proof (1) that the defendant threatened to kill a person and (2) that, by the defendant's words or conduct, the person was placed in reasonable fear that the threat to kill him would be carried out. RCW 9A.46.020(2)(b). Johnson argues that there is insufficient evidence of his intent to commit felony harassment while he entered the dwelling

because he had already completed the felony harassment by threatening Costi outside the door. But after making the verbal threat to break Costi's neck unless she opened the door, Johnson forcibly broke through Costi's door to enter her dwelling. This conduct, occurring just moments after Johnson made the verbal threat, could reasonably be interpreted as a continuation of his threat to kill her.

Taking all inferences in the light most favorable to the State, a rational jury could conclude that Johnson continued to harass Costi by breaking into her dwelling shortly after threatening to break her neck unless she let him in. Therefore, sufficient evidence exists that Johnson entered unlawfully with the intent to commit felony harassment by further putting Costi in reasonable fear that he would kill her.

2. *Sufficient Evidence of Intent To Commit Theft Inside*

Theft occurs when a person "wrongfully obtain[s] or exert[s] unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). The intent to "permanently" deprive the victim of the stolen property is not an element of theft. *State v. Komok*, 113 Wn.2d 810, 816-17, 783 P.2d 1061 (1989).

Viewing all evidence here in the light most favorable to the State, a rational jury could have found that Johnson remained unlawfully in Costi's residence with the intent to commit theft of her phone. After she told him to leave, he refused to do so and instead demanded she give him her phone. She complied out of fear that he would hurt her. Then, he talked on the phone with the 911 operator, and while he did so, Costi could not use the phone. This evidence supports a finding that Johnson wrongfully obtained Costi's phone with the intent to deprive her

of it. *See Komok*, 113 Wn.2d at 816 n.4. Thus, sufficient evidence supports this theory of burglary.

II. LESSER INCLUDED OFFENSE INSTRUCTION

Johnson argues that the trial court erred by refusing to give his requested instruction on the lesser included offense of misdemeanor harassment. We agree.

A. *Standard of Review*

Where the evidence supports it, both the State and the defendant have a statutory right to present an instruction to the jury on lesser included offenses. *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). If the trial court fails to give a lesser included instruction when the defendant is entitled to one, it commits reversible error. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005). We apply the *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), test to determine whether a defendant is entitled to a lesser included offense instruction. *State v. Porter*, 150 Wn.2d 732, 736, 82 P.3d 234 (2004).

A defendant is entitled to a lesser included offense instruction if the two prongs of the *Workman* test are met. *Workman*, 90 Wn.2d at 447. First, under the *Workman* test's legal prong, each element of the lesser included offense must be a necessary element of the charged offense. 90 Wn.2d at 447-48. Second, to meet the *Workman* test's factual prong, evidence presented in a case "must raise an inference that *only* the lesser included[] . . . offense was committed to the exclusion of the charged offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). When analyzing the factual prong, we view the evidence that purports to support a requested instruction in the light most favorable to the party who requested the instruction at trial. 141 Wn.2d at 455-56.

The parties agree that *Workman*'s legal prong is met here. Where only the factual prong is in dispute, we review the trial court's determination for an abuse of discretion. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

To determine whether the factual prong of the *Workman* test is satisfied, we determine whether the evidence "'affirmatively establish[es] the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt.'" *Porter*, 150 Wn.2d at 737 (quoting *Fernandez-Medina*, 141 Wn.2d at 456). If the evidence would permit a jury to rationally find the defendant guilty of the lesser offense and acquit him of the greater offense, a lesser included instruction should be given. *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997).

B. *Misdemeanor Harassment Instruction*

A person commits misdemeanor harassment if, without lawful authority, he or she knowingly threatens to cause bodily injury immediately or in the future to the person threatened or to any other person and, by words or conduct, places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(1). The distinction between felony and misdemeanor harassment lies in the type of threat: "[t]he offense of harassment is elevated from a misdemeanor to a felony when the threat is a threat to kill." *State v. Mills*, 154 Wn.2d 1, 12, 109 P.3d 415 (2005).

At trial, Costi testified that Johnson threatened to break her neck before forcibly entering her home. Costi told the 911 operator that she believed Johnson would kill her, and she testified

at trial that she thought Johnson might hurt her. Johnson later requested an instruction on the lesser included offense of misdemeanor harassment. The trial court denied Johnson's requested instruction despite stating, "'I'm gonna break your f[***]ing neck' means that's a fatal injury or she's going to be paralyzed for the rest of her life." 3 VRP at 280.

The evidence presented at trial, viewed in a light most favorable to Johnson, raises the inference that Johnson committed only misdemeanor harassment. As the trial court recognized, the threat to break another's neck is not necessarily a threat to kill. Rather, the jury could infer from these facts that Johnson threatened only to injure Costi. Therefore, the trial court abused its discretion by not instructing the jury on the lesser included offense.

We affirm Johnson's conviction for residential burglary but reverse his conviction for felony harassment and remand for a new trial on that charge.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

I concur:

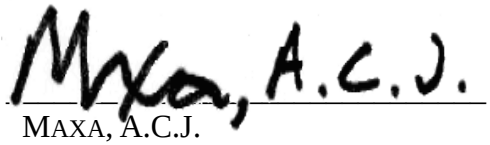
Melnick, J.

MAXA, A.C.J. (dissenting in part) – I agree that the trial court erred in failing to give a lesser included instruction on misdemeanor harassment and therefore that Ryan Johnson's felony harassment conviction must be reversed. I also agree that sufficient evidence existed to support Johnson's residential burglary conviction based on his intent to commit harassment in Reba Costi's residence. However, I disagree that there was sufficient evidence to support the residential burglary conviction based on Johnson's intent to commit theft of Costi's telephone.

RCW 9A.56.020(1) provides that theft includes the unauthorized control over the property of another. Johnson demanded that Costi give him her telephone. But there is no evidence that Johnson intended to *take* the phone. His only intent was to *use* the phone. Johnson wanted to – and did – talk to the 911 operator who was already on the line. Under the circumstances here, I do not believe that Johnson's use of Costi's telephone to talk with the 911 operator constituted a theft of that telephone.

RCW 9A.56.020(1) provides that theft also includes the unauthorized control over the "services" of another. In certain situations, the unauthorized use of a telephone might constitute the theft of services. *See State v. Brunson*, 76 Wn. App. 24, 31, 877 P.2d 1289 (1994) (suggesting that an unpermitted use of the telephone would amount to a theft of services). But here, Johnson did not use the phone to initiate a call. Costi was already talking on the phone. He simply wanted to join the conversation. Under the circumstances here, I do not believe that Johnson's use of Costi's telephone to join a conversation with the 911 operator already on the line constituted a theft of services.

I would reverse Johnson's residential burglary conviction because the evidence does not support one of the alternative means of the crime – that Johnson entered or remained in Costi's residence with the intent to commit theft of her telephone.



MAXA, A.C.J.