

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

AMBER ROSE WYDNER,
Appellant.

No. 41411-2-II

UNPUBLISHED OPINION

Van Deren, J. — Amber Rose Wydner appeals from her convictions of felony harassment and second degree identity theft, arguing that the State failed to present sufficient evidence to convict her of those crimes. We affirm in part, reverse in part, and remand for resentencing.¹

FACTS

On April 15, 2010, between her morning and afternoon shifts as a school bus driver, Terry Jones left her house to run some errands, taking her dog with her. When Jones returned, she parked at the back of the house and she and the dog entered through the back door. As she walked inside, her dog seemed unusually agitated and led her to the guest bedroom. Jones noticed that a window was open in the room, a cabinet had been knocked over with some items spilled out, and a bag's contents had been dumped out. The dog then led Jones to her bedroom,

¹ A commissioner of this court initially considered Wydner's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

where she came upon Wydner, crouched holding a black bag and grabbing items out of Jones's armoire. Jones, who had never seen Wydner before, yelled, "'What are you doing in here? Get out!'" Report of Proceedings (RP) at 36. Jones moved toward Wydner with the intention of pushing her down and then immediately calling the police, but Wydner pushed her into a bedroom wall and told Jones, "I'm going to f[***]ing kill you." RP at 26. Wydner ran out of the bedroom and down the hall, yelling, "I'm going to f[***]ing kill you." RP at 26. Wyder dropped her cellular telephone, as she ran out the front door carrying a black cloth grocery bag.

A short time later, a canine unit tracked Wydner to a backyard several blocks away, where she was attempting to conceal herself behind a bush and a trellis. A police officer brought Jones to the scene to identify Wydner. Another officer located the black bag, a jewelry box, and a red hooded sweatshirt in another backyard approximately one block away. Jones identified the items found in the bag as hers. The items included wedding rings, watches, and Jones's old driver's license.

The State charged Wydner with first degree burglary, count 1; harassment—death threats (felony harassment), count 2; second degree identity theft, count 3; and making or having burglary tools, count 4. The jury found Wydner guilty as charged on all four counts, with two aggravating circumstances on count 1 and one aggravating circumstance on count 3. She appeals from the convictions of felony harassment and second degree identity theft, arguing that the State failed to present sufficient evidence to find her guilty of those crimes.

ANALYSIS

I. Standard of Review

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000) (internal quotation marks omitted) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We consider circumstantial evidence as reliable as direct evidence. *Turner*, 103 Wn. App. at 520. We do not review credibility determinations. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970, *abrogated in part on other grounds by Crawford*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

II. Second Degree Identity Theft

A person commits second degree identity theft by “knowingly obtain[ing], possess[ing], us[ing], or transfer[ring] a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). Wydner argues that the State failed to prove that she possessed Jones’s identification with the intent to use it to commit a crime. The State presented a photograph of the bag with items from Jones’s home inside. Jones testified that “[m]ost of it is just stuff that was in the jewelry box and papers and change.” RP at 30. When asked to identify the rest of the items in the bag, she testified, “I think we had a couple of wedding rings and watches and I had an old driver’s license and some [identification documents] in there.” RP at 31. She testified that her driver license had

been in her jewelry box.

The State only presented evidence that Wydner stole the identification documentation. Possession of the documents as a result of stealing them from Jones's house, alone, does not support a finding that Wydner intended to use the documents to commit a crime. Even viewing the evidence in a light most favorable to the State, a rational juror could not have found that Wydner, by merely possessing the identification documents, intended to use them to aid, abet, or commit a crime. Thus, we reverse Wydner's conviction for second degree identity theft.

III. Felony Harassment

Under RCW 9A.46.020(1):

A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person other than the actor, [and]

....

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

If the threats are to "kill the person threatened or any other person," the harassment is a class C felony. RCW 9A.46.020(2)(b)(ii). Further, the State must show that "the person threatened was placed in reasonable fear of 'the threat'—the actual threat made" and prove that the harm threatened and the harm feared are the same. *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003). And for felony harassment, the State must prove that the person's words or conduct created a reasonable fear of death, not merely bodily harm or injury. *C.G.*, 150 Wn.2d at 609. Assuming evidence shows the victim's subjective fear, the standard for determining whether the fear was reasonable is an objective standard considering the facts and circumstances of the

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case. *State v. Alvarez*, 74 Wn. App. 250, 260-61, 872 P.2d 1123 (1994), *aff'd*, 128 Wn.2d 1, 904 P.2d 754 (1995)).

Wydner's statements that she was "going to f[***]ing kill" Jones were made in the course of a burglary of Jones's home. RP at 26. Jones was asked whether she was afraid that Wydner might carry out her threat and she responded, "Yes." RP at 26-27. This is sufficient evidence that Jones feared that Wydner would carry out her threat. Further, Wydner was an intruder in Jones's house and Jones did not know who she was. At the time Wydner made her first threat, Jones was blocking Wydner's only means of escape from Jones's bedroom. Wydner shoved the much-smaller Jones into the bedroom wall. Again this is sufficient evidence for the reasonableness of Jones's fear. Viewing the evidence in the light most favorable to the State, a reasonable juror could have found that Jones subjectively feared for her life, and that the fear was reasonable. Thus, we affirm Wydner's felony harassment conviction.

Having affirmed Wydner's felony harassment conviction but reversed her second degree identity theft conviction, we remand for resentencing.

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.

Van Deren, J.

We concur:

Penoyar, C.J.

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Quinn-Brintnall, J.