

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
CARTEZ JUWON GREEN,  
  
Appellant.

No. 85151-9-I  
  
DIVISION ONE  
  
UNPUBLISHED OPINION

CHUNG, J. — A jury convicted Cartez Green of burglary in the first degree with a firearm enhancement and misdemeanor harassment based on a domestic violence incident with his girlfriend, Samantha Turo. While Turo did not participate in the trial, the court admitted a recording of her police interview conducted shortly after the incident. On appeal, Green contends that admission of the police interview and related testimony by the officer violated his constitutional right to confrontation. We agree that the court erred by admitting this evidence because it was testimonial and the constitutional error was not harmless. We therefore reverse the conviction for burglary in the first degree with a firearm enhancement, but affirm the misdemeanor harassment conviction.

FACTS

At 12:12 a.m. on May 2, 2021, Cartez Green called 911 to report a car collision. Police arrived at 12:27 a.m. to find a vehicle off the side of the road with no reporting party on scene and began to impound the vehicle.

At 12:27 a.m., 911 received a call from a woman who was screaming, crying, yelling “get out,” and arguing with a male voice. She yelled that she needed officers there and that “he is armed. I have six people [here].” She provided an address and continued screaming at “Cartez” to get out and that “they’re scared of you.” The dispatcher told the caller that the address belonged to an apartment complex and asked which apartment. She continued to scream “get out” and did not give the dispatcher the apartment number. The audio became increasingly chaotic, with the caller screaming and a male voice speaking. Crying hysterically, the caller yelled, “Officer hurry up!” Over the next several minutes, the caller became angrier, screaming and pleading with the dispatcher, who repeated that he did not know which apartment. The man in the background was angry and yelling at the caller. The caller began crying and asking for help, then yelling profanity at the dispatcher for not responding quickly. The dispatcher told the caller the call had been entered but repeated that he did not know which apartment.

Approximately seven minutes after the call began, a different female voice took the phone and provided dispatch with the apartment number. According to the second woman, who did not identify herself, the initial caller was Samantha Turo, and the male voice belonged to her boyfriend. Dispatch asked about weapons, to which the speaker responded that the man had a gun, but then clarified he had left the gun in his car. She also reported that the man had been hitting Turo the entire duration of the phone call. Shortly before hanging up, the woman stated that the man had left, but they did not know where he had gone.

other than “outside.” According to police computer-aided dispatch reports, Green returned to his car at 12:35 a.m., where he met with two officers.

Three law enforcement officers arrived at Turo’s apartment at 12:36 a.m. When the police entered the apartment, they noticed “a lot of items strewn and broken across the ground.” The television in the living room was overturned, and there were several broken glass bottles on the floor in the kitchen and living room. The floor was sticky, “suggesting that the bottles of alcohol were full, or had been full prior to them breaking.” Overall, “it looked like some sort of altercation had occurred in the living room.”

In addition to Turo, the officers found several women who had been having a “girls’ night” and two teens babysitting Turo’s baby. The primary officer on scene, Jeffrey Lewis, noted that Turo had had swelling and bruising around her left eye and a small laceration under the eye. Turo was “very overwhelmed, and she was near hysterics. . . yelling and crying, and difficult to speak to and hard to understand at first.” Lewis wore a microphone that captured the audio from the apartment and recorded to a video camera in his police vehicle. Lewis asked, “Is everybody OK?,” and multiple women responded “yes.” Turo told officers, “I don’t want to see you.” When asked if she was “OK,” Turo responded, “No! I’m not OK,” and explained that she was angry because the police had not come when she called, further stating, “I don’t want to talk to you. Can’t you see what the fuck is going on? I am not in the mood to talk to you!” Lewis spoke with some of the other women to learn what had happened at the apartment. Another

officer was able to obtain a name, date of birth, and photograph of the alleged assailant from Turo.

About 10 minutes after arriving at the apartment, Lewis attempted to speak with Turo once again. On the recording of the encounter, Turo continued to cry. According to Lewis, Turo “was still very animated, still crying. . . she was very distraught,” but he was able to have a conversation with her about the events of the evening. Lewis thanked Turo for speaking with his partner and explained that some of his questions might be redundant but he was “just trying to get an accurate picture of what happened.”

In response to Lewis’s questions, Turo reported that the alleged assailant was Cartez Green and they had been seeing each other for about a month. Through additional questions, Lewis clarified with Turo that Green was not the father of her baby, but the two had been in an intimate relationship. Turo said that earlier, Green had thrown something against the window and she went to see what had happened. Turo knew that Green had come for his belongings. When she opened the door, Green barged inside. She tried to push Green out but he forced his way into the living room and then the bedroom. She said Green pointed his gun “at the girls” and then at her. Turo said “he pointed his gun at me, and then I put it up to the side and then it went off, because my child was right here, and that scared me.” Lewis asked what Turo thought when Green pointed the gun at her, and she responded, “He was gonna shoot me. I know him. I know him, he’s crazy.” Lewis inquired about what happened after Green fired the gun into the ceiling, and Turo explained that Green left because she said she was

calling “the cops,” but he kept texting her “threatening shit.” Because Turo’s phone was out of battery power, Lewis could not view the text messages at that time. Later, Lewis sent an officer back to the apartment to photograph the text messages, which did not include time stamps.

After finishing the interview with Turo, Lewis learned that Green had been the earlier 911 caller from the nearby car collision and went to meet him at that location, which was only two or three hundred yards away from the front entrance of the apartment complex. At that point, the officers who responded to the collision had already spoken with Green. Lewis placed Green under arrest.

Green told Lewis that he had been staying at Turo’s apartment for two weeks. He said that he went to the apartment to grab his clothes and Turo let him in the front door. He initially claimed that his gun was in his car the whole time, but then admitted to having his gun in the apartment and that it went off accidentally. He also told Lewis that Turo hit him several times and she had bruises because he tried to protect himself.

The State charged Green with one count of burglary in the first degree, alleging he was armed with a deadly weapon and assaulted Turo, and one count of felony harassment. Both counts included a firearm enhancement.

Turo and the other women in the apartment did not participate in the prosecution and trial. Lewis and other law enforcement officers were the only witnesses to testify during the trial. The State sought to admit the audio recordings of Turo’s 911 call, Lewis’s interview with Turo, and Green’s call to 911 for roadside assistance. Green objected to the admission of Turo’s interview and

portions of her 911 call on confrontation clause grounds. The court admitted Green's 911 call. It also determined the entirety of Turo's 911 call was nontestimonial in nature, and statements by Turo and the other unidentified person on the call were excited utterances and present sense impressions which were admissible as exceptions to the hearsay rule. The court admitted Turo's statements to Lewis because they "occurred while determining the nature and extent of the emergency occupants of the apartment and police officers were facing, thereby being non-testimonial in nature." Additionally, the court found Turo's statements to Lewis to be excited utterances and present sense impressions. Green moved for reconsideration of the court's decision to admit the interview. Again, the court concluded the statements were nontestimonial because, "the circumstances show the situation at the time of the interview to be chaotic and emergent, it was not secure. The interview was very informal, Ms. Turo was emotional, sobbing, and marginally responsive to questions."

During the trial, the jury heard the recording of Turo's 911 call. Through Lewis, the State played the recording of his interview with Turo in two parts. Video 1 recorded the initial contact with Turo, consisting mainly of her screaming and crying because of the delayed police response. The second video contained a redacted version of Lewis's interview with Turo, detailing the events recounted above. At trial, Lewis testified extensively as to the details of the events as reported to him by Turo during the interview. The court also admitted photographs of text messages between Turo and Green.

The jury convicted Green of burglary in the first degree through a general verdict. The jury found Green not guilty of felony harassment but convicted him of the lesser included offense of misdemeanor harassment. The jury also returned several special verdicts including firearm enhancements for both counts.

At sentencing, Green requested a mitigated sentence for his failed self-defense claim. The trial court acknowledged that while it “agree[d] that the standard sentence here is too long,” it did not have authority to alter it. Moreover, it did not find evidence of provocation to support a mitigated sentence. As a result, the court sentenced Green to the low end of the standard range sentence, 21 months, plus the mandatory 60-month term for the firearm enhancement on the felony burglary conviction, for a total of 81 months. For the misdemeanor harassment conviction, the court sentenced Green to 364 days to run concurrently with the burglary sentence.

Green appeals.

## DISCUSSION

Green alleges the admission of Lewis’s interview with Turo and his related testimony violated his constitutional right to confrontation. Green also challenges the trial court’s denial of an exceptional sentence for the burglary conviction. Further, he claims the State failed to present sufficient evidence to support the misdemeanor harassment conviction. Finally, he requests that we remand to strike the victim penalty assessment (VPA) and DNA fee from his felony judgment and sentence.

I. Confrontation Clause

Green argues the trial court violated his constitutional right to confrontation by admitting the recording of the interview with Lewis because the primary purpose was to gather evidence for future prosecution. The State contends the court properly determined the statements from the recorded interview were not testimonial statements because the primary purpose was to meet an ongoing emergency. We disagree with the State and conclude the recording was testimonial and its admission was constitutional error.

The Sixth Amendment of the United States Constitution provides criminal defendants the right to “be confronted with the witnesses against him.” U.S. CONST. amend. VI. To protect this right, the confrontation clause bars admission of out-of-court testimonial statements unless the witness is unavailable and the defendant had prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But “not all out-of-court statements give rise to the protections of the confrontation right because not all speakers are acting as a ‘witness’ against the accused as described in the Sixth Amendment.” State v. Wilcox, 185 Wn.2d 324, 325, 373 P.3d 224 (2016) (quoting Crawford, 541 U.S. at 51). The confrontation clause applies only to testimonial statements. Id. at 333-34.

A testimonial statement “is designed to establish or prove some past fact, or is essentially a weaker substitute for live testimony at trial.” Id. at 334. Statements that “were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a



later trial” are testimonial. Crawford, 541 U.S. at 52. The State has the burden of establishing that statements are not testimonial. State v. O’Cain, 169 Wn. App. 228, 235, 279 P.3d 926 (2012). The appellate court examines whether a defendant’s right to confrontation was violated only if the statement is testimonial. Wilcoxon, 185 Wn.2d at 332. Appellate courts review alleged violations of the confrontation clause de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

A. Character of the Statements

The parties disagree as to whether Turo’s recorded statements to Lewis were testimonial. The State contends they were not, because they were made in response to an ongoing emergency, while Green argues they were testimonial because they were made to support future criminal prosecution. To resolve this question, courts apply the “primary purpose test”:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). We consider the purpose of the interrogation objectively, so “the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individual’s statements and actions and the

circumstances in which the encounter occurred.”<sup>1</sup> Michigan v. Bryant, 562 U.S. 344, 360, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011); see also State v. Burke, 196 Wn.2d 712, 726, 478 P.3d 1096 (2021). Assessing the primary purpose of statements “requires a combined inquiry that accounts for both the declarant and the interrogator.” Bryant, 562 U.S. at 367. This combined approach takes into account the mixed motives of the participants to the interrogation. Id. at 368. However, the analysis “turns on the purpose of the challenged statement—not the question that prompted it.” State v. Ta’afulisia, 21 Wn. App. 2d 914, 932, 508 P.3d 1059 (2022). Thus, in Ta’afulisia, statements by the defendants to their “uncle,” who was wired and acting as a police informant, were properly admitted because they were not testimonial. Id. at 920, 928. The defendants thought their “uncle” was a trusted family member who was “there to counsel and admonish them,” and their statements “clearly did not have a purpose of creating a record for trial.” Id. at 938. Even though as a police agent, the “uncle” had an investigatory purpose, an informant’s “secret purpose in gathering or recording evidence for possible use at a later trial does not transform such utterance[s]” into testimonial statements. Id. at 937. Instead, Ta’afulisia held, the *declarant’s* motives have greater weight when assessing whether or not statements are testimonial. 21 Wn. App. 2d at 938.

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<sup>1</sup> The parties agree that the primary purpose test outlined in Bryant controls, and we determine the primary purpose by objectively evaluating the statements and actions of the parties in light of the circumstances in which the interrogation occurs. See State v. Scanlan, 193 Wn.2d 753, 763-66, 445 P.3d 960 (2019); State v. Burke, 196 Wn.2d 712, 726, 478 P.3d 1096 (2021). Green additionally argues that the four factors from State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009), assist in this analysis. However, post-Bryant, Washington courts have not applied the Koslowski factors. See Burke, 196 Wn.2d at 726; State v. Ta’afulisia, 21 Wn. App. 2d 914, 508 P.3d 1059 (2022).

Determination of a statement's primary purpose is "a highly context-dependent inquiry." Bryant, 562 U.S. at 363. The parties' perception of the emergent nature of the situation "is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial." Id. at 370. "[T]he existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public." Id. at 370-71.

For example, in Bryant, the United States Supreme Court determined that the victim's statements were made to enable police to meet an ongoing emergency based on the circumstances of the encounter and the statements and actions of the victim and police. 562 U.S. at 377-78. Police responding to an early morning radio dispatch that a man had been shot arrived on scene to find the victim lying on the ground next to his car in a gas station parking lot. Id. at 349. The victim had a gunshot wound to his abdomen, had difficulty speaking, and appeared to be in great pain. Id. Police asked "what had happened, who had shot him, and where the shooting had occurred," to which the victim responded that "Rick" shot him and gave a time and location for the shooting. Id. The victim was transported to the hospital, where he died, and the police called for backup and went to the shooter's house. Id.

The statements in Bryant were made within moments of the officers' arrival and before they knew the location of the shooter or could secure the scene of the shooting. 562 U.S. at 374. The victim was mortally wounded, in pain, with difficulty breathing and talking such that the Court "[could not] say that

a person in [the victim's] situation would have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution.' ” Bryant, 562 U.S. at 375 (quoting Davis, 547 U.S. at 822). The police were also unaware of the scope of the threat or whether the threat was ongoing. Bryant, 562 U.S. at 372-73. “[T]hey did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred.” Id. at 375-76. As a result, the police asked “the exact type of questions necessary to allow the police to ‘assess the situation, the threat to their own safety, and possible danger to the potential victim’ and the public.” Bryant, 562 U.S. at 376 (quoting Davis, 547 U.S. at 832).

According to the State, Turo's statements to Lewis occurred in a similarly emergent situation because the apartment was not a safe environment, Green continued to pose a physical threat to the occupants of the home, his whereabouts were unknown, and he was texting threatening messages that he had sent others to the apartment to carry out his threats. Additionally, Turo was frantic and angry, “under the stress of the event and too upset to understand that what she said would be used in a future prosecution.”

However, in this case, the type and duration of the dispute as well as the tone of the interview differ significantly from the facts in Bryant. The victim's statements in Bryant occurred within moments of the police's arrival and while police were assessing the immediate needs at the scene. Here, Turo made her statements to Lewis approximately ten minutes after police had arrived at her apartment. Turo had already spoken with Lewis's partner, and Lewis had talked

to several other women about what had happened. Lewis's partner had obtained identifying information and a photograph of Green and had been told to conduct further research.

While Turo and the officers did not know where Green had gone, the fact that Green's location was unknown is not dispositive. Bryant explicitly states that an emergency is not necessarily ongoing "in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose." Bryant, 562 U.S. 365. Domestic violence incidents, in particular, "often have a narrower zone of potential victims than cases involving threats to public safety." Id. at 363. Our court has acknowledged that police presence at the scene can end an ongoing emergency. See State v. Reed, 168 Wn. App. 553, 570, 278 P.3d 203 (2012). For example, in Reed, a woman called 911 to report that her boyfriend had assaulted her and left her by the side of the road in an unfamiliar area. 168 Wn. App. at 559-60. When police arrived, she exclaimed without prompting, "my boyfriend beat me up, choked me, [and] wouldn't let me out of my car." Id. at 560. She was hysterical, crying uncontrollably, and out of breath. Id. After declining medical treatment, the woman described the incident in greater detail. Id. at 560. We determined the victim's call to 911 and initial statements to the police were related to securing police protection and assistance in responding to an emergency. Id. at 569-70. Therefore, her initial statements were not testimonial. Id. at 570-71. However, "once this police protection was secured, reasonable participants in [victim and officer's] circumstances would understand that the threat to [the victim] was neutralized and the emergency had ended." Id.

at 570. Thus, the statements made once she was under police protection were testimonial and inadmissible. Id.

Similar circumstances resulted in a finding that statements to police were testimonial in one of the consolidated cases in Davis, 547 U.S. at 829-30.<sup>2</sup> Police responded to a domestic disturbance and found defendant's wife, Amy, on the porch and her husband in the kitchen. 547 U.S. at 819. While Amy appeared somewhat frightened, she told police that nothing was the matter. Id. at 819. One officer spoke with Amy and had her sign a battery affidavit while another officer spoke with her husband in a separate room. Id. at 820. Amy did not appear at her husband's trial for domestic battery, but the officer recounted her statements, and the State introduced the signed affidavit as evidence, over the husband's objection. Id. at 820. The United States Supreme Court reversed the decision admitting the affidavit, holding that "[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged." Id. at 829. There was no emergency in progress and no immediate threat. "When the officer

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<sup>2</sup> The cases on appeal in Davis were Washington v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005), and Hammon v. Indiana, 829 N.E.2d 444 (Ind. 2005). The Court noted the similarity of Amy's statements in Hammon to the testimonial statements in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004):

What we called the 'striking resemblance' of the Crawford statement to civil-law ex parte examinations, 541 U.S. at 52, 124 S. Ct. 1354, is shared by Amy's statement here. Both declarants were actively separated from the defendant . . . Both statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed. And both took place some time after the events described were over. Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial.

Davis, 547 U.S. at 830.

questioned Amy for the second time, and elicited the challenged statements, he was not seeking to determine (as in Davis) ‘what is happening,’ but rather ‘what happened.’ ” Davis, 547 U.S. at 830.

Similarly, here, Turo had been under the protection of three police officers for approximately 10 minutes by the time she began speaking with Lewis. Turo had calmed down but was still crying and distraught as Lewis attempted to “get an accurate picture of what happened.” He asked Turo to tell him the sequence of events from the start, asking questions as she related the details, such as: How long had they been dating? Is her child Green’s child? Were they intimate? What did she think when Green pointed the gun at her? Did he ever strike her with an object? What did she think caused the injuries to her face? How many times did he punch her? These questions were not the type to elicit information to assess the nature of an emergency and respond, but to “figure out her side of the story.” Such questions, as with the questions to Amy discussed in Davis, were “not seeking to determine ‘what is happening,’ but rather ‘what happened.’” Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . . .” Davis, 547 U.S. at 830. The details as to how many times Green punched Turo, or how she felt when he pointed a gun at her would not assist officers in finding Green, but would establish grounds for potential criminal charges.

Lewis admitted during the pretrial hearing on admissibility that he had concerns that Green would return but “was primarily investigating the crime.” He also explicitly informed Turo of his reasons for asking the questions. Lewis

waited about ten minutes after arriving before questioning Turo, allowing her to calm down. While Turo was still upset and crying, the audio recording portrays no urgency on the part of Lewis. After thanking Turo for speaking with his partner, he explained that some of his questions might be redundant but he was “trying to get an accurate picture of what happened.” When Lewis asked the name of her child, before answering, Turo inquired “why?” Lewis responded that her child was a victim of the crime and he wanted to make sure Green “gets in trouble for every crime he committed tonight . . . I want to make sure this guy gets held accountable for everything that he did tonight, and so in order to do that I need to list your kid as a victim.” Thus, given that the explicit reason for Lewis’s questions was to gather information to hold Green accountable, Turo’s primary purpose in answering was to provide information potentially relevant to later criminal prosecution.

Turo also made spontaneous statements to Lewis that demonstrate she understood Lewis was investigating possible criminal activity. When recounting that she pushed Green’s gun up toward the ceiling to protect her child, Turo became very upset and explained that they would have to arrest her because she would kill Green if necessary to protect her child. She tearfully justified her actions to Lewis, who assured her that nobody was going to arrest her and he was glad she protected her child. At that point, Turo’s statements focus more on explaining her past actions and feelings than responding to an immediate danger.



An objective assessment shows that the “statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation.” Davis, 547 U.S. at 832. Rather, the statements recounted details of “past events potentially relevant to later criminal prosecution.” Davis, 547 U.S. at 822. By the time Lewis interviewed Turo, the immediate danger had passed. Lewis had informed Turo that he needed information to hold Green accountable for all of his actions. Turo was aware of the investigative nature of Lewis’s questions and attempted to shield herself from possible arrest. Turo’s statements to Lewis admitted through the recording of the interview and Lewis’s related testimony were testimonial statements. Therefore, admission of the statements violated Green’s constitutional right to confrontation.

B. Constitutional Harmless Error Analysis

Because the trial court’s admission of the recording of Turo’s statements to Lewis and his testimony recounting those statements violated the confrontation clause, it was constitutional error. Constitutional errors are presumed prejudicial. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). The State bears the burden of showing that constitutional error was harmless. Id. “We find a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (internal citations omitted). If the State cannot prove harmlessness, the remedy is a new trial. Id.

In this case, the constitutional harmless error analysis is required only for the burglary conviction with the firearm enhancement, as the State did not rely on Lewis's interview with Turo and associated testimony to prove the harassment charge.<sup>3</sup> Burglary in the first degree is an alternative means crime and may be committed by either being armed with a deadly weapon or assaulting a person. State v. Lambert, 199 Wn. App. 51, 70, 395 P.3d 1080 (2017). The State must prove beyond a reasonable doubt that "with intent to commit a crime against a person or property therein," a person "enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom . . . (a) is armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020(1); Lambert, 199 Wn. App. at 70. Here, the State charged Green with both means of committing burglary as well as with a firearm enhancement. The court instructed the jury on the alternative means: "The State alleges that the defendant committed acts of Burglary in the First Degree by two distinct acts: being armed with a deadly weapon and assault of a person." The court also instructed the jury on the unanimity requirement: "To convict the defendant in count 1 of Burglary in the First Degree, one specific act of Burglary in the First Degree must be proved beyond a reasonable doubt and you must unanimously agree that act has been proved." The court provided only a general verdict form for burglary in the first degree, and special verdict forms as to whether Green was armed with a firearm

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<sup>3</sup> To the extent that the State relied on any of the inadmissible evidence in support of the harassment charge, we consider only the untainted evidence in the analysis below of Green's claim of insufficient evidence to support the conviction for harassment.

at the time of the commission of the crime and as to whether Green and Turo were intimate partners.

“A general verdict satisfies due process only so long as each alternative means is supported by sufficient evidence.” State v. Woodlyn, 188 Wn.2d 157, 165, 392 P.3d 1062 (2017). However, insufficient evidence to support any of the means requires a “particularized expression” of jury unanimity. Id. (quoting State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014)). “Thus, a reviewing court is compelled to reverse a general verdict unless it can ‘rule out the possibility the jury relied on a charge unsupported by sufficient evidence.’ ” Woodlyn, 188 Wn.2d at 165 (quoting State v. Wright, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009)).

Thus, in this case, because there was a general verdict on the burglary charge, the constitutional harmless error analysis requires the State to prove beyond a reasonable doubt that any reasonable jury would convict on both means of committing first degree burglary without Turo’s interview or Lewis’s testimony about her statements. The properly admitted evidence—including the 911 call, Lewis’s interview with Green, the text messages—must provide sufficient evidence to prove beyond a reasonable doubt that Green “enter[ed] or remain[ed] unlawfully in a building with intent to commit a crime against a person or property therein,” while he was armed with a deadly weapon (first alternative means), *and* he assaulted someone (second alternative means).

Turo’s interview and Lewis’s testimony about her statements provide the cohesive narrative of this case and explain that Green pushed his way into the

apartment, pointed the gun at several people, shot the gun toward the ceiling, left the apartment, and then returned and gained entrance by breaking in through the window. Without the erroneously admitted evidence, the 911 call, Lewis's interview with Green, and the text messages do not establish that Green forced his way into the apartment. In fact, Green claimed that he went to Turo's apartment merely to obtain his clothes and she had let him in the front door. Without evidence of forced entry, the State cannot prove that Green entered unlawfully.

However, Turo's 911 call provides evidence that Green would not leave the apartment when asked. During the call, Turo was crying and yelling at someone to get out of her apartment. She told the man to "get out" multiple times. She said "I'm scared of you," and twice stated, "[Y]ou put hands on me." The second woman on the recorded call informed the dispatcher that the man had been hitting Turo the entire time on the call. This information from the 911 call establishes two key elements of the first means of committing first degree burglary—that Green remained in Turo's apartment after she asked him to leave and that Green assaulted Turo.

As to the intent element of burglary, the text messages demonstrate that Green remained unlawfully "with intent to commit a crime against a person or property therein." Green's various texts expressed his intention to assault Turo if she did not give him his belongings. Therefore, even without Turo's statements to Lewis and his testimony about those statements, the untainted evidence proves

that with intent to assault Turo, Green unlawfully remained in her apartment and assaulted her.

The State must also establish beyond a reasonable doubt that any reasonable jury would reach the same result on the second alternative means of committing burglary in the first degree, which was premised on Green's possession of a deadly weapon. The erroneously admitted evidence, Turo's statements to Lewis and his testimony, provides the clearest evidence that there were two separate incidents—Green's first entry into the apartment, when he "barged in" and shot the gun, and the second entry, during which he assaulted Turo but did not have his gun. Without Turo's statements to Lewis and his testimony about them, the State lacked evidence that Green entered or remained unlawfully with a deadly weapon.

The untainted evidence includes Green's admission that he had the gun and it accidentally fired, as well as testimony from two officers about locating a small hole, consistent with a bullet hole, in the ceiling of the bedroom. The text messages also reference the gun and support the inference that after the initial incident, Green left and returned, as Turo wrote, "You literally came in and shot up my shit?!!" She also texted, "And you came in and tried to shoot my child!!!" to which Green replied, "Negative didn't try to shoot no child. . . That's how I know u a fake." Turo responded, "That's why the gun was pointed that direction!!"

In direct contradiction to this evidence of a firearm, the second female speaker from Turo's 911 call told the dispatcher that Green had a gun but then clarified that he left his gun in his car. Thus, the untainted evidence was that

Green possessed and fired a gun at some point, but did not have a gun at the time he unlawfully remained in the apartment and assaulted Turo. Because the untainted evidence does not establish beyond a reasonable doubt that Green had a gun at the time he unlawfully remained, the State cannot prove that the jury would have convicted on the deadly weapon alternative means for burglary.<sup>4</sup>

The general verdict does not indicate whether the jury convicted Green on the burglary count based on assault, possession of a deadly weapon, or both. Therefore, because the untainted evidence does not prove both means beyond a reasonable doubt, we reverse the conviction for burglary in the first degree and the associated firearm enhancement.<sup>5</sup>

## II. Sufficiency of Evidence of Harassment

Green claims the State failed to provide sufficient evidence that Turo feared bodily injury based on the text messages.<sup>6</sup> The State contends the evidence was sufficient because a reasonable jury could infer Turo's fear of harm from her words and actions. After considering only the untainted evidence, we agree with the State.

Due process requires that the State prove every element of a crime beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). To determine whether sufficient evidence supports a conviction, an

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<sup>4</sup> The lack of evidence that Green had a firearm also undermines the special verdict that resulted in a firearm enhancement for the burglary in the first degree conviction.

<sup>5</sup> At trial, Green argued that he lived in the apartment and that he acted in self-defense. Discussion of these defenses is unnecessary in light of our reversal of the burglary conviction.

<sup>6</sup> Green also contends there was insufficient evidence to support the firearm enhancement on the harassment conviction. Green was convicted of misdemeanor harassment. Firearm enhancements apply only to felonies. RCW 9.94A.533(3). While the jury returned a special verdict finding that Green was armed with a firearm for the harassment count, the trial court properly did not include an enhancement in the sentence for the non-felony conviction.

appellate court must “view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). A claim of insufficient evidence admits the truth of the State’s evidence and all reasonable inferences from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be interpreted in favor of the State and most strongly against the defendant. Id.

Although Green was charged with felony harassment, the jury convicted him of the lesser offense of misdemeanor harassment. To convict for misdemeanor harassment, the court instructed the jury that it had to find Green “knowingly threatened to cause bodily injury immediately or in the future to Samantha Turo” and “the words or conduct of the defendant placed Ms. Turo in reasonable fear that the threat would be carried out.”<sup>7</sup> See RCW 9A.46.020(1).

Green contends that Turo never told Lewis the text messages made her feel afraid and that her words and texts demonstrate that she was not afraid. As Green argued at trial, Turo texted Green to “just go ca[l]m down” and “Nobody scared.” In contrast, the State pointed the jury to Green’s text message that stated, “Now u bout to get to sleep early,” and Turo’s responses, “Okay you can take my l[i]fe,” and “[i]t’s not that I haven’t asked to die before” as evidence of Green’s threats and Turo’s fear.

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<sup>7</sup> The “to convict” instruction also included the elements “[t]hat the defendant acted without lawful authority” and “[t]hat the threat was made or received in the State of Washington,” which are not at issue.

The State emphasized the context of the text messages, including Turo's 911 call during which Green was actively assaulting her, leaving her with a black eye. During the 911 call, Turo screamed, "I'm scared of you." The jury also heard Turo continue to cry and scream as she yelled at Green to leave her home. While Turo may have texted "Nobody scared," in light of the events of the evening, any rational fact finder could have concluded beyond a reasonable doubt that the text messages caused Turo to fear bodily injury. Therefore, we affirm the misdemeanor harassment conviction.

Reversed in part and affirmed in part.<sup>8</sup>

Chung, J.

WE CONCUR:

Díaz, J.

Díaz, J.

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<sup>8</sup> Due to our disposition of the burglary conviction, we need not address Green's challenge to the trial court's denial of an exceptional sentence for that conviction or his request to strike the VPA and DNA fee from his felony judgment and sentence. The judgment and sentence for the remaining conviction for misdemeanor harassment does not include the assessment or fee.