

70769-8

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NO. 70769-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GENEROUS SONY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN, JUDGE

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUN -5 PM 3:07

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A. ISSUE

1. Where the legislature has provided that certain proscribed conduct may be committed in more than one way, the crime encompasses alternative means. Different subjective mental states do not ordinarily define alternative means. The intent required by the burglary statute is the intent to commit any crime against a person or property inside the burglarized premises. The jurors here were instructed that, to convict Sony of residential burglary, they had to find that he entered or remained unlawfully in the victims' apartment with the intent to commit a crime against a person or property therein. Where the jury made no explicit finding as to Sony's specific intent (i.e., person or property), was his right to jury unanimity nevertheless protected?

2. Where one of the alternative means on which a jury is instructed is not supported by sufficient evidence, the verdict will nevertheless stand if the appellate court can determine that it was based on only one of the alternative means, and that means was sufficiently supported. There was overwhelming evidence that Sony stole money from the victims' apartment. There was no evidence that would support a rational inference that Sony intended to commit a crime against a person, and the prosecutor never

argued that he did. Even if the intent element of residential burglary encompasses alternative means, should the verdict of guilt nevertheless stand?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Generous Sony was charged by amended information with residential burglary. The State alleged that, on April 1, 2013, Sony “enter[ed] and remain[ed] unlawfully in the dwelling of Ashley Gicewicz and Juan Parrondo . . . with intent to commit a crime against a person or property therein.” The State also alleged the aggravating factor that “the victim of the burglary was present in the building or residence during the crime.” CP 1-4, 10; RCW 9A.52.025, 9.94A.535(3)(u).

The trial court instructed the jury that, before Sony could be found guilty of the charged crime, the State had to prove that, on the date in question, Sony entered or remained unlawfully in a dwelling “with intent to commit a crime against a person or property therein,” and that this occurred in Washington. CP 28; WPIC 60.02.02. The jury found Sony guilty of residential burglary, and

answered "yes" to the aggravating factor (victim present).

CP 45-46.

At the sentencing hearing, the State did not request an exceptional sentence based on the aggravating factor. 5RP¹ 3. The trial court imposed a standard-range sentence of nine months of confinement. 5RP 11; CP 47-52.

2. SUBSTANTIVE FACTS.

On the evening of March 31, 2013, Ashley Gicewicz was doing laundry in the laundry room down the hall from her apartment. 2RP 32-33, 34-35. It was late, and Gicewicz was tired. 2RP 32-33. When she finished and returned to her apartment, she neglected to lock the door. 2RP 35.

At about 3:00 a.m., a man entered the bedroom where Gicewicz was sleeping with her three children.² 2RP 32-33, 34; 3RP 17-18. Gicewicz was scared but, not wanting to wake her children, she did not scream. 2RP 33. The man came in and out of

¹ The verbatim report of proceedings in the trial court will be referred to in this brief as follows: 1RP (July 8, 2013), 2RP (July 9, 2013), 3RP (July 10, 2013), 4RP (July 10, 2013 – Verdict), 5RP (July 19, 2013). Note that the cover sheets for July 8 and 9 have mistakenly reversed those two dates; the second page of each of these two volumes indicates the correct date.

² Gicewicz identified Sony both at the scene when he was apprehended, as well as in court, as the person who came into her bedroom that night. 2RP 27, 35.

the bedroom about three times, saying that he was sorry, that he was "policia," and that he believed in God; he asked Gicewicz to sit down and give him her hand. 2RP 33-34.

Gicewicz heard the man go into the kitchen. 2RP 34. She heard coins falling to the floor. 2RP 39. Then she heard her boyfriend yell; she got up and followed him as he chased the man from the apartment. 2RP 34. Gicewicz called 911, and police arrived soon after. 2RP 34, 39.

Juan Parrondo, Gicewicz's boyfriend and the father of her three children, had been watching television while Gicewicz did the laundry. 3RP 16-17. On the evening in question, Parrondo fell asleep in the living room between 10:00 – 11:00 while watching television. 3RP 18. He awoke to a noise in the kitchen that sounded like coins falling to the floor and drawers opening. 3RP 18. Parrondo got up, and saw a man in the kitchen.³ 3RP 18.

The man ran out of the apartment, and tried to hold the door closed; Parrondo struggled to open the door from the inside. 3RP 19. Parrondo eventually got outside, and chased the man down the steps from the third-floor apartment. 3RP 19-20. The man managed to get outside and ran toward the street. 3RP 20.

³ Parrondo identified Sony as the man in the kitchen, both when Sony was apprehended near the apartment and again in court. 2RP 27; 3RP 22.

When police arrived, they discovered Sony hiding in some bushes on the other side of a chain-link fence that bordered the parking lot of the apartment building. 2RP 13-14, 46-49; 3RP 9-10. Both Gicewicz and Parrondo identified Sony as the man who had been in their apartment. 2RP 26-28; 3RP 22. Parrondo had never seen Sony before that night, but Gicewicz associated Sony with neighbors who lived in a nearby apartment on the same floor as her own. 2RP 39-40; 3RP 23.

The pair discovered that \$440 that had been in Parrondo's wallet to pay the rent was missing, as were some quarters that had been on the counter in the kitchen.⁴ 2RP 36; 3RP 19, 21. A search of Sony's person upon his arrest revealed that he had this exact amount -- \$440. 2RP 14-15. Police recalled Sony saying, "I'm sorry." 2RP 15.

Sony testified at trial. He denied any memory of the incident, claiming that he had consumed a large amount of beer and was both tired and drunk that night. 3RP 30-35. He denied any intention to enter the victims' apartment or to take anything that did not belong to him. 3RP 35-36.

⁴ Parrondo's wallet was also in the kitchen, next to the microwave. 3RP 25.

C. ARGUMENT

1. THE INTENT REQUIRED FOR RESIDENTIAL BURGLARY DOES NOT CREATE ALTERNATIVE MEANS OF COMMITTING THAT CRIME.

Sony contends that residential burglary is an alternative means crime. He argues that “intent to commit a crime against a person” is a means that is distinct from “intent to commit a crime against property.” He maintains that there was insufficient evidence that he intended to commit a crime against a person when he entered the victims’ apartment, and that, because the jury was instructed on both “alternative means,” his conviction must be reversed.

This argument fails. The alternative descriptions of the intent necessary for burglary do not create alternative “means” of committing that crime. Even if they did, it is clear from the record that the jury could only have relied on Sony’s intent to commit a crime against property in finding him guilty of burglary. The conviction should be affirmed.

The Washington Constitution guarantees criminal defendants the right to a unanimous jury verdict. Const. art. I, § 21. Under some circumstances, this right includes the right to express unanimity on the *means* by which the defendant is found to have

committed the crime. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the evidence is sufficient to support each of the alternative means submitted to the jury, no expression of unanimity is required. Id. at 707-08. However, if one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if the reviewing court can determine that the verdict was based on only one of the alternative means and that alternative is supported by substantial evidence.⁵ State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999), review denied, 140 Wn.2d 1013 (2000).

Sony was convicted of residential burglary. "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1).

An alternative means crime is one that provides that the proscribed conduct may be proved in more than one way. State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010). Because the

⁵ While the quantum of evidence necessary to support an alternative means has sometimes been expressed as "substantial evidence," the Washington Supreme Court has consistently applied the sufficiency of the evidence standard. State v. Owens, 180 Wn.2d 90, 323 P.3d 1030, 1035 n.5 (2014). Evidence is sufficient if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id. at 1035.

legislature has not statutorily defined alternative means crimes, nor specified which crimes are alternative means crimes, this determination is left to the courts. Id. There is no bright-line rule for determining whether the legislature intended to create an alternative means crime; rather, each case must be evaluated on its merits. Id. The mere use of a disjunctive in the statute does not necessarily mean that there are alternative means of committing the proscribed crime. Id. at 770.

The alternative means analysis focuses on the *act* that constitutes the offense. Id. at 770. By way of illustration, the court in Peterson pointed out that the two alternative means of committing theft (by wrongfully obtaining or exerting control over another's property, and by obtaining control over another's property through color or aid of deception) describe "distinct acts" that amount to the same crime. Id. By contrast, the court observed, the statute proscribing failure to register as a sex offender contemplated a single act – moving without alerting the appropriate authority. Id. "The fact that different deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering." Id.

Addressing a crime more closely analogous to residential burglary, the court in State v. Huynh, 175 Wn. App. 896, 307 P.3d 788, review denied, 179 Wn.2d 1007 (2013), employed a similar analysis. The crime at issue in Huynh was possession of a controlled substance with intent to manufacture or deliver. The jury was instructed that, to convict Huynh of this charge, the State had to prove beyond a reasonable doubt that he possessed a controlled substance “with the intent to manufacture or deliver a controlled substance.” Id. at 901.

Rejecting Huynh’s argument that there was not substantial evidence in support of each “alternative means” of the crime, the court reasoned:

The only physical act involved in “possess[ion] with intent to manufacture or deliver” is the act of possession. The intent to manufacture and the intent to deliver elements of the crime address the defendant’s subjective mental state. *An element dealing with a defendant’s subjective mental state generally cannot be the subject of an alternative means analysis.*

Id. at 905-06.

Similarly, here, the only physical act involved in residential burglary is the act of entering or remaining unlawfully in a dwelling.⁶ The different subjective mental states possible do not define alternative means. The logic here is sound – while it may be possible to discern the intruder’s intent in some cases (as here, where Sony stole property), subjective intent is likely known only to the defendant where he is apprehended inside a dwelling but has yet to effect his plan.⁷

The Washington Supreme Court’s opinion in State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985), is on point. The question before the court was whether intent to commit a specific crime inside the premises was an element of burglary. Id. at 4. The court found that such specificity was not required: “The intent required by our burglary statutes is simply the intent to commit *any crime against a person or property* inside the burglarized premises.” Id. (italics added). As to jury instructions, the court concluded that “[i]t is sufficient if the jury is instructed . . . in the language of the

⁶ The alternative means of unlawful entry and unlawful remaining do not ordinarily raise unanimity concerns. State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005).

⁷ See State v. Bergeron, 105 Wn.2d 1, 10, 711 P.2d 1000 (1985) (observing that criminal intent usually resides exclusively in the defendant’s mind).

burglary statutes.” Id. at 16. That is exactly what the trial court did in this case. CP 28; RCW 9A.52.025(1).

Sony’s reliance on State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000), review denied, 143 Wn.2d 1010 (2001), is misplaced. Tresenriter was charged with first degree burglary; the information narrowly alleged that he had entered or remained unlawfully in a building “with intent to commit a crime *against a person* therein.” Id. at 490 (italics added). The jury instructions, however, stated that a person commits burglary when he enters or remains unlawfully in a building “with the intent to commit a crime *against a person or property* therein.” Id. (italics added). The appellate court dismissed the burglary conviction without prejudice, finding that the information was constitutionally defective. Id. at 492-93. The court explained: “The State, by not charging the alternative means of committing a burglary, i.e., with intent to commit a crime against property, did not provide Tresenriter with the necessary notice.” Id. at 492.

While Sony is able to find the language that he needs in Tresenriter, the case does not support the result he seeks. Tresenriter addressed the due process notice requirement, not alternative means of committing burglary. Beyond the phrase that

Sony seizes upon, there is no discussion or analysis of alternative means crimes. A case that does not discuss a legal theory is not controlling in a future case where the theory is properly raised. Berschauer/Phillips v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). See also Kucera v. Dep't of Transp., 140 Wn.2d 200, 220, 995 P.2d 63 (2000) (appellate court will not rely on case that fails to specifically raise or decide an issue). The court in Tresenriter merely accepted intent as provable by alternative means without discussion; thus, it cannot control here.

In any event, even if a defendant's subjective intent upon unlawfully entering a dwelling *could* create alternative means of committing burglary, Sony cannot benefit here. Where one of the alternative means on which the jury is instructed is not supported by sufficient evidence, the verdict will nevertheless stand if the appellate court can determine that the verdict was based on only one of the alternative means and that means was sufficiently supported. Rivas, 97 Wn. App. at 351-52.

Such a determination can be made here. There was no evidence in the record to support any intent to commit a crime in the victims' residence other than the stolen money. Moreover, the prosecutor explicitly relied on the stolen money to prove criminal

intent: "And it's undisputed that the defendant entered the apartment and took money. He intended to take money."

3RP 54-55. The only mention of Sony entering the victim's bedroom is in the context of countering the defense of mistake:

If it had been a mistake he would have just left.
That's what a reasonable person would have done.
But no, he entered the bedroom three times. He even told Ms. Gicewicz ssh, I'm the policia. He told her sit down, be still. He didn't want to get caught. He knew he wasn't supposed to be in there.

3RP 55. The prosecutor continued in this vein:

[I]f it really was a mistake that he was in there, wouldn't a reasonable person try and leave, try to find an exit? Would a reasonable person have gone in the bedroom three times then after seeing that's not someone I live with, that woman and her three kids sleeping in there is not someone I live with, would a reasonable person then go to the kitchen, pick up a wallet, take money out of it, take laundry change and start looking and rummaging through drawers and cabinets looking for other items to take?

3RP 56-57. Again, addressing Sony's intent, the prosecutor argued to the jury:

He didn't tell Ms. Gicewicz oh, my gosh, my mistake or looked confused. . . . His intent was he didn't want to get caught. He didn't want Ms. Gicewicz to panic so he thought he would tell her I'm the police.

And then let's look at his actions after that. He didn't intend to leave the apartment. No, his next step was I'm going to the kitchen, what can I find in here.
Yeah, I might be drunk but I'm going to see what I can

find. And he takes money from the wallet, he takes laundry change

3RP 58-59.

Given the evidence and the arguments in this case, there is simply no basis to conclude that any juror's verdict could have been based upon a conclusion that Sony intended to commit a crime against a person. The verdict was clearly based on Sony's intent to steal money from the victims – a crime against property. There was overwhelming evidence of this intent. The verdict should stand.

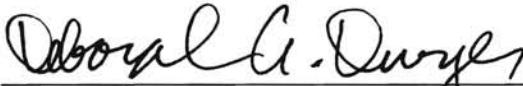
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Sony's conviction for residential burglary.

DATED this 3rd day of June, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Maureen M. Cyr**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. GENEROUS SONY**, Cause No. **70769-8-I**, in the Court of Appeals for the State of Washington, Division I.

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



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