91122-3

Supreme Court No. _____
COA No. 70769-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GENEROUS SONY,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Generous Sony requests this Court grant review pursuant to RAP 13.4 of the published decision of the Court of Appeals in State v. Sony, No. 70769-8-I, filed November 17, 2014. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000), the Court of Appeals held that intent to commit a crime against a person inside the burglarized premises, and intent to commit a crime against property inside the premises, are alternative means of committing the crime of burglary. In Mr. Sony's case, the Court of Appeals held intent to commit a crime against a person and intent to commit a crime against property are *not* alternative means of the crime of burglary. This Court has never addressed the question. Does the Court of Appeals' opinion conflict with Tresenriter and present an issue of substantial public interest warranting review by this Court? RAP 13.4(b)(2), (4).

2. The Court of Appeals relied on State v. Huynh, 175 Wn. App. 896, 307 P.3d 788, review denied, 179 Wn.2d 1007, 315 P.3d 531 (2013), and reasoned that an element dealing with a defendant's intent

generally cannot be the subject of an alternative means analysis. But this reasoning is belied by the criminal code, which sets forth several crimes that have alternative means that turn on a defendant's subjective intent. Should this Court grant review to clarify that an element dealing with a defendant's intent *can* be the subject of an alternative means analysis?

3. In its published decision, the Court of Appeals relied on State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985) for the proposition that "the intent required by our burglary statute is simply the intent to commit any crime against a person or property inside the burglarized premises." This statement attributed to Bergeron is overbroad because the burglary statute requires proof of an intent to commit a crime *against a person or property*, and not simply an intent to commit *any* crime. Should this Court grant review to clarify that, in order to prove the crime of burglary, the State must prove an intent to commit a crime against a person or property and not simply an intent to commit *any* crime?

C. STATEMENT OF THE CASE

Generous Sony grew up on an island in Micronesia and moved to the United States in 2013. 7/10/13RP 28-29. Upon his arrival, he

lived in an apartment in Seattle with several family members. 7/10/13RP 38-39.

One day, Mr. Sony and two of his relatives drove to Salem, Oregon to attend several church services. 7/10/13RP 29-30, 41-42. After staying overnight in a motel, they returned to Seattle, drinking beer in the car on the way back. 7/10/13RP 30-31, 41-43. By the time Mr. Sony arrived in Seattle, he was tired and drunk. 7/10/13RP 31. He intended to go straight to his room and go to bed. 7/10/13RP 32. He did not remember anything else that happened that night. 7/10/13RP 33-36.

Ashley Gicewicz, her boyfriend Juan Parrondo, and their three children lived in an apartment that was right across the hall from the apartment where Mr. Sony and his family lived. 7/09/13RP 31-32, 40. That evening, Ms. Gicewicz did some laundry in the laundry room down the hall. 7/09/13RP 32. The last time she returned to her apartment, she forgot to lock the apartment door. 7/09/13RP 35, 40. Later, she fell asleep in her bedroom. 7/09/13RP 33-34. Mr. Parrondo fell asleep on the couch in the living room while watching television. 7/10/13RP 18.

At around 3 a.m., Ms. Gicewicz woke up to see Mr. Sony enter her bedroom. 7/09/13RP 33. She did not know him and had never seen him before. 7/09/13RP 37. He came in and out of her bedroom about three times. 7/09/13RP 33. He was talking and mumbling and said something about "policia" and that he believed in God. 7/09/13RP 33. He told her to sit down and asked her to give him her hand, then left the room. 7/09/13RP 34.

Ms. Gicewicz heard Mr. Sony go into the kitchen. 7/09/13RP 34. Mr. Parrondo also heard a noise in the kitchen, which caused him to wake up. 7/10/13RP 18. It sounded like coins falling on the floor and drawers being opened. 7/10/13RP 18. Mr. Parrondo got up and saw Mr. Sony in the kitchen. 7/10/13RP 18. He chased him out of the apartment. 7/10/13RP 19. Ms. Gicewicz called 911. 7/09/13RP 34.

When the police arrived, they found Mr. Sony in the bushes near the parking lot of the apartment building. 7/09/13RP 46-48. They searched him incident to arrest, finding $440 in cash and several quarters on him. 7/09/13RP 15. Four hundred and forty dollars was missing from Mr. Parrondo's wallet. 7/10/13RP 19. Also, several quarters—Ms. Gicewicz's laundry money—had been taken from the kitchen counter. 7/10/13RP 19.

Mr. Sony was charged with one count of residential burglary, RCW 9A.52.025. CP 10. The State alleged he entered and remained unlawfully in Mr. Gicewicz's and Mr. Parrondo's apartment "with intent to commit a crime against a person or property therein." CP 10.

At the jury trial, Mr. Sony explained he was so intoxicated that night, he could not remember anything that happened. 7/10/13RP 34-35. He did not intend to enter the apartment or commit any crime inside. 7/10/13RP 36.

The jury was instructed it could convict Mr. Sony of residential burglary if it found he entered or remained unlawfully in a dwelling "with intent to commit a crime against a person or property therein." CP 28. The jury found him guilty of residential burglary as charged. CP 45.

Mr. Sony appealed, arguing that intent to commit a crime against a person inside the burglarized premises, and intent to commit a crime against property inside the premises, are two alternative means of committing the crime of burglary. He argued his constitutional right to jury unanimity was violated because the State did not prove beyond a reasonable doubt that he had an intent to commit a crime against a person. The Court of Appeals affirmed in a published decision, holding

that intent to commit a crime against a person and intent to commit a crime against property are not alternative means of the crime of burglary.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' opinion conflicts with State v. Tresenriter, warranting review. RAP 13.4(b)(2), (4)

Criminal defendants in Washington have a fundamental constitutional right to a unanimous jury verdict. Const. art. I, §§ 21, 22; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the crime charged can be committed by more than one means, jury unanimity is not required as to the means by which the crime was committed only if substantial evidence supports each of the relied-upon alternatives. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). Thus, the jury should be instructed on only those means for which there is substantial evidence. State v. Franco, 96 Wn.2d 816, 824, 639 P.2d 1320 (1982) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)).

The two purposes of the alternative means doctrine are to prevent jury confusion about what criminal conduct must be proved beyond a reasonable doubt, and to prevent the State from charging

every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict. State v. Smith, 159 Wn.2d 778, 789, 154 P.3d 873 (2007).

An "alternative means case" is one in which the State alleges and the jury is instructed on more than one means of committing the crime. Id. at 790. The question on review is whether substantial evidence supports each of the means presented to the jury. State v. Randhawa, 133 Wn.2d 67, 74, 941 P.2d 661 (1997). The substantial evidence test is satisfied only if the reviewing court is convinced that a rational trier of fact could have found each means proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 410-11.

In State v. Tresenriter, 101 Wn. App. 486, 490-92, 4 P.3d 145 (2000), the Court of Appeals held that committing a burglary with intent to commit a crime against a person, and with intent to commit a crime against property, are two distinct alternative means of committing the crime. In that case, the information charging first degree burglary alleged only that the accused, while armed with a firearm, entered or remained unlawfully in a building "with intent to commit a *crime against a person* therein." Id. at 490 (emphasis in

original). But the jury instructions stated the accused could be found guilty if the jury found that he entered or remained unlawfully in a building "with the intent to commit a *crime against a person or property* therein." Id. (emphasis in original). The court held the information was constitutionally deficient because it did "not charg[e] the alternative means of committing a burglary, i.e., with intent to commit a crime against property." Id. at 492.

In Mr. Sony's case, the Court of Appeals held that, contrary to Tresenriter, intent to commit a crime against a person and intent to commit a crime against property are *not* alternative means of committing the crime of burglary.[1] Slip Op. at 5. Because the court's opinion conflicts with Tresenriter, this Court should grant review. RAP 13.4(b)(2), (4).

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[1] The court characterized the court's statement in Tresenriter as "dicta." Slip Op. at 5.

2. This Court should grant review to clarify that separate alternative means *can* be created based on the nature of the defendant's subjective intent

The Court of Appeals held that a defendant's intent in committing the crime of burglary—"to commit a crime against a person" or "to commit a crime against property"—are not distinct acts and therefore do not constitute alternative means of committing the crime. Slip Op. at 4-5. The court relied on its earlier decision in State v. Huynh, 175 Wn. App. 896, 905-06, 307 P.3d 788, review denied, 179 Wn.2d 1007, 315 P.3d 531 (2013), for the proposition that "[a]n element dealing with a defendant's subjective mental state generally cannot be the subject of an alternative means analysis." Slip Op. at 4-5.

This proposition is plainly incorrect because there are several crimes set forth in the criminal code which have alternative means that turn on a defendant's subjective mental state. For example, the first degree kidnapping statute provides that a person commits the crime if he or she intentionally abducts another person with any of the following different intents:

> (a) To hold him or her for ransom or reward, or as a shield or hostage; or
>
> (b) To facilitate commission of any felony or flight thereafter; or
>
> (c) To inflict bodily injury on him or her; or

(d) To inflict extreme mental distress on him, her, or a third person; or

(e) To interfere with the performance of any governmental function.

RCW 9A.40.020. Each separate intent constitutes a different alternative means of committing the crime. See State v. Garcia, 179 Wn.2d 828, 836, 318 P.3d 266 (2014) (in prosecution for first degree kidnapping, jury was instructed on three "alternative means" of intentionally abducting victim with intent "(a) to hold [her] as a shield or hostage, or (b) to facilitate the commission of Burglary in the Second Degree or flight thereafter, or (c) to inflict extreme mental distress on [her]").

Likewise, the crime of second degree assault is divided into several alternative means, some of which depend on the nature of the defendant's subjective intent. The second degree assault statute provides:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

RCW 9A.36.021. Thus, for example, a defendant who is charged with assaulting another "with intent to commit robbery in the second degree or indecent liberties" has been charged with two separate alternative means of committing the crime. State v. Thompson, 169 Wn. App. 436, 473-74, 290 P.3d 996 (2012), review denied, 176 Wn.2d 1023, 299 P.3d 1172 (2013).

Another example is the crime of first degree murder. The statute provides:

(1) A person is guilty of murder in the first degree when:

(a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person; or

(b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person.

RCW 9A.32.030. Causing the death of another person by "acting with the premeditated intent to kill" or by "engaging in conduct manifesting

an extreme indifference to human life," are two alternative means of committing the crime. State v. Pettus, 89 Wn. App. 688, 693-94, 951 P.2d 284 (1998).

In Huynh, the Court of Appeals addressed the crime of possession of a controlled substance with intent to manufacture or deliver and concluded that the "intent to manufacture or deliver" element does not create alternative means of committing the offense because it "deals with the defendant's subjective mental state" and not with separate *acts*. Huynh, 175 Wn. App. at 899. Because "[t]he only physical act involved in 'possess[ion] with intent to manufacture or deliver' is the act of possession," that element does not create separate alternative means. Id. at 905-06.

This reasoning, whether or not it is correct for the crime of possession of a controlled substance with intent to manufacture or deliver, is not correct for the crime of burglary. To prove the crime of residential burglary, the State must prove the defendant entered or remained unlawfully in a dwelling "with intent to commit a crime against a person or property therein." RCW 9A.52.025(1). Thus, to prove the crime, the State must prove the defendant's subjective mental state. To meet its burden, the State would typically offer evidence of

the defendant's *actions* while entering or remaining in the building. In Mr. Sony's case, for example, the State offered evidence that Mr. Sony took money from the residence. That evidence tended to show he intended to commit a crime against property—specifically, the crime of theft. In a different case, the State might offer evidence that the defendant assaulted someone inside the residence, which would tend to show he acted with an intent to commit a crime against a person. In other words, although it is impossible for the State to prove definitively what a defendant was thinking at any given moment, the State can, and often does, offer evidence from which a jury can infer, from the defendant's *actions*, what his subjective mental state was.

Thus, a crime can be divided into separate alternative means based on a defendant's mental state. The crimes of first degree kidnapping, second degree assault, and first degree murder all contain alternative means that turn on the nature of the defendant's intent. To say that "[a]n element dealing with a defendant's subjective mental state generally cannot be the subject of an alternative means analysis," Huynh, 175 Wn. App. at 905-06, is an incorrect statement of law. Review is therefore warranted.

3. This Court should grant review to clarify that, in order to prove the crime of burglary, the State must prove the defendant acted with the intent to commit a crime against a person or property and not simply with the intent to commit *any* crime

Quoting State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985), the Court of Appeals stated, "'[t]he intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises.'" Slip Op. at 4-5. The Court of Appeals reasoned that because Bergeron held that the specific crime or crimes the defendant intended to commit inside the burglarized premises is not an element of the crime of burglary, whether the defendant intended to commit a crime against a person or against property are not alternative means of committing the crime. Slip Op. at 4-5.

It is true that Bergeron held, "[t]he intent to commit a specific named crime inside the burglarized premises is not an 'element' of the crime of burglary in the State of Washington." Bergeron, 105 Wn.2d at 4. But this does not mean the State need prove only that the defendant had the intent to commit *any* crime. The statute requires the State to prove the defendant acted with an intent to commit *either* "a crime against a person" *or* "a crime against . . . property." RCW

9A.52.025(1). In other words, the State must prove the nature of the defendant's intent with some specificity.

Some crimes are neither "crimes against persons" nor "crimes against property." The crime of unlawful possession of a firearm, for example, is a crime against the general public and not a crime against a person or property. See State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000). Likewise, the crime of unlawful possession of a controlled substance is a crime against the general public. See State v. Williams, 135 Wn.2d 365, 368-69, 957 P.2d 216 (1998). Thus, a person could not be convicted of burglary for unlawfully entering or remaining in a building with an intent to commit either of these crimes.

In determining whether a crime consists of different alternative means, the Court "focuses on the different underlying acts that could constitute the same crime." State v. Owens, 180 Wn.2d 90, 97, 323 P.3d 1030 (2014). "[A]lternative means should be distinguished based on how varied the actions are that could constitute the crime." Id.

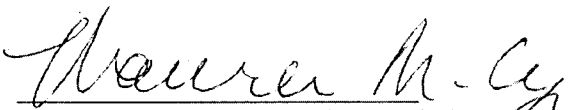
This Court should accept review and hold that whether a person commits a burglary with an intent to commit a crime against a person, or with an intent to commit a crime against property, are alternative means because the actions that could constitute the crime are

significantly varied. In Mr. Sony's case, for example, the evidence tended to show he had an intent to commit a crime against property because he took money from the residence. In a different case, the evidence might show the defendant had an intent to commit a crime against a person if he or she assaulted someone inside the residence. The State would prove these differing intents by proving the significantly different *actions* taken by the defendant. Because a defendant who intends to commit a crime against property will act in a way that is very different from a defendant who intends to commit a crime against a person, the two different intents constitute alternative means of committing the crime. See Owens, 180 Wn.2d at 97.

E. CONCLUSION

Because the Court of Appeals' opinion conflicts with State v. Tresenriter and presents an issue of substantial public importance regarding the crime of burglary, this Court should grant review.

Respectfully submitted this 17th day of December, 2014.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GENEROUS SONY, Appellant.	No. 70769-8-I DIVISION ONE PUBLISHED OPINION FILED: November 17, 2014

APPELWICK, J. – Sony appeals his conviction for residential burglary. He argues that he was denied the right to a unanimous jury verdict because the evidence was insufficient to support one of the alternative means of committing the crime. Because residential burglary is not an alternative means crime in the way Sony suggests, we affirm.

FACTS

On the evening of March 31, 2013, Ashley Gicewicz was doing laundry in the laundry room down the hall from the apartment she shared with her boyfriend, Juan Parrondo. When Gicewicz finished and returned to the apartment, she neglected to lock the door. Gicewicz placed the quarters left over from the laundry on the kitchen counter and went to sleep in the bedroom with the couple's three children. Parrondo fell asleep on the couch watching television.

Around 3:00 a.m., Gicewicz awoke and saw Sony in her bedroom. Sony left the bedroom and returned three times, saying that he "was sorry," that he "was policia," and that he "believes in God." Sony asked Gicewicz to give him her hand. Gicewicz was scared and did not want to wake her children so she buried her face in

the mattress and hoped Sony would leave. She heard Sony go into the kitchen, where she heard what sounded like coins falling on the floor.

Parrondo awoke to the noise in the kitchen. He went into the kitchen and saw Sony. Sony ran out of the apartment and tried to hold the door closed as Parrondo struggled to open the door from the inside. Parrondo was eventually able to open the door and chased Sony down the stairs from the third floor apartment. Police discovered Sony hiding in some bushes on the other side of a chain-link fence that bordered the apartment complex parking lot. Both Gicewicz and Parrondo identified Sony as the man who had been in their apartment. Parrondo discovered that $440 was missing from his wallet, which he had left in the kitchen. Police searched Sony and found exactly $440 on his person. Sony told police, "I'm sorry."

The State charged Sony with residential burglary, alleging 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."

At trial, Sony testified that on the evening in question he had been very tired and very drunk. He testified that he did not remember entering Gicewicz and Parrondo's apartment or taking any money.

The trial court instructed the jury that to find Sony guilty of residential burglary, the State was required to prove that Sony entered or remained unlawfully in a

dwelling "with intent to commit a crime against a person or property therein." The jury returned a verdict convicting Sony of residential burglary. Sony appeals.

DISCUSSION

In Washington, criminal defendants have a constitutional right to a unanimous jury verdict. WASH. CONST. art. I, § 21, State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). "This right may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime." State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). An alternative means crime sets forth "distinct acts that amount to the same crime." State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). "When a crime can be committed by alternative means, express jury unanimity as to the means is not required where each of the means is supported by substantial evidence." State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006). However, if the evidence is insufficient to support each of the means, a particularized expression of jury unanimity is required. Ortega-Martinez, 124 Wn.2d at 707-08.

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. Sony argues that "with intent to commit a crime against a person" and "with intent to commit a crime against property" are alternative means of committing residential burglary. He argues that his

constitutional right to a unanimous verdict was violated because (1) the State did not elect a particular means and the trial court did not instruct the jury that it must reach unanimous agreement as to the means, and (2) the evidence was insufficient to show that he intended to commit a crime against a person.

While residential burglary is an alternative means crime, the alternative means are not those that Sony suggests. "The analysis of whether the legislature intended a crime to have alternative means of commission focuses on the act that constitutes the offense." State v. Huynh, 175 Wn. App. 896, 904, 307 P.3d 788, review denied, 179 Wn.2d 1007, 315 P.3d 531 (2013). There are two distinct physical acts that amount to residential burglary: (1) unlawfully entering a building with intent to commit a crime, or (2) unlawfully remaining in a building with intent to commit a crime. RCW 9A.2d.025. These constitute the alternative means of committing burglary. Gonzales, 133 Wn. App. at 243. The different intents which may be present—"to commit a crime against a person" or "to commit a crime against property"—are not distinct acts and therefore do not constitute alternative means of committing residential burglary. See Huynh, 175 Wn. App. at 905-6 ("An element dealing with a defendant's subjective mental state generally cannot be the subject of an alternative means analysis."). Rather, "[t]he 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 "specific crime or crimes intended to be committed inside burglarized premises is not an

burglary that must be included in the information, jury instructions[,] orin the trial court's findings and conclusions." Id.

Sony's reliance on State v. Tresenriter, 101 Wn. App. 486, 4 P.3d 145 (2000) is misplaced. In Tresenriter, the information narrowly charged that the defendant entered or remained unlawfully with "'intent to commit a *crime against a person* therein,'" but the jury was instructed that they had to find the defendant entered or remained unlawfully "'with the intent to commit a crime against a person or property therein.'" Id. Division Two of this court reversed the defendant's conviction, holding the charging document was constitutionally defective. Id. at 492. In explanation, it stated, "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. But, the issue presented in Tresenriter was whether the charging document satisfied due process. Id. at 491. In addressing the issue, the court accepted the defendant's characterization of "intent to commit a crime against a person" as an alternative means without analysis. The statement upon which Sony relies is dicta, and we decline to adopt it.[1]

Because Sony has failed to establish that "with intent to commit a crime against a person" and "with intent to commit a crime against property" are alternative

[1] We note that Division Two, in an unpublished opinion, has since clarified its holding in Tresenriter, stating that it "did not intend to imply a reading of the burglary statute that would create alternative means of commission based solely on differing intents." State v. Pierce, noted at 135 Wn. App. 1014, 2006 WL 2924475, at *6.

means of committing residential burglary, Sony's right to a unanimous verdict was not violated. We affirm.

Appelwick, J.

WE CONCUR:

Leach, J.

Schindler, J.

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