

Supreme Court No. 93090-1  
Court of Appeals No. 47506-5-II

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DAVID KALAC,

Petitioner.

**FILED**  
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WASHINGTON STATE  
SUPREME COURT

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PETITION FOR DISCRETIONARY REVIEW

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## **A. IDENTITY OF PETITIONER AND DECISION BELOW**

David Kalac, the petitioner, asks this Court to review the Court of Appeals' decision affirming his convictions for first degree burglary and unlawful imprisonment. A copy of the Court of Appeals' unpublished opinion, issued on September 7, 2016, is attached in the appendix.

## **B. ISSUES PRESENTED FOR REVIEW**

1. Burglary requires proof that the defendant entered or remained unlawfully in a "building." "Each unit of a building consisting of two or more units separately secured or occupied is a separate building." RCW 9A.04.110(5). Due to the ambiguity of this language and the shared interests of the residents, rooms inside a single family home are not separate "buildings." State v. Thomson, 71 Wn. App. 634, 645, 861 P.2d 492 (1993). In contrast, units in an apartment, dormitory, or a hotel may qualify as separate "buildings" because of the distinct privacy interest retained by the tenants. Inmates in jail have no legitimate privacy interest in their cells. They are not tenants; the government is the sole tenant. Applying the rule of lenity, is a jail cell its own "building" within the meaning of the burglary statute? RAP 13.4(b)(1), (2), (4).

2. Unlawful imprisonment requires proof of restraint, meaning that the defendant substantially interfered with the victim's liberty of movement. This Court has held that "substantial" means "considerable."

State v. Rich, 184 Wn.2d 897, 904-05, 365 P.3d 746 (2016). Over the course of about two minutes, Mr. Kalac committed a brief, simple assault against another inmate. Did the State fail to prove that this assault constituted a considerable interference with the inmate's liberty of movement? RAP 13.4(b)(1), (4).

### **C. STATEMENT OF THE CASE**

In December 2014, David Kalac was an inmate at the Kitsap County Jail in Port Orchard. RP 591-92. Mr. Kalac was confined to a cell on the lower level. RP 592. Wayne Carlson, another inmate in the same unit, was confined to a cell on the upper level. RP 592. At some point during their custody, the two got into a heated exchange. RP 882.

Mr. Kalac decided to settle their differences by fighting Mr. Carlson. RP 898. Because the two were not out of their cells at the same time, Mr. Kalac concocted a plan to get out of his cell so he could fight Mr. Carlson one-on-one. RP 900-01.

On December 9, 2014, when Mr. Mr. Kalac returned to his cell, he placed a playing card in the locking mechanism of the door. RP 900. This made it so that the door appeared to be locked when closed, although it was not. RP 900.

At about 3:30 p.m., the inmates from the upper tier were released out of their cells and allowed to be in the dayroom until 6:00 p.m. See RP

593. Mr. Carlson ate his dinner and returned to his cell, leaving the door open. RP 605. Mr. Carlson's cellmate was in the dayroom. RP 605.

At about 4:58 p.m., Mr. Kalac left his cell and proceeded directly upstairs to Mr. Carlson's cell. RP 735, 917. Mr. Kalac knew that the guards would not be there because it was after dinner service. RP 913. Mr. Kalac entered the cell, closing the door behind him. RP 904. Mr. Kalac then fought Mr. Carlson, who refused to fight back. RP 607-11, 904-09. Mr. Carlson was able to use a button inside his cell to summon help. RP 609-10.

At 5:00 p.m., three officers arrived. RP 576, 645, 655-56, 735. The officer in the lead saw through the window of the door that Mr. Kalac had Mr. Carlson in a headlock. RP 647. Through the door, the lead officer told them to stop fighting and ordered Mr. Kalac to get onto the ground and place his hands behind his back. RP 652, 658, 678-79. Mr. Kalac immediately complied. RP 652. The officer then unlocked the door and entered. RP 654. The officers separated the two. RP 655, 670.

Mr. Carlson suffered from a minor laceration on his head and redness around his neck. RP 670, 792. No bandages or stitches were medically necessary. RP 789.

Rather than charge Mr. Kalac with fourth degree assault, the State charged him with attempted murder in the first degree, first degree

burglary, and unlawful imprisonment. CP 10-12. Unconvinced that Mr. Kalac attempted to murder Mr. Carlson, the jury convicted Mr. Kalac of the lesser included offense of attempted fourth degree assault. CP 110. The jury, however, convicted Mr. Kalac of first degree burglary and unlawful imprisonment. CP 110-11.

On appeal, Mr. Kalac argued the evidence was insufficient to convict him of burglary and unlawful imprisonment. He also argued that the trial court erred in dismissing the attempted murder charge *without* prejudice. The Court of Appeals agreed with Mr. Kalac on the latter argument,<sup>1</sup> but otherwise disagreed and affirmed.

#### **D. ARGUMENT**

- 1. Jail cells inside a jail are not separate “buildings” within the meaning of the burglary statute. Due to statutory ambiguity, the rule of lenity compels this conclusion. The Court of Appeals’ analysis is contrary to precedent and the issue is one of substantial public interest, meriting review.**

First degree burglary requires proof that the defendant entered or remained unlawfully in a “building.” RCW 9A.52.020(1). The term “building” has its “ordinary meaning” and includes “any dwelling.” RCW

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<sup>1</sup> Accepting the State’s concession of error, the Court of Appeals remanded for dismissal of the attempted first degree murder charge with prejudice.



9A.04.110(5). “Each unit of a building consisting of two or more units separately secured or occupied is a separate building.” Id.<sup>2</sup>

The question presented in this case is whether a jail cell within a jail is its own “building.” Under the statutory language, precedent, and the rule of lenity, the answer is no.

The most relevant case is State v. Thomson, 71 Wn. App. 634, 861 P.2d 492 (1993). There, a woman invited a man into her home. Thomson, 71 Wn. App. at 636. The woman rebuffed the man’s sexual advances, but permitted the man to stay in a guest room. Id. Later that night, the man broke into the woman’s room and raped her. Id. The man was convicted of first degree rape, which required proof that the defendant had feloniously entered into a “building.” Id.

The Thomson court held that the woman’s bedroom was not a “building” separate from the house. Id. at 646. The Court reasoned that

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<sup>2</sup> In full:

“Building,” in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

RCW 9A.04.110(5). “Dwelling” is defined as meaning “any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging.” RCW 9A.04.110(7).

rooms in single family houses did not qualify as “buildings” because there is a single privacy interest in the entire house:

In the situation involving the house, each family member has a privacy interest in the entire house, and that interest is not different from the interests of other family members. Thus, it makes sense to characterize the burglarized rooms as parts of a single building.

Id. at 645. The Court further reasoned that its construction was supported by the rule of lenity because the statute was ambiguous. Id.

Following Thomson, the Court of Appeals held that an evidence locker within a police station was not a separate “building” because the police station was occupied by a single tenant and was not a building consisting of multiple separately secured units. State v. Deitchler, 75 Wn. App. 134, 137, 876 P.2d 970 (1994). Similarly, separate stalls and coin boxes at a car wash were not their own “buildings” because the car wash was “occupied by a single tenant and was not a building consisting of two or more units separately secured or occupied.” State v. Miller, 90 Wn. App. 720, 729, 954 P.2d 925 (1998). In contrast, a large storage locker inside the common area of an apartment complex, used by a tenant and secured with a lock, qualified as a “building” given the separate privacy interest and multiple tenants. State v. Miller, 91 Wn. App. 869, 870-73, 960 P.2d 464 (1998).

Contrary to Thomson, the Court of Appeals reasoned that “the language of the statute defining ‘building’ unambiguously includes a jail cell.” Slip. op. at 9. The court reasoned that jail cells qualified because the cells were “dwellings,” meaning they were used for lodging. Slip. op at 9. The court also cited the evidence that the cell was occupied and secured by a lock. Slip. op. at 9-10. But the bedroom in Thomson was also used for the lodging of a person, was occupied, and secured by a lock. Under the Court of Appeals’ analysis in this case, the appellant in Thomson should have lost, not won. Thus, the decision is contrary to precedent. RAP 13.4(b)(2).

The Court of Appeals further reasoned that a jail cell qualified as a “building” because “[a] jail is a multi-unit building where each unit is occupied by a different individual or, in this case, a different pair of individuals.” Slip. op at 9. This reasoning is a form of the logical fallacy of begging the question, meaning that the court simply assumed its conclusion. The Court of Appeals failed to recognize the ambiguity of the RCW 9A.04.110(5).

The Court of Appeals also failed to recognize that inmates in a jail are not tenants. There is only one tenant, the government. The government forcibly houses inmates in the jail. As this Court wrote, “[n]o situation imaginable is as alien to the notion of privacy than an

arrestee sitting in a jail cell.” State v. Cheatam, 150 Wn.2d 626, 638, 81 P.3d 830 (2003) (quoting Oles v. State, 993 S.W.2d 103, 109 (Tex. Crim. App. 1999)). In short, inmates in a Washington jail lack any privacy interest in their cells. Hudson v. Palmer, 468 U.S. 517, 527, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984); State v. Babcock, 168 Wn. App. 598, 605-06, 279 P.3d 890 (2012) (citing Hudson for proposition that inmate did not have a privacy interest in his cell). Certainly, an inmate has no right to preclude another person from entering or remaining in his or her cell. That right belongs entirely to the jail (the government), not inmates.

The record in this case shows that the privacy of inmates at the Kitsap County Jail was not any greater. Inmates are locked in their cells and inmates have no control over when the door to their cell is locked. RP 60-04. Calls from the jail are recorded. RP 770-76. Cameras are present. RP 563, 714. The dayroom can be viewed from the control room through a one-way mirror. RP 567, 893. Inmates, including Mr. Carlson and Mr. Kalac, have cellmates. See RP 562, 605, 879, 891. The cells have speakers that can be used by the jailers to eavesdrop. RP 583, 598. As for the belongings inmates are permitted to keep in their cell, such as clothing, these belongings are required to be kept inside a clear bag so that guards can more easily search the cells. RP 887, 889-90.

Even if Mr. Kalac's interpretation of the statute is not the *only* reasonable one, at the least, it is *a* reasonable one. See, e.g., State v. Conover, 183 Wn.2d 706, 711-14, 355 P.3d 1093 (2015). Accordingly, as in Thomson, the Court of Appeals should have applied the rule of lenity and interpreted the statute in Mr. Kalac's favor. Applying Mr. Kalac's interpretation, the Court of Appeals should have reversed Mr. Kalac's conviction for burglary because he did not enter or remain unlawfully in a "building."

The court's decision is in conflict with Thomson. It is also contrary to precedent applying the rule of lenity. Thus, the issue merits review. RAP 13.4(b)(1), (2). The issue of whether a jail cell qualifies as a "building" under the burglary statute is an issue of substantial public interest, meriting review. RAP 13.4(b)(4). This Court should grant review and provide clarity on meaning of the term "building" as defined RCW 9A.04.110(5).

**2. Unlawful imprisonment requires proof of restraint, meaning that the person's liberty of movement has been restricted in a manner that is "considerable." In conflict with precedent, the Court of Appeals applied a lesser standard, effectively holding that any brief, simple assault constitutes unlawful imprisonment, a felony.**

This Court should also grant review on whether the evidence was sufficient to prove unlawful imprisonment. Unlawful imprisonment is a

lesser included offense of kidnapping. State v. Davis, 177 Wn. App. 454, 461, 311 P.3d 1278 (2013). It requires proof that the defendant “knowingly restrains another.” RCW 9A.40.040. “‘Restraint’ is defined as a restriction of a person’s movement without his or her consent and without legal authority, in a manner substantially interfering with that person’s liberty.” State v. Berg, 181 Wn.2d 857, 863, 337 P.3d 310 (2014) (citing RCW 9A.40.010(6)).

The term “substantial” is not defined by statute and the term was not defined for the jury. In Robinson, a case challenging the sufficiency of the evidence to sustain a conviction for unlawful imprisonment, two judges on the Court of Appeals defined the term “substantial” (for the purposes of unlawful imprisonment), “to mean a ‘real’ or ‘material’ interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict.” State v. Robinson, 20 Wn. App. 882, 884, 582 P.2d 580 (1978) aff’d, 92 Wn.2d 357, 597 P.2d 892 (1979). The court cited two out-of-state civil cases in support of this definition. Id. at 884 n.1. Applying this definition, the majority concluded that the evidence was sufficient to convict the defendant of unlawful imprisonment. The defendant had forcibly grabbed a teenage girl who was walking home from school and pulled her toward

his running car. Id. at 883. The teenager fought back and was able to secure her release. Id.<sup>3</sup>

In contrast, the dissent maintained that the term “‘substantially’ must have a broader meaning than ‘actual’ or ‘real.’” Id. at 886 (Roe, J., dissenting). The dissent correctly reasoned that the offense “requires something more than mere assault by gripping and pulling” and that the evidence was inadequate to prove the offense. Id. at 886-87.

This Court summarily agreed that the evidence was sufficient to convict the defendant in Robinson of unlawful imprisonment. State v. Robinson, 92 Wn.2d 357, 360, 597 P.2d 892 (1979). The Court, however, did not discuss or construe the meaning of the term “substantial.” Id.

Since Robinson, in the context of a case involving second degree assault, this Court rejected a definition defining substantial as meaning “something having substance or actual existence.” State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011). Rather, this Court concluded that “substantial” means “‘considerable in amount, value, or worth.’” Id. at 805 (quoting Webster’s Third New International Dictionary 2280 (2002)). Following McKague, this Court recently applied this definition in the context of the reckless endangerment statute, which requires proof of a

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<sup>3</sup> These facts appear to be sufficient to prove an attempted kidnapping in the second degree, a felony. RCW 9A.40.030; RCW 9A.28.020.

“substantial” risk. State v. Rich, 184 Wn.2d 897, 904-05, 365 P.3d 746 (2016).

Rich and McKague notwithstanding, the Court of Appeals held that the lesser Robinson standard was still viable. Slip. op. at 14. Other than recounting that the offense of burglary is codified in chapter 9A.52 RCW and that assault and reckless endangerment are codified in chapter 9A.36 RCW, the court did not explain why this result should follow. Slip. op. at 14. Absent evidence that the Legislature intended a different meaning, the meaning of “substantial” should have the same plain language definition. Further, the Robinson definition is suspect because it is based on out-of-state civil cases rather than Washington criminal caselaw.

Thus, contrary to the majority decision in Robinson, the term substantial has a stricter meaning than simply a “real” interference with a person’s liberty. Rather, it must be a “considerable” interference. Here, any restraint upon Mr. Carlson was simply incidental to the brief assault, which at best lasted about two minutes. Most simple assaults qualify as fourth degree assault, a gross misdemeanor. RCW 9A.36.041(2). But under the Court of Appeals’ analysis, many simple assaults are properly charged as unlawful imprisonment, a felony. RCW 9A.40.040(2). This was not the intent of the Legislature.



That Mr. Kalac closed the door of the cell, which then automatically locked, also did not prove unlawful imprisonment. Closing the cell door was a mere annoyance which lasted only about two minutes. It was akin to purposefully pushing an elevator button so as to force the occupant to a floor beyond which he or she wanted to go, which the Court of Appeals has indicated would be insufficient to prove sufficient restraint. Robinson, 20 Wn. App. at 885. Moreover, at trial during closing, the State conceded this was insufficient and identified Mr. Kalac's assaultive conduct against Mr. Carlson as the evidence supporting the charge. RP 1039 (“[Mr. Carlson’s] liberty was restricted by [Mr. Kalac’s] physical force. Forget the shape of the cell that he’s in or that the cell door must be closed.”) (emphasis added).

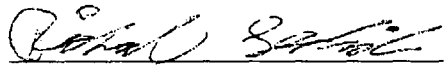
Perhaps in an effort to avoid review by this Court, the Court of Appeals reasoned, alternatively, that even applying the definition of “substantial” as used in Rich and McKague, the evidence was still sufficient. Slip. op. at 15. The court’s analysis is conclusory. It ignores the undisputed evidence that the restraint was incidental to an assault and, at best, lasted about two minutes. This does not establish that Mr. Carlson’s liberty of movement was restricted in a manner that was “considerable.”

The Court of Appeals' interpretation of the term "substantial" is in conflict with precedent from this Court, meriting review. RAP 13.4(b)(1). And whether a minor, simple assault (usually a misdemeanor) can properly constitute unlawful imprisonment (a felony) is an issue of substantial public interest, further meriting review. RAP 13.4(b)(4).

#### **E. CONCLUSION**

A jail cell is not a separate "building" within the meaning of the burglary statute. And to be guilty of unlawful imprisonment, the restraint imposed on a person's liberty of movement must be "considerable." To resolve the conflict in the precedent and to provide clarity as to the burglary and unlawful imprisonment statutes, this Court should grant review.

Respectfully submitted this 5th day of October, 2016.



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# Appendix

September 7, 2016

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

DAVID MICHAEL KALAC,

Appellant.

No. 47506-5-II

UNPUBLISHED OPINION

LEE, J. — David Michael Kalac broke out of his jail cell, walked up the stairs, and entered the cell of another inmate, Wayne Carlson. Kalac pulled Carlson off of his bunk, kicked him, and put him in a headlock until jail guards arrived approximately two minutes later. Kalac was convicted of first degree burglary, unlawful imprisonment, and attempted fourth degree assault as a lesser included offense to the charged crime of attempted first degree murder.

On appeal, Kalac argues that (1) insufficient evidence was presented to convict him of burglary because the State did not prove (a) Carlson's cell constituted a "building," nor that (b) Kalac's entry or remainder in Carlson's cell was "unlawful"; (2) insufficient evidence was presented to convict him of unlawful imprisonment; (3) the trial court's dismissal without prejudice of his attempted murder charge violates double jeopardy; (4) he received ineffective assistance of counsel when his attorney failed to object to, and signed, the order dismissing the

attempted murder charged without prejudice; and (5) appellate costs should not be awarded against him.

We hold that sufficient evidence exists to persuade a rational trier of fact beyond a reasonable doubt that Kalac was guilty of first degree burglary and unlawful imprisonment. We also hold that the trial court's dismissal without prejudice of his attempted murder charge violates double jeopardy, and accordingly, we do not address his ineffective assistance of counsel claim. Finally, we do not award appellate costs against Kalac. We affirm, but remand for the trial court to dismiss the attempted first degree murder charge with prejudice.

#### FACTS

In December 2014, Kalac and Carlson were incarcerated in Unit B of the Kitsap County Jail. Unit B has two floors with jail cells on each floor and a dayroom on the lower floor. Each cell is equipped with a speaker and button to activate the speaker, which allows for two-way communication between the cell and the guards. The door to each cell locks automatically when it is closed. The door to each cell has a window, allowing people to speak through the doors. The dayroom is a common area that is used by the inmates of Unit B at different times depending on which floor of Unit B they are housed; the inmates housed on the lower floor are not in the dayroom at the same time as inmates from the upper floor. One wall of the dayroom is a one-way mirror, allowing guards to observe the activity in the dayroom without being in the dayroom. The one-way mirror also enabled the inmates housed on the lower floor to see the majority of the cells on the second floor. Inmates housed in the lower floor are not allowed on the upper floor, and no inmate is allowed in another inmate's cell.

Kalac was housed in the lower floor of Unit B and Carlson was housed in the upper floor. Sometime in early December 2014, while Carlson was in the dayroom and Kalac was locked in his cell, Carlson flipped Kalac off. The two subsequently engaged in a heated verbal exchange at Kalac's cell door, with Carlson in the dayroom and Kalac locked in his cell. Kalac decided to fight Carlson.

On December 9, 2014, Kalac returned to his cell from the dayroom and placed a playing card in the locking mechanism of his cell door. He then closed his cell door, making it appear to the guards as though he were locked in, while the playing card kept the door from locking. Kalac watched the reflection in the one-way mirror as Carlson returned to his cell but did not close his cell door. Kalac then pushed his cell door open and proceeded upstairs to Carlson's cell. The video recordings of the dayroom show it was 4:58 p.m.

Kalac entered Carlson's cell, closed the door behind him, and pulled Carlson off of the top bunk. Kalac's and Carlson's accounts of the following assault differ, but both agree that Kalac kicked and tried to punch Carlson before putting Carlson in a headlock. During the scuffle, Carlson was able to push the emergency button in his cell repeatedly and Carlson's head hit the sink in the cell. Three officers responded, ordering Kalac to stop and get on the ground with his hands behind his back. Kalac complied and the officers entered. The video recordings of the dayroom show the officers entering Carlson's cell at 5:00 p.m.

Kalac was charged with first degree burglary, unlawful imprisonment, and first degree attempted murder. A jury found him guilty of first degree burglary, unlawful imprisonment, and attempted fourth degree assault as a lesser included offense to the attempted first degree murder

charge.<sup>1</sup> The jury also found by special verdict that Kalac restrained Carlson without consent and by physical force, intimidation, or deception. The trial court entered an order dismissing the attempted first degree murder charge without prejudice. Kalac was sentenced to a total of 41 months and, finding that Kalac did not have the ability to pay legal financial obligations (LFOs), the sentencing court imposed only mandatory LFOs. Kalac appeals.

#### ANALYSIS

##### A. SUFFICIENCY OF THE EVIDENCE

A challenge to the sufficiency of the evidence to convict is a constitutional question we review de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Our Supreme Court in *Rich* explained this court's review on a sufficiency of the evidence challenge as follows:

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. CONST. amend. XIV; WASH. CONST. art. 1, § 3. To determine if sufficient evidence supports a conviction, we consider “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime *beyond* a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (some emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A “modicum” of evidence does not meet this standard. *Jackson*, 443 U.S. at 320.

*Rich*, 184 Wn.2d at 903.

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<sup>1</sup> Because the jury found Kalac guilty of fourth degree assault as the lesser included offense to the attempted first degree murder charge, no mistrial was declared on the attempted first degree murder charge.

1. Burglary Conviction

Kalac argues insufficient evidence was presented at trial to convict him of burglary. Specifically, Kalac argues insufficient evidence was presented to establish that Carlson's cell was a "building," and that his entry into or remaining within Carlson's cell was "unlawful," as each term is used in the burglary statute. Br. of Appellant at 9-17. We hold that sufficient evidence was presented to show Carlson's cell was a "building" and Kalac's entry and remainder in Carlson's cell was "unlawful" as those terms are defined in Washington's statutory proscription of burglary.

Kalac was convicted of first degree burglary. First degree burglary is statutorily proscribed in Washington as follows:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020(1). Thus, first degree burglary requires, as elements to the offense, that the defendant enter or remain "unlawfully" in a "building." RCW 9A.52.020(1).<sup>2</sup>

We review issues of statutory construction de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). We look to the statute's plain language in order to give effect to legislative intent, giving statutory terms their plain and ordinary meaning. *Id.* at 346. Whenever possible, statutes are read in harmony and in such manner as to give each effect. *State v. Bays*, 90 Wn. App.

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<sup>2</sup> The to-convict jury instruction mirrored this language. Kalac does not assign error to any of the jury instructions.



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731, 735, 954 P.2d 301 (1998). Statutes are interpreted to give effect to all language in them and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

a. “Building”

Kalac argues that jail cells are not “buildings” within the meaning of the statute, but at the very least, the rule of lenity requires the adoption of a narrower definition of “building.” Br. of Appellant at 15. In support, he uses the definitions of “building” from *State v. Thomson*, 71 Wn. App. 634, 861 P.2d 492 (1993); *State v. Deitchler*, 75 Wn. App. 134, 876 P.2d 970 (1994), *review denied*, 125 Wn.2d 1015 (1995); and *State v. Miller*, 91 Wn. App. 869, 960 P.2d 464 (1998), *review denied*, 137 Wn.2d 1012 (1999), to argue that in order for a place to be considered a building, there must be “a separate ‘privacy interest’ from other tenants in their space.” Br. of Appellant at 12 (quoting *Thomson*, 71 Wn. App. at 645). We hold that jail cells are “buildings” for purposes of the burglary statute.

RCW 9A.04.110(5) provides the statutory definition for “building” as follows:

(5) “Building,” in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

“Dwelling” is “any building or structure . . . or a portion thereof, which is used or ordinarily used by a person for lodging.” RCW 9A.04.110(7).

In *Thomson*, a woman invited Thomson back to her house one night, whereupon she rebuffed his sexual advances and told him he could sleep in the guest bedroom. 71 Wn. App. at

636. The woman returned to her room and locked her bedroom door behind her. *Id.* During the night, Thomson broke through the woman's bedroom door and raped her. *Id.* On appeal, the court held that the woman's entire home constituted a "building" under RCW 9A.04.110(5), rather than her individual room. *Id.* at 646.

The *Thomson* court held that the phrase of RCW 9A.04.110(5) that follows the semicolon—"each unit of a building consisting of two or more units separately secured or occupied is a separate building"—was intended by the legislature to define each unit within a multi-unit structure as an individual "building" where each unit is occupied by different tenants. *Id.* at 645. The court reasoned that, in a multi-unit structure, "each tenant has a privacy interest in his or her room or apartment, and that interest is separate from the interests of other tenants." *Id.* The court further held that applying "the rule of lenity would lead us to the same construction of the statute," specifically, that "RCW 9A.04.110(5) should be construed as applying to multi-unit buildings in which two or more rooms are occupied or intended to be occupied by different tenants separately, but not to dwellings wholly occupied by a single tenant."<sup>3</sup> *Id.* at 645-46.

A year later, the issue of what constituted a "building" under RCW 9A.04.110(5) was again considered in *Deitchler*, 75 Wn. App. at 136. The *Deitchler* court held that an evidence locker in a police station that was ten inches high, by ten inches wide, and about two feet deep, was not a "building" under RCW 9A.04.110(5), and therefore, a burglary conviction could not be affirmed. *Id.* at 135, 137.

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<sup>3</sup> The court defined the rule of lenity. "The rule of lenity provides that ambiguity in a criminal statute should be resolved in favor of the defendant." *Thomson*, 71 Wn. App. at 645.

The court explained:

RCW 9A.04.110(5) has two parts, one preceding and one following the semicolon. The first deals with “buildings” not within a larger “building.” The second deals with “buildings” within a larger building. According to the second, a structure or space within a larger building will be a “separate building” if the larger building has “two or more units separately secured or occupied”, and the structure or space being considered is one of those “units”. By negative implication, a structure or space within a larger building will *not* be a “separate building” *unless* the larger building has “two or more units separately secured or occupied”, and the structure or space being considered is one of those “units”.

*Id.* at 137. Because the police station was occupied by a single tenant, the *Deitchler* court held there was no separate privacy interest between the police station and the evidence locker such that the evidence locker could be considered a separate building. *Id.*

Finally, the definition of “building” under RCW 9A.04.110(5) was again considered in *Miller*. 91 Wn. App. 869. In *Miller*, an apartment manager discovered Miller in or around the basement storage locker of one of the apartment’s tenants and called the police. *Id.* at 870-71. The police tracked Miller’s car and called the manager to identify Miller and the items in Miller’s possession. *Id.* at 871. The manager was able to unlock a padlock found in Miller’s jacket with his manager’s keys and identify luggage in Miller’s back seat that came from a storage locker of one of the apartment’s tenants. *Id.*

The *Miller* court held that the storage locker was considered a separate “building,” apart from the larger apartment building within which the storage locker was located. *Id.* at 870. The court reasoned that “the storage locker Miller broke into was large enough to accommodate a human being, that is, to allow entry or occupation.” *Id.* at 873. “Moreover, the padlocked, door-

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accessed unit was secured from other tenants, the manager or building owners of the apartment complex, indicat[ed] a separate privacy interest.” *Id.*

Here, the language of the statute defining “building” unambiguously includes a jail cell, and the reasoning expressed in *Thomson, Deitchler, and Miller* support the definition of “building” to include a jail cell. First, jail cells are “used for lodging of persons,” and therefore fit the plain language of the statutory definitions of “building” and “dwelling” as defined in the burglary statute. RCW 9A.04.110(5) (“‘Building,’ . . . includes any dwelling . . . or any other structure used for lodging of persons”); RCW 9A.04.110(7) (“‘Dwelling’ means any building or structure . . . or a portion thereof, which is used or ordinarily used by a person for lodging”). Second, *Thomson, Deitchler, and Miller* each held that the portion of the definition of “building” that follows the semicolon was intended by the legislature “to define ‘building’ to include each unit of a multi-unit building where each unit is occupied by a different individual.” *Miller*, 91 Wn. App. at 872. A jail is a multi-unit building where each unit is occupied by a different individual or, in this case, a different pair of individuals.

Kalac’s argument that there must be “a separate ‘privacy interest’ from other tenants” in order for it to be considered a building fails because the reasoning from *Thomson, Deitchler, and Miller* support the opposite conclusion. Br. of Appellant at 12 (quoting *Thomson*, 71 Wn. App. at 645). Here, the inmates have an interest in their respective jail cells that are “separate from the interests of [the] other tenants,” where those “other tenants” are the other inmates. *Thomson*, 71 Wn. App. at 645 (reasoning that units within a multi-unit structure are separate buildings for purposes of the burglary statute when the tenants of each unit have an interest in their unit that “is

separate from the interests of other tenants.”). Additionally, within Unit B, there are 13 cells on each floor and each cell has its own locking mechanism; thus, the jail is “the larger building [and] has ‘two or more units separately secured or occupied,’” making each “unit,” or jail cell, a “separate building.” *Deitchler*, 75 Wn. App. at 137 (reasoning that a space is considered a “‘separate building’ if the larger building has ‘two or more units separately secured or occupied.’”). Finally, each cell is “large enough to accommodate a human being” and is designed to be secured from other inmates, and, therefore, each cell is considered a “building” for the purposes of the burglary statute. *Miller*, 91 Wn. App. at 873 (reasoning that a space was considered a building when it “was large enough to accommodate a human being, that is, to allow entry or occupation,” and was secured from other tenants but not the manager of the larger structure).

In conclusion, we hold that jail cells are separate buildings within the meaning of RCW 9A.52.020(1) and RCW 9A.04.110(5), and that sufficient evidence was presented to establish that Carlson’s cell was a “building.” The rule of lenity does not apply to give Kalac’s interpretation effect because there is no ambiguity in the statutes as they relate to the inclusion of a jail cell within the definition of a “building” that can be burglarized under RCW 9A.52.020(1) and RCW 9A.04.110(5).

b. “Unlawfully”

Kalac argues that even if the cell qualified as a building, the State failed to prove that he “unlawfully” entered or remained in Carlson’s cell. Br. of Appellant at 16. Specifically, Kalac argues that the State did not present any evidence of jail regulations that forbade inmates from entering another inmate’s cell. We disagree.

Former RCW 9A.52.010(3) (2011) provides the statutory definition for “[e]nters or remains unlawfully.”

A person “enters or remains unlawfully” in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

“‘Premises’ includes any building [or] dwelling.” Former RCW 9A.52.010(1). “The law of burglary was designed to protect the dweller, and hence, the controlling question here is occupancy rather than ownership.” *State v. Schneider*, 36 Wn. App. 237, 241, 673 P.2d 200 (1983).

Here, Carlson testified that there is a rule book and inmates are provided those rules when they are booked into the jail. He testified the rules do not allow inmates from the lower floor to go to the second upper floor and that inmates are not allowed to go into other inmates’ cells. Kalac testified that he knew he was not supposed to go into another inmate’s cell, that he should not have been in Carlson’s cell, and that he intentionally went into Carlson’s cell without invitation. He further testified that he knew he would be seen and caught in Carlson’s cell. Finally, the cell Carlson occupied was a “premises” for the purposes of the burglary statute because it was a “building.” *See* subsection a, *supra*. Accordingly, the testimony presented at trial established Kalac was not “licensed, invited, or otherwise privileged to so enter or remain” in the cell Carlson occupied, and therefore, we hold Kalac’s entry and remainder in the cell Carlson occupied was “unlawful.” Former RCW 9A.52.010(3).

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt the elements of burglary Kalac challenges. Therefore, we affirm his conviction for first degree burglary.

2. Unlawful Imprisonment Conviction

Kalac argues that the evidence presented was insufficient to convict him of unlawful imprisonment. Specifically, Kalac argues that he did not restrain Carlson's movements in a "substantial" or "considerable" manner. Br. of Appellant at 19, 20, 21. We hold that sufficient evidence was presented to convict Kalac of unlawful imprisonment.

"A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). "'Restrain' means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is 'without consent' if it is accomplished by (a) physical force, intimidation, or deception." RCW 9A.40.010(6). For restraint to be substantial, there must be a "'real' or 'material' interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict." *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff'd*, 92 Wn.2d 357, 597 P.2d 892 (1979).

Here, Kalac entered Carlson's cell and closed the door, knowing that when the door closed it would lock and remain so until unlocked by the guards who would come break up the fight. Kalac testified that when he heard the guards enter the dayroom downstairs and yell "lockdown" he put Carlson in a headlock and "wanted to hold on to Mr. Carlson long enough for the guards to get there" to the door of Carlson's cell. 6 VRP at 909. Kalac held Carlson in a headlock inside the locked cell until ordered to release him by the guards. The guards then unlocked the cell and opened the door. Under these facts, viewed in the light most favorable to the prosecution, a rational trier of fact could find that Kalac knowingly restricted Carlson's movements without Carlson's

consent or legal authority by physical force. Therefore, we hold that sufficient evidence was presented to convict Kalac of unlawful imprisonment.

Kalac argues that our Supreme Court changed the standard for “substantial” from the “‘real’ or ‘material’ interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict,” as stated in *Robinson*, 20 Wn. App. at 884, to “‘considerable,’” and cites to *State v. McKague*, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011), and *Rich*, 184 Wn.2d at 904-05. We disagree.

In *McKague*, our Supreme Court considered a challenge to the sufficiency of the evidence to convict on a second degree assault charge. 172 Wn.2d at 805. Specifically, the court considered the definition of “substantial” for the element of “substantial bodily harm” under second degree assault, RCW 9A.36.021(1)(a).<sup>4</sup> *McKague*, 172 Wn.2d at 805. Our Supreme Court held that the dictionary definition of “substantial” as “‘something having good substance or actual existence,’ would make practically any demonstrable impairment or disfigurement a ‘substantial’ injury regardless of how minor.” *McKague*, 172 Wn.2d at 806 (quoting *State v. McKague*, 159 Wn. App. 489, 503 n.7, 246 P.3d 558 (2011)). The court held “‘instead that the term ‘substantial,’ as used in RCW 9A.36.021(1)(a) [second degree assault], signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence.” *McKague*, 172 Wn.2d at 806.

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<sup>4</sup> “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.” RCW 9A.36.021(1).



In *Rich*, our Supreme Court considered a challenge to the sufficiency of the evidence to convict on a reckless endangerment charge. 184 Wn.2d at 900-01. To convict on the reckless endangerment charge, the State had to prove there was a “substantial risk of death or serious physical injury.” *Rich*, 184 Wn.2d at 904 (quoting RCW 9A.36.050(1)). Our Supreme Court recognized there was no statutory definition for “substantial” as it is used in RCW 9A.36.050(1), and looked to the definition it used in *McKague*, “as ‘considerable in amount, value, or worth’ and more than just ‘having some existence.’” *Rich*, 184 Wn.2d at 905 (quoting *McKague*, 172 Wn.2d at 806).

Here, we decline to hold that the *Robinson* definition of “substantial” has been replaced with the *McKague* and *Rich* definition for “substantial.” *Robinson* specifically addressed the term “substantial” as it is used in the unlawful imprisonment statute. 20 Wn. App. at 883-85. Unlawful imprisonment is proscribed in chapter 9A.40 RCW. *McKague* and *Rich* addressed the term “substantial” as it is used in the second degree assault and reckless endangerment statutes, both of which are proscribed in chapter 9A.36 RCW. The definition from *Robinson* remains good law, at least in the context of sufficiency challenges to unlawful imprisonment convictions. *See e.g. State v. Washington*, 135 Wn. App. 42, 49-50, 143 P.3d 606 (2006) (stating, in the context of a sufficiency of the evidence challenge to an unlawful imprisonment conviction, “A substantial interference is ‘a real or material interference with the liberty of another as contrasted with a petty annoyance, a slight inconvenience, or an imaginary conflict.’” (quoting *Robinson*, 20 Wn. App. at 884), *review denied*, 160 Wn.2d 1017 (2007)).

But, even applying the definition of “substantial” that our Supreme Court has used for second degree assault and reckless endangerment, we still hold that sufficient evidence was presented at trial to convince a rational trier of fact of Kalac’s guilt beyond a reasonable doubt. As recited above, Kalac entered Carlson’s cell and closed the door knowing it could not be opened from the inside, and he subsequently placed Carlson in a headlock so that he could not move until the guards arrived. Testimony at trial showed the headlock resulted in Carlson feeling like his circulation and ability to breathe were cut off, and resulted in red marks on the side of Carlson’s throat. Viewed in the light most favorable to the State, this evidence was sufficient to persuade a rational trier of fact that Kalac’s restraint of Carlson was “considerable in amount, value, or worth” and more than just “having some existence,” as our Supreme Court has defined the term “substantial” in other chapters of the RCW. *Rich*, 184 Wn.2d at 905 (quoting *McKague*, 172 Wn.2d at 806). Therefore, we hold that Kalac’s challenge to the sufficiency of the evidence to convict him of unlawful imprisonment fails.

B. DOUBLE JEOPARDY

Kalac argues that the trial court erred in signing an order of dismissal without prejudice on the charge of attempted first degree murder. We agree and remand to the trial court to dismiss the attempted first degree murder charge with prejudice.

The federal and Washington constitutions prohibit placing defendants in double jeopardy. WASH. CONST. art. I, § 9; U.S. CONST. amend. V. The prohibitions on double jeopardy provide that “a conviction on a lesser-included offense bars a subsequent trial on the greater offense.” *Illinois v. Vitale*, 447 U.S. 410, 421, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980).

Here, the State “concedes that on this record it may not retry Kalac on that charge” of attempted first degree murder of Carlson. Br. of Resp’t at 23. Because the jury found Kalac guilty of fourth degree assault as the lesser included offense for the attempted first degree murder charge, we accept the State’s concession and remand for dismissal of the attempted first degree murder charge with prejudice.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Kalac argues that he received ineffective assistance of counsel when his attorney failed to object to, and instead signed, the order dismissing the attempted murder charge without prejudice. We do not reach this issue because the relief Kalac requests in asserting his ineffective assistance of counsel claim—that the charge be dismissed with prejudice—has been granted on double jeopardy grounds. *See* Section B, *supra*.

D. Appellate Costs

Kalac argues that any requests for appellate costs to be imposed on him be denied because the trial court determined that he did not have the present or future ability to pay legal financial obligations. The State asserts that it “has no intention of seeking appellate costs in this case.” Br. of Resp’t at 24.

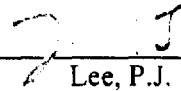
RAP 15.2(f) provides that “[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” Here, an order of indigency was filed with the trial court and the record does not reflect a finding by the trial court that Kalac’s financial

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condition has improved beyond indigency. Therefore, we do not impose any appellate costs on Kalac in this case.

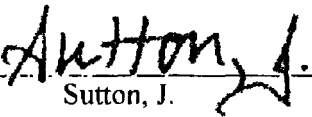
We affirm but remand for the trial court to dismiss the attempted first degree murder charge with prejudice.

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.

  
\_\_\_\_\_  
Lee, P.J.

We concur:

  
\_\_\_\_\_  
Melnick, J.

  
\_\_\_\_\_  
Sutton, J.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 47506-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent John Cross  
[kcpa@co.kitsap.wa.us]  
Kitsap County Prosecutor's Office
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: October 5, 2016

# WASHINGTON APPELLATE PROJECT

**October 05, 2016 - 4:15 PM**

## Transmittal Letter

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Court of Appeals Case Number: 47506-5

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