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COURT OF APPEALS
STATE OF WASHINGTON
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NO. 64475-1-I

IN THE COURT OF APPEALS THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TROY NEAL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine D. Shaffer

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Troy Neal was convicted of residential burglary based upon his entry of a maintenance room in the common area of an apartment building. He contends on appeal that this room was not a “dwelling” within the meaning of the burglary statute and that the trial court erred in failing to instruct the jury in the language of the statute, therefore, his conviction for residential burglary must be reversed.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred by entering a conviction for residential burglary in the absence of sufficient evidence from which the jury could find, beyond a reasonable doubt, that Mr. Neal entered or remained unlawfully in a “dwelling.”

2. The trial court erred in failing to instruct the jury in the language of the statute regarding “dwelling” in violation of his right to present a defense and endure a conviction only upon a unanimous jury verdict on all the elements beyond a reasonable doubt.

3. The trial court’s instruction defining “dwelling” was an improper comment on the evidence in violation of Article IV, section 16 of the Washington Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. A “dwelling” is “a building or structure” “or portion thereof,” which is used or ordinarily used by a person for lodging” Where the maintenance closet or tool room in question was not ordinarily used for lodging, did it constitute a dwelling for purposes of the residential burglary statute? (Assignment of Error 1).

2. An accused person is entitled to have the jury fully instructed on the law in support of his theory of defense. The trial court refused to instruct the jury using the more complete statutory definition of “dwelling” which provided that a dwelling is “any building or structure, or a portion thereof, that is used or ordinarily used by a person for lodging.” CP 21. Was Mr. Neal deprived of his opportunity to present his defense by the trial court’s failure to fully instruct the jury on the statutory definition of “dwelling?” (Assignment of Error 2-3).

3. Did the failure to fully instruct the jury on the elements of the offense serve as a comment on the evidence and deprive Mr. Neal of the constitutional right to a jury verdict as to the nature of the “building or structure, or a portion thereof” which he was alleged to have entered? (Assignment of Error 2-3).

D. STATEMENT OF THE CASE.

Mr. Neal explained that after his wife died he found himself on an emotional rollercoaster fueled by drug and alcohol abuse. SRP 8-10. At the bottom of that desperate ride, Mr. Neal was apparently found intoxicated and taking tools from a 10' x 10' room used for storage that was part of an apartment building in Seattle. RP 88-93, 105, 135. When confronted by maintenance worker Ward Nelson, Mr. Neal reportedly muttered something and left with some tools in a bag. Id. Mr. Nelson followed Mr. Neal for a couple of blocks while calling the police on a cell phone before Mr. Neal went in the emergency entrance of the nearby Harborview Medical Center. RP 94-97.

Mr. Neal was eventually arrested by Seattle Police officers on the seventh floor of the medical center and identified by Mr. Nelson. RP 73-77, 99, 109, 134-35. At the time of his arrest, Mr. Neal was also found to be in possession of a very small amount of cocaine and a credit card that was not his own. RP 78-81, 112-13, 122-28, 152-60.

Mr. Neal was charged with residential burglary (RCW 9A.52.025), possession of stolen property (RCW 9A.56.160(1)(c), 9A.56.140(1) and 9A.56.010(1)), and possession of cocaine (RCW

69.50.4013). CP 1-2. Following a jury trial before the Honorable Catherine Shaffer, Mr. Neal was convicted as charged. CP 89. This appeal timely followed. CP 99.

E. ARGUMENT.

1. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH RESIDENTIAL BURGLARY AND HIS CONVICTION MUST BE REVERSED

a. The evidence failed to establish the tool room was a “dwelling.” Ward Nelson described the room in which Mr. Neal was found as a 10’ x 10’ tool room. RP 91. Officer Connors described the room as being on the ground level, tucked in a back corner.¹ Mr. Nelson further acknowledged that it was not necessary to enter a residence to get to the tool room, and that no lives or sleeps in the room. CP 102.

At the close of the State’s case, Mr. Neal moved to dismiss the residential burglary charge based on the failure to establish the tool room was a dwelling, i.e., a building or structure, or a portion thereof, ordinarily used for lodging. RP 170-72. The Court denied the motion. RP 173-78.

¹ Mr. Nelson didn’t recall there being a sign on the door. CP 92. Officer Connors testified, however, that the room had a sign that said “Maintenance Room, No Trespassing.” RP 137-38, 145.

b. The residential burglary statute limits such prosecutions to a "dwelling". Residential burglary is now defined by statute in Washington. State v. Bergeron, 105 Wn.2d 1, 6, 711 P.2d 1000 (1985). RCW 9A.52.025 defines residential burglary as follows:

(1) 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.04.110(7) in turn defines "dwelling" as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging."

Constitutional due process, in turn, requires the prosecution to prove each element of residential burglary charge beyond a reasonable doubt. U.S. Const. Amend XIV; Apprendi v. New Jersey, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Mr. Neal contends that where the undisputed evidence was that the tool room was never used for lodging, its tangential attachment to the building was insufficient to sustain this conviction.

c. The evidence was insufficient to meet the statutory definition of “dwelling.” The aggravated nature of residential burglary is based on the extraordinary invasiveness of entering a person’s dwelling place where there is a heightened state of both privacy and security. See e.g. State v. Smith, 67 Wn.App. 81, 92, 834 P.2d 26 (1992); State v. Falling, 50 Wn.App. 47, 55, 747 P.2d 1119 (1987). Nevertheless, fundamental rules of statutory interpretation require a narrow construction be given to the word “dwelling.”

As a part of a penal statute, the “dwelling” provision must be construed strictly and may not be extended by construction to situations not clearly intended by the Legislature. See Blanchard Co. v. Ward, 124 Wash. 204, 207, 213 P. 929 (1923). If the statutory definition is ambiguous, under the rule of lenity, courts must adopt the interpretation that favors the defendant. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

The meaning of a statutory provision must be discerned from the ordinary meaning of the language, the context of the

statute in which it is found and the statutory scheme as a whole. See Christensen v. Ellsworth, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007). If the statutory language is susceptible to more than one reasonable interpretation, then the court may resort to rules of statutory construction, legislative history, and relevant case law for assistance. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

As noted already, RCW 9A.04.110(7) defines "dwelling" as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." Division Three of this Court has concluded that an attached garage constitutes a dwelling because it is a portion of a building that is used as a dwelling. See e.g. State v. Murbach, 68 Wn.App. 509, 843 P.2d 551 (1993). Such an interpretation is inconsistent, however, with simple English grammatical constructions which would require the reference to a portion of the building also include the requirement that the portion in question also be used as for lodging. See United States v. Excitement Video, 513 U.S. 64, 77-78, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).

Furthermore, the "doctrine of the last antecedent" which provides that qualifying words, phrases or clauses apply to the

words, phrases or clauses immediately preceding it.” See Barnhart v. Thomas, 540 U.S. 20, 26, 124 S.Ct. 376, 381, 157 L.Ed.2d 333 (2003); United States v. Hodge, 321 F.3d 429, 433 (3d Cir., 2003). The legislative definition of “dwelling” can only be given full effect where the lodging requirement is applied to the provision of the statute immediately preceding it to require that portion of a building be used for lodging.²

If Quasimodo sleeps in the organ loft of Notre Dame, does the entire cathedral become a dwelling because some small portion is used for his lodging? This is the absurd result that extending the interpretation developed in Murbach would produce. “[T]he rule of statutory construction that trumps every other rule,” is that the Court should not adopt an interpretation that results in absurd or strained consequences. Davis, 137 Wn.2d at 971. This Court should therefore reject the application of Murbach to the current case as inconsistent with the legislative definition of dwelling and reverse Mr. Neal’s conviction for residential burglary.

² The meaning of any particular word in the statute is not gleaned from that word or phrase alone, as the reviewing court's purpose is to ascertain the legislative intent of the statute as a whole. Davis v. Dep't of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999) (citing Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

d. Reversal of the residential burglary conviction is required. Where the evidence presented at trial was insufficient to support Mr. Neal's conviction for residential burglary, this Court must reverse. Furthermore, in the absence of instructions on a lesser included offense the appropriate remedy is dismissal. To do otherwise now would violate double jeopardy. State v. Crediford, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996); Burks v. United States, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE TRIAL COURT VIOLATED MR. NEAL'S
RIGHT TO DUE PROCESS AND TRIAL BY JURY
WHEN IT FAILED TO PROVIDE A COMPLETE
DEFINITIONAL INSTRUCTION OF THE WORD
"DWELLING" ELEMENT OF RESIDENTIAL
BURGLARY

a. Mr. Neal timely requested the jury be properly instructed. Mr. Neal proposed a jury instruction which provided the complete statutory definition of "dwelling." CP 21. He argued that given the plain statutory language, he was entitled the instruction in order to argue his own theory of defense. RP 186.³ Judge Shaffer,

³ Mr. Neal's attorney explained:

I would like that language in there, "or any portion thereof," because – probably for the same reason the state doesn't want it in there.

relying on her own interpretation of Division Three's Murbach⁴ opinion, concluded the language applied to a form of mixed use building apparently not present here. RP 186-88.

Prior to instructing the jury, Mr. Neal formally objected to the definition of "dwelling" provided by the court and took exception to the refusal to give the statutory definition he offered. 8/6/09RP 5, 13; CP 21, 62. Having preserved the issue for appellate review, Mr. Neal now seeks relief in this Court. RAP 2.2.

b. Mr. Neal was constitutionally entitled to have the jury fully and accurately instructed on all elements of the crime.

The state and federal constitutions guarantee that a person will not suffer loss of liberty without due process of law and ensure a criminal defendant the right to a jury trial. U.S. Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22.⁵ These constitutional rights

Because it is susceptible to two interpretations, depending on how it's read, and I don't think there is really any commentary or case law that prohibits one of the reasonable interpretations of that language.

RP 186.

⁴ State v. Murbach, 68 Wn.App. 509, 843 P.2d 551 (1993).

⁵ U.S. Const. amend. 6 provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

U.S. Const. amend. 14 states in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Wash. Const. art. 1 § 3 states, "No person shall be deprived of life, liberty, or property, without due process of law."

“indisputably entitle a defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); State v. Cronin, 142 Wn.2d 568, 579-80, 14 P.3d 752 (2000). Thus, the jury may not be instructed in a manner that relieves the State of its burden of proving every element of the crime beyond a reasonable doubt. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); Cronin, 142 Wn.2d at 580.

The elements of residential burglary are that the defendant enter or remain unlawfully in a dwelling with the intent to commit a crime therein. RCW 9A.52.025(1). The statute reads:

Wash. Const. art. 1 § 21, provides, “The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.”

Wash. Const. art. 1 § 22 provides, in pertinent part, “In all criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases”

A person is guilty of residential burglary if, with intent to commit a crime against person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

Id. Thus, whether a building or structure is a dwelling is an essential element of the crime that must be found by the jury beyond a reasonable doubt. State v. McDonald, 123 Wn.App. 85, 91, 96 P.3d 468 (2004). In McDonald, the Court looked to other jurisdictions for guidance as to whether a vacant house is a dwelling and determined it is a question for the jury. Id.

According to most other jurisdictions, however, the question whether a building is a residence turns on all relevant factors and is generally a matter for the jury to decide. Agreeing, we hold that the evidence in this case presents a jury question on whether the Hintons' house was a "dwelling."

Id. Here, too, whether the maintenance room was a dwelling was a jury question.

c. Removing the "portion thereof" language denied

Mr. Neal the opportunity to argue his case and denied him his right to a jury verdict on all the elements. Jury instructions need not define words or expressions that are commonly understood, but the court must instruct the jury when a term has a specific legal definition. State v. Allen, 101 Wn.2d 355, 358, 361-62, 678 P.2d

798 (1984) (jury must be given statutory definition of “intent”).⁶

“Dwelling” is specifically and uniquely defined in the criminal code as:

“Dwelling” means 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) (emphasis added).

Instead of using the statutory definition of “dwelling,” and contrary to Allen and Olmedo, the trial court deleted the “or a portion thereof” language. CP 62. The given instruction reads:

Dwelling means any building or structure, or a portion thereof, which is used or ordinarily used by a person for lodging.

Id.

The jury was, however, was capable of deciding if the maintenance room in this case was a building used for lodging, or a portion of a building used for lodging. By failing to instruct the jury in the language of the statute, the trial court improperly removed that element from the jury’s consideration. See McDonald, 123 Wn.App. at 91. This violated Mr. Neal’s fundamental constitutional

⁶ See also State v. Olmedo, 112 Wn.App. 525, 534, 49 P.3d 960 (2002) (defendants entitled to instruction defining legal standards for storage of anhydrous ammonia in prosecution for unlawful storage of that chemical).

right to a jury determination, beyond a reasonable doubt, of every element of the crime.

The trial court reasoned that the instruction was a proper statement of the law based upon this Court's opinion in State v. Murbach, 68 Wn.App. 509, 843 P.2d 551 (1993). RP 177. Murbach, however, addresses the sufficiency of the evidence for a residential burglary, not the appropriate jury instructions.⁷ The Murbach court was influenced by a New Mexico case construing a similar statutory definition of dwelling, State v. Lara, 92 N.M. 274, 587 P.2d 52, 53 (N.M.App.), cert. denied, 586 P.2d 1089 (1978). The New Mexico court simply found a burglary of an attached garage was a residential burglary "because the garage was part of the structure used as living quarters." Murbach cannot be held to mean every ancillary storage facility with some relationship to a facility where someone lodges is a "dwelling." Id. Ultimately, it is

⁷ In that case teenage boys were camping out in their yard when they found a neighbor in their garage, only a few feet away, and noticed the family car had been damaged. 68 Wn.App. at 510. The garage was attached to the family home by a door. Id. at 511.

On appeal, the defendant argued there was not sufficient evidence to support her residential burglary conviction because the garage was not a dwelling. Murbach, 68 Wn.App. at 511-12. Looking at the facts, this Court concluded the attached garage fit the statutory definition of dwelling because it was a "portion" of the family home. Id. at 513.

for a jury to determine whether the “building or structure” or “a portion thereof” is used for lodging.

d. The court’s instruction defining dwelling was an improper comment on the evidence in violation of Article IV, section 16 of the Washington Constitution. Washington’s Constitution provides that judges determine the law and juries determine the facts. Wash. Const. art. IV § 16. “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Id.

“A statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement.” State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). An instruction to the jury violates this constitutional provision if it “instruct[s] the jury that matters of fact have been established as a matter of law” or otherwise resolves a disputed factual issue that should have been determined by the jury. State v. Becker, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997), citing State v. Primrose, 32 Wn.App. 1, 3, 645 P.2d 714 (1982).

The Washington Supreme Court explained the basis for the rule.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. 245, 250-51, 60 Pac. 403 (1900).

Based upon Wash. Const. art. IV § 16, the Washington Supreme Court reversed a sentence enhancement based upon a jury finding that a drug violation occurred within 1000 feet of a school in Becker.⁸ The Supreme Court found that the instruction resolved the question of whether the building in question was in fact a school by stating it was. Id. at 64-65.

By effectively removing a disputed issue of fact from the jury's consideration, the special verdict form relieved the State of its burden to prove all elements of the sentence enhancement statute.

Id. at 65. Because the special verdict form was "tantamount to a directed verdict," the enhancements were vacated. Id. at 65-66.

Accord, State v. Akers, 136 Wn.2d 641, 644, 965 P.2d 1078 (1998).

⁸ In a special verdict form, the trial court in Becker asked the jury to decide if the defendants were "within 1000 feet of the perimeter of school grounds, to wit: Youth Employment Education Program School at the time of the commission of the crime." Id. at 64.

Thus, a jury instruction may not resolve factual issues for the jury.⁹ In Mr. Neal's case, the trial court effectively commented on the evidence in violation of article IV, section 16 by resolving the question of whether the tool roowas a dwelling as defined by RCW 9A.04.110(7). By instructing the jury that a building or structure used for lodging is a dwelling, without regard to the unique nature of a structure such as this, the court effectively resolved that factual issue. The instruction conveyed to the jury that the court's conclusion regarding the scope of the statute and its application to the evidence presented. The instruction was thus an impermissible comment on the evidence.

e. Mr. Neal's residential burglary conviction must be reversed because the improper definition of "dwelling" relieved the State of its burden of proof as to this element of the crime.

i. The error is structural, mandating reversal by this Court. Error in a jury instruction is presumed prejudicial. State

⁹ State v. Jackman, 125 Wn.App. 552, 558-61, 104 P.3d 686 (2005) (inclusion of the alleged minor victims' dates of birth in the "to convict" instructions was an impermissible comment on the evidence where the minority of the alleged victims were essential elements of the charged offenses); State v. Eaker, 113 Wn.App. 111, 118, 53 P.3d 37 (2002) ("to convict" instruction assumed as undisputed fact that defendant baby-sat the alleged victim within the charging period); Primrose, 32 Wn.App. at 2-3 (improper to instruct jury in bail jumping case that defendant had no lawful excuse for failing to appear "as a matter of law").

v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001); State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). When a jury instruction improperly states the law so as to relieve the State of its burden of proof beyond a reasonable doubt, reversal required. California v. Roy, 519 U.S. 2, 117 S.Ct. 337, 339, 136 L.Ed.2d 266 (1996) (Scalia, J., concurring); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002); State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999).

The trial court's decision not to give the complete statutory definition of an element of the crime of third degree assault resulted in the automatic reversal of the conviction in State v. Gray, 124 Wn.App. 322, 102 P.3d 814 (2004). The defendant was charged with third degree assault by assaulting a health care provider performing her duties, but the trial court did not give the jury an instruction providing the statutory definition of health care provider found at RCW 9A.36.031(1)(h). 124 Wn.App. at 324-25. Because the victim's status as a health care provider was an essential element of the crime, the lack of an instruction relieved the State of its burden of proof and required the automatic reversal of the third degree assault conviction. Id. at 325.

Similarly here, the court essentially directed a verdict on this element by instructing the jury without reference to the “or portion thereof” is “used or ordinarily used by a person for lodging.” Because the trial court’s definition of dwelling relieved the State of its burden of proof as to the relationship between this portion of the building or structure and the lodging requirement, this Court cannot engage in harmless error analysis. See Jackson, 137 Wn.2d at 727 (harmless error analysis not appropriate where improper accomplice liability instructions permitted jury to find accomplice liability from failure to act); Jackman, 125 Wn.App. at 560-61 (instructing jury on facts proving element of crime is structural error not subject to harmless error analysis). Mr. Neal’s residential burglary conviction must be reversed.

ii. The improper instruction defining dwelling was not harmless beyond a reasonable doubt. When an erroneous instruction does not clearly relieve the State of its burden of proof, the reviewing court must determine if the error is harmless. State v. Brown, 147 Wn.2d at 339-41. A constitutional error is harmless only if the prosecution can demonstrate beyond a reasonable doubt that the error did not contribute to the jury verdict. Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999);

Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Brown, 147 Wn.2d at 341.¹⁰ The constitutional harmless error standard has also been utilized for comments on the evidence in violation of article. IV, section 16. Eaker, 113 Wn.App. at 119.

An Illinois appellate court addressed whether an incorrect definition of dwelling in a prosecution for residential burglary was harmless in a case where defendants were seen emerging from a garage attached to a residence in People v. Donoho, 245 Ill.App.3d 938, 615 N.E.2d 805 (1993). Although the word “dwelling” had a specific statutory definition for purposes of the residential burglary statute, the court’s instruction differed substantially from that definition. 615 N.E.2d at 807. The appellate court said it was not finding as a matter of law that an attached garage did not fit the statutory definition of dwelling, but rather that the jury should be given the correct statutory definition in order to make the determination. Id. at 807. Because it was possible that a properly-

¹⁰ See also State v. Walden, 131 Wn.2d. 469, 478, 932 P.2d 1237 (1997) (error in a jury instruction is harmless only when it is so trivial, formal, or academic that it could not have affected the outcome of the case); Wanrow, 88 Wn.2d at 237 (same); State v. Jones, 3 Wash. 175, 179-80, 28 Pac. 254 (1891) (defendant has right to correct instructions on the law and giving of improper instructions prejudicial error).

instructed jury would have acquitted the defendant, the court held the error was not harmless. Id.

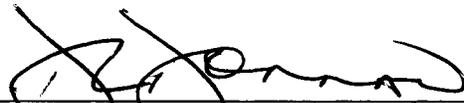
As pointed out in Murbach, a garage may be considered a dwelling if it is part of the dwelling unit. 68 Wn.App. at 513. This Court cannot be convinced beyond a reasonable doubt that the jury would necessarily have concluded this tool room, separated from residential units, was necessarily a "dwelling" as defined by RCW 9A.04.110(7). This Court must reverse Mr. Neal's residential burglary conviction.

F. CONCLUSION.

Because the undisputed evidence established that the room from which Mr. Neal was accused of taking tools was never used for lodging his conviction for residential burglary should be reversed and his case remanded to the superior court for dismissal of the charge and resentencing.

DATED this 29th day of June 2010.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 64475-1-I
)	
TROY NEAL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] TROY NEAL	(X)	U.S. MAIL
278268	()	HAND DELIVERY
COYOTE RIDGE CORRECTIONS CENTER	()	_____
PO BOX 769		
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SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JUNE, 2010.

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