

FILED  
Court of Appeals  
Division III  
State of Washington  
1/17/2018 12:40 PM

NO. 35040-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

---

---

STATE OF WASHINGTON,

Respondent,

v.

PATRICK GARCIA,

Appellant.

---

---

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

The Honorable John Knodell, Judge

---

---

REPLY BRIEF OF APPELLANT

---

---

MARY T. SWIFT  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
DISMISSAL IS THE ONLY ADEQUATE REMEDY WHERE THE VERDICT IS AMBIGUOUS AS TO WHETHER THE JURY RELIED ON AN INSUFFICIENT ACT TO CONVICT GARCIA OF BURGLARY. ....	1
B. <u>CONCLUSION</u> .....	7

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Det. of Halgren</u> 156 Wn.2d 795, 132 P.3d 714 (2006).....	2
<u>State v. Deitchler</u> 75 Wn. App. 134, 876 P.2d 970 (1994).....	3
<u>State v. Engel</u> 166 Wn.2d 572, 210 P.3d 1007 (2009).....	3
<u>State v. France</u> 180 Wn.2d 809, 329 P.3d 864 (2014).....	3
<u>State v. Garcia</u> 179 Wn.2d 828, 318 P.3d 266 (2014).....	1, 2
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998).....	4, 6
<u>State v. Irby</u> 187 Wn. App. 183, 347 P.3d 1103 (2015).....	2
<u>State v. Jacobs</u> 154 Wn.2d 596, 115 P.3d 281 (2005).....	5
<u>State v. Kier</u> 164 Wn.2d 798, 194 P.3d 212 (2008).....	5
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	2, 4
<u>State v. Laico</u> 97 Wn. App. 759, 987 P.2d 638 (1999).....	4
<u>State v. Miller</u> 90 Wn. App. 720, 954 P.2d 925 (1998).....	3

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Owens</u> 180 Wn.2d 90, 323 P.3d 1030 (2014).....	3
<u>State v. Peterson</u> 168 Wn.2d 763, 230 P.3d 588 (2010).....	3
<u>State v. Smith</u> 159 Wn.2d 778, 154 P.3d 873 (2007).....	3
<u>State v. Stark</u> 48 Wn. App. 245, 738 P.2d 684 (1987).....	5
<u>State v. Whittaker</u> 192 Wn. App. 395, 367 P.3d 1092 (2016).....	5, 6
<u>State v. Woodlyn</u> 188 Wn.2d 157, 392 P.3d 1062 (2017).....	7
<u>State v. Wright</u> 165 Wn.2d 783, 203 P.3d 1027 (2009).....	7

**FEDERAL CASES**

<u>United States v. Baker</u> 16 F.3d 854 (8th Cir. 1994) .....	5
--	---

**RULES, STATUTES AND OTHER AUTHORITIES**

RCW 9A.04.110 .....	3, 4
RCW 9A.52.020 .....	2
RCW 9A.52.030 .....	3

A. ARGUMENT IN REPLY

DISMISSAL IS THE ONLY ADEQUATE REMEDY WHERE THE VERDICT IS AMBIGUOUS AS TO WHETHER THE JURY RELIED ON AN INSUFFICIENT ACT TO CONVICT GARCIA OF BURLGARY.

The State agrees with Garcia that the jury's question regarding the definition of a fenced area "strongly suggests the State's election during closing argument was insufficient to steer consideration away from the partially-fenced area Garcia undeniably entered and toward the inside of the camper, which was contested." Br. of Resp't, 8. The State accordingly—and correctly—concedes the instructional error "deprived Garcia of his right to a unanimous verdict." Br. of Resp't, 7-8. The State further concedes defense counsel's "performance was deficient for failing to appreciate the import of the jury's question." Br. of Resp't, 8.

But the parties disagree as to the appropriate remedy: dismissal or a new trial. Garcia contends dismissal is the only adequate remedy because the verdict is ambiguous as to whether the jury relied on the insufficient act of entering the yard to convict him of burglary, triggering the rule of lenity. Br. of Appellant, 12-16. The State counters that a new trial would be adequate, essentially because Garcia's act of entering the yard and act of entering the trailer were alternative means of committing burglary. Br. of Resp't, 9, 11 ("[T]he jury was instructed to consider an alternative means of

entering a ‘building’—entry into a fenced area—that was unsupported by the evidence.”). Where one alternative means is not supported by sufficient evidence, the remedy is to remand for a new trial only on the remaining, sufficient means. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

The State’s argument fails, however, because this is not an alternative means case but a multiple acts case. In a multiple acts case, several acts are alleged and any one of them could constitute the crime charged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The jury must be unanimous as to which act or incident constitutes the crime. Id.

By contrast, an alternative means case involves a single crime that may be committed in more than one way. Id. at 410; In re Det. of Halgren, 156 Wn.2d 795, 809, 132 P.3d 714 (2006) (“Alternative means statutes identify a single crime and provide more than one means of committing the crime.”). The jury must be unanimous as to *guilt* for the single crime charged, but need not be unanimous as to the *means*, so long as sufficient evidence supports each alternative means. Kitchen, 110 Wn.2d at 410. A classic example of an alternative means crime is first degree burglary, which can be committed if a person enters or remains unlawfully in a building and (1) is armed with a deadly weapon or (2) assaults any person. RCW 9A.52.020(1); State v. Irby, 187 Wn. App. 183, 198-99, 347 P.3d 1103 (2015).

An element of second degree burglary is unlawfully entering or remaining “in a building other than a vehicle or a dwelling.” RCW 9A.52.030(1) (emphasis added). RCW 9A.04.110(5) defines “building,” in addition to its ordinary meaning, as “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.” Courts dismiss where there is insufficient evidence that the structure the defendant entered was a “building.” See, e.g., State v. Engel, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009) (private yard partially enclosed by a fence not a building); State v. Miller, 90 Wn. App. 720, 728-30, 954 P.2d 925 (1998) (open car wash and small coin boxes not building); State v. Deitchler, 75 Wn. App. 134, 137-38, 876 P.2d 970 (1994) (evidence locker not a building).

However, Washington courts hold “the alternative means doctrine does not apply to mere definitional instructions; a statutory definition does not create a ‘means within a means.’” State v. Owens, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014) (quoting State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007)); State v. France, 180 Wn.2d 809, 818, 329 P.3d 864 (2014) (rejecting “the notion that multiple definitions of statutory terms necessarily create either new elements or alternate means of committing a crime”); State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010) (“The mere use of a

disjunctive in a statute does not an alternative means crime make.”). For instance, the statutory definition of “great bodily harm,” also included in RCW 9A.04.110, does not create alternative means of committing first degree assault.<sup>1</sup> State v. Laico, 97 Wn. App. 759, 762-64, 987 P.2d 638 (1999).

This well-established law demonstrates the various statutory definitions of a building are not alternative means of committing second degree burglary. Therefore, Garcia’s undisputed entry into the yard and his disputed entry into the trailer are not alternative *means* of committing burglary. Rather, as the jury perceived it, there were two different *acts* that could constitute burglary. The State’s own concession that “Garcia was deprived of a unanimous verdict” acknowledges this is a multiple acts case rather than an alternative means case, because the jury need not be unanimous as to the means. Br. of Resp’t, 9; Kitchen, 110 Wn.2d at 410.

This leads us to the remedy. Presumably the State would not dispute that where insufficient evidence supports a conviction, dismissal with prejudice is the proper remedy. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Garcia’s case presents a novel scenario not previously

---

<sup>1</sup> Like the definition of a building, “great bodily harm” has multiple meanings and is defined in the disjunctive as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c).

addressed by Washington courts, where there is evidence to suggest the jury relied on an insufficient act, while another sufficient, though disputed act existed.<sup>2</sup> Garcia acknowledges the merger holdings of State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), and State v. Whittaker, 192 Wn. App. 395, 367 P.3d 1092 (2016), are not directly on point. Rather, Garcia relies on those cases for their holdings regarding ambiguous jury verdicts, which is not limited to merger. See, e.g., State v. Jacobs, 154 Wn.2d 596, 603-04, 115 P.3d 281 (2005) (reversing because rule of lenity required ambiguous statute to be interpreted in the defendant's favor); United States v. Baker, 16 F.3d 854, 857-58 (8th Cir. 1994) (when imposing sentence based on ambiguous verdict susceptible to two interpretations, court may not impose alternative producing higher sentence range)

The rule of lenity requires an ambiguous verdict to be interpreted in the defendant's favor. Kier, 164 Wn.2d at 814. In Kier, the verdict was ambiguous as to whether the jury believed the same person was the victim of both the robbery and the assault. Id. The rule of lenity required the court to presume the jury relied on the same victim, which violated double jeopardy.

---

<sup>2</sup> These unique facts distinguish Garcia's case from State v. Stark, 48 Wn. App. 245, 251, 738 P.2d 684 (1987), where there was no suggestion the jury relied on the insufficient act and the court could presume the jury relied on only the sufficient acts, given the clear jury instructions. Br. of Appellant, 14-15 (discussing Stark). Not so in Garcia's case, where the instructions did not adequately define a fenced area to ensure the jury did not rely on entry into the yard to convict for burglary.

Id. In State v. Whittaker, the verdict was ambiguous as to whether the jury relied on the same no-contact order violation to convict Whittaker of both that offense and felony stalking. 192 Wn. App. 395, 415-16, 367 P.3d 1092 (2016). The rule of lenity required the court to presume the jury relied on the same act, which violated double jeopardy. Id. at 417.

Similarly, the verdict is ambiguous in Garcia's case because we do not know which act the jury relied on to convict him of burglary, one of which is insufficient as a matter of law.<sup>3</sup> The State acknowledges this ambiguity:

Here, there is no way to determine from the record whether the jurors convicted Garcia of second degree burglary because they unanimously agreed he entered the Knigges' partially-fenced property, unanimously agreed he entered the camper, or because some jurors thought he entered both the property and the camper and some thought he entered only the property.

Br. of Resp't, 10. The State articulates the very reason why dismissal is necessary. The jury may have relied on an insufficient act to convict Garcia of burglary. The rule of lenity requires this Court to presume that it did. Double jeopardy principles require that a jury verdict not supported by sufficient evidence be reversed and the charge dismissed with prejudice. Hickman, 135 Wn.2d at 103.

---

<sup>3</sup> The State agrees "the property on which the camper sat was only partially fenced." Br. of Resp't, 7.

In the alternative, this Court should accept the State's concession that a new trial is necessary, for the reasons articulated in Garcia's opening brief and the State's response. See State v. Woodlyn, 188 Wn.2d 157, 392 P.3d 1062 (2017) (“[A] reviewing court is compelled to reverse a general verdict unless it can ‘rule out the possibility the jury relied on a charge unsupported by sufficient evidence.’” (quoting State v. Wright, 165 Wn.2d 783, 803 n.12, 203 P.3d 1027 (2009))).

B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should dismiss Garcia's burglary conviction. Alternatively, this Court should reverse and remand for a new trial on both convictions.

DATED this 17<sup>th</sup> day of January, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



---

MARY T. SWIFT  
WSBA No. 45668  
Office ID No. 91051

Attorney for Appellant

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**January 17, 2018 - 12:39 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35040-1  
**Appellate Court Case Title:** State of Washington v. Patrick Michael Garcia  
**Superior Court Case Number:** 15-1-00374-0

**The following documents have been uploaded:**

- 350401\_Briefs\_20180117123521D3670749\_6773.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was RBOA 35040-1-III.pdf*

**A copy of the uploaded files will be sent to:**

- gdano@grantcountywa.gov
- kwmathews@grantcountywa.gov

**Comments:**

Copy mailed today to: Patrick Garcia Brownstone Work Release 223 S Browne St Spokane, WA 99201

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Mary Swift - Email: swiftm@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20180117123521D3670749**