

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Deficient jury instructions violated appellant's right to a unanimous verdict as to which act the jury relied on to convict appellant of second degree burglary.

2. Double jeopardy principles necessitate dismissal of appellant's burglary conviction because the jury could have relied on an act that was insufficient as a matter of law to constitute burglary.

3. Defense counsel was ineffective in failing to propose an appropriate instruction to safeguard against the jury relying on an insufficient act to convict appellant of burglary.

4. The trial court admitted testimonial statements in violation of appellant's constitutional right to confront the witnesses against him.

Issues Pertaining to Assignments of Error

1. Do double jeopardy principles necessitate dismissal, or at least retrial, where the verdict is ambiguous as to whether the jury unanimously agreed as to which act it relied on to convict appellant of second degree burglary and further ambiguous as to whether the jury relied an act that is insufficient as a matter of law to constitute burglary?

2. Was defense counsel ineffective in acquiescing to an instruction to the deliberating jury that failed to protect against the jury relying on an insufficient act to convict appellant of burglary?

3. Did a police officer's testimony that he was unable to corroborate the appellant's statements after talking to nearby residents violate the confrontation clause, thereby necessitating reversal, where appellant had no prior opportunity to cross-examine the residents and the State repeatedly exploited the violation in closing argument?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Patrick Garcia by amended information with one count of residential burglary (count 1), one count of second degree burglary in the alternative (count 2), four counts of tagging and graffiti (counts 3-6), and one count of third degree theft (count 7). CP 24-27. The State further alleged Garcia was armed with a deadly weapon in commission of the alternative burglary charges. CP 24-26.

Before trial, the State voluntarily dismissed one of the tagging counts (count 6). CP 36; 2RP 7.¹ At trial, after the State rested its case, the court dismissed the remaining tagging counts for insufficient evidence (counts 3-5). 4RP 452; CP 81. The jury found Garcia not guilty of residential burglary, but guilty of second degree burglary and third degree theft. CP 64-

¹ This brief refers to the verbatim reports of proceedings as follows: 1RP – September 21, 2015, October 17, 2016, January 18, 2017; 2RP – October 26 & 27, 2016; 3RP – October 27, 2016; 4RP – October 27 & 28, 2016.

67; 4RP 551-58. The jury further found Garcia was not armed with a deadly weapon in commission of the burglary. CP 66; 4RP 555-56.

Pursuant to the parties' agreement, the trial court imposed 22 months for the burglary—the low end of the standard range. 1RP 20-22; CP 81. Garcia filed a timely notice of appeal. CP 97.

2. Substantive Evidence²

April and Douglas Knigge live in a house on West Marina Drive in Moses Lake, Washington. 3RP 249-50, 313. Around 6:00 a.m. on June 8, 2015, Ms. Knigge heard their dog barking and went to their mud room, a glass room that looks out onto their yard and driveway, where their fifth wheel trailer is parked. 2RP 91-92; 3RP 251. Ms. Knigge explained they used the trailer for camping the previous weekend, but otherwise did not live in it. 3RP 264, 273.

She saw a young man, later identified as Garcia, near their trailer dumping a small white wastebasket into their large city-provided garbage bin. 3RP 253-55. Ms. Knigge told Garcia he needed to leave, so he walked down the driveway and towards a trailer park nearby. 3RP 255-60. Ms. Knigge did not see anything in Garcia's hands as he left and agreed it was unlikely he had anything concealed under his clothes, given what he was

² Given the dismissal of all the tagging counts, this section focuses solely on the evidence related to the burglary and theft charges.

wearing at the time: no shirt and silk shorts. 2RP 113; 3RP 253-55, 268-77.

She then called the police and described Garcia. 3RP 256-57.

Sergeant Dean Gaddis and Corporal Thomas Tufte were dispatched to the scene. 2RP 91-92; 3RP 381-82. Tufte saw a man matching Garcia's description in the nearby trailer park. 3RP 383-84. Tufte announced his presence and when Garcia turned around, he had several items in his hands, including two large bowie knives and miscellaneous toiletries. 3RP 386-87.

Tufte asked Garcia where he got the items, to which Garcia responded he found them in a nearby field. 3RP 387. Tufte acknowledged there was vacant land near the Knigges' home that could be described as a field. 4RP 429. Tufte told Garcia he matched the description of a suspect. 3RP 388. Garcia explained he was at the trailer park to visit a friend and he did not know what Tufte was talking about. 3RP 388. Over defense objection, Tufte testified he attempted to "check out" what Garcia told him and "was not able to." 3RP 388. Tufte then arrested Garcia and took him to the Knigge residence, where Gaddis was. 3RP 388-90.

Ms. Knigge identified Garcia as the man who was in her yard earlier that morning. 3RP 268-69. She further identified the toiletries as having come from inside the trailer. 3RP 266-67. Mr. Knigge later identified his bowie knives and explained he kept them in their trailer kitchen. 3RP 316-

19. The Knigges also explained they kept several small white wastebaskets inside their trailer. 3RP 253-55, 338-40.

Gaddis asked Garcia what he was doing by the Knigges' house. 2RP 162-63. Garcia said he was picking up garbage, but did not explain why he was doing so. 2RP 162-63. Garcia told Gaddis that he did not go inside the camper. 2RP 163-64. The officers found shoeprints on the Knigges' property similar to Garcia's shoes, but did not find any footprints inside the trailer. 2RP 108-09, 132-37; 3RP 208, 396.

All witnesses agreed they did not see Garcia go in or out of the trailer. 3RP 207-08, 272, 343-46. Ms. Knigge also agreed the items could have been outside the trailer because of someone else, and she did not see Garcia carry anything from their property. 3RP 273-74. Mr. Knigge did not believe he locked the trailer door the previous night and acknowledged he did not know how many people went inside or how long they were there. 3RP 324, 343-46.

C. ARGUMENT

1. GARCIA'S BURGLARY CONVICTION MUST BE DISMISSED WHERE THE VERDICT IS AMBIGUOUS AS TO WHETHER THE JURY UNANIMOUSLY AGREED ON A LEGALLY SUFFICIENT ACT.

The State's theory of the burglary was that Garcia entered the trailer with intent to commit the crime of theft therein. However, the record

suggests the jury may have relied on entry into the Knigges' yard to convict Garcia of burglary. The Knigges' yard was not completely enclosed by fencing and so entry is insufficient as a matter of law to support a burglary conviction. Given the deficient jury instructions, the verdict is ambiguous as to whether the jury relied on a sufficient act and unanimously agreed on a particular act to convict Garcia of burglary.

- a. Garcia's right to a unanimous jury verdict on an act legally sufficient to constitute burglary was violated, necessitating dismissal or at least reversal.

Several constitutional rights are at issue here. In every criminal prosecution, due process requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

The state and federal constitutions prohibit placing a person twice in jeopardy for the same offense. U.S. CONST. amend. V; CONST. art. I, § 9. Where a conviction is overturned on appeal for insufficient evidence, a person may not be retried for that offense without violating this prohibition against double jeopardy. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct.

2141, 57 L. Ed. 2d 1 (1978); State v. Souza, 60 Wn. App. 534, 538, 805 P.2d 237 (1991). Thus, the remedy for insufficient evidence is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

In Washington, an accused also has the constitutional right to a unanimous jury verdict. CONST. art. 1, § 22; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).³ This right guarantees a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. State v. Borsheim, 140 Wn. App. 357, 365, 165 P.3d 417 (2007). A jury must therefore be unanimous as to which act or incident constitutes the particular charged crime. Id. Thus, in cases where several acts could form the basis of one charged count, the State must elect the act on which it relies, or the trial court must instruct the jury to unanimously agree the State proved the same criminal act beyond a reasonable doubt—a Petrich instruction. Kitchen, 110 Wn.2d at 411.

To convict Garcia of burglary, the State needed to prove beyond a reasonable doubt that he entered a dwelling (residential burglary) or a building (second degree burglary) with intent to commit a crime against a

³ Petrich was overruled in part because it applied the incorrect harmless error standard. Kitchen, 110 Wn.2d at 405-06.

person or property therein. CP 51, 54; RCW 9A.52.025(1), .030(1). The State's theory of the burglary was that Garcia entered the fifth wheel trailer with intent to steal. 4RP 488. The State contended the trailer was either a building, within its ordinary meaning, or a dwelling. 4RP 482-84. Though there was direct evidence that Garcia was on the Knigges' property, the State acknowledged there was only circumstantial evidence that he entered the trailer. 4RP 479-80.

The defense theory admitted Garcia was trespassing on the Knigges' property but pointed to the lack of evidence regarding Garcia's entry into the trailer: "Was he on the property? Yes, he trespassed. Is there evidence that he went inside? No." 4RP 499-511. Defense counsel pointed to Garcia's statement that he was never inside the trailer and found the knives in a nearby field. 4RP 499-502. Counsel emphasized Ms. Knigge did not see Garcia carry anything off her property. 4RP 503. Shoeprints and Ms. Knigge's visual observation of Garcia placed him on the property, but no shoeprints, DNA, or fingerprints placed him inside the trailer. 2RP 132; 3RP 208. All witnesses agreed no one saw him go in or come out of the trailer. 3RP 207-08, 272, 343-46.

Despite the State's theory that Garcia entered the trailer, the jury was instructed: "Building, in addition to its ordinary meaning, includes any fenced area, railway car or cargo container. Building also includes any other

structure used mainly, for carrying on business therein.” CP 53 (emphasis added); see also RCW 9A.04.110(5) (defining “building”); 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 2.05 (4th ed. 2016) (WPIC) (same). The note on use for WPIC 2.05 specifies to “[u]se this definition only if the term ‘building’ has other than its ordinary meaning.” The jury was not instructed that it had to be unanimous as to which act of burglary it relied on to convict Garcia.

During deliberations, the jury asked: “What is the definition of ‘any fenced area.’” CP 63. Case law holds that a “fenced area” is limited to “an area that is completely enclosed either by fencing alone or . . . a combination of fencing and other structures.” State v. Engel, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009). The State acknowledged this case law and noted “[t]here’s no evidence that the Knigges’ property is completely fenced.” 4RP 540. But the State opposed defining the term for the jury because “the state’s not relying on that theory in this case.” 4RP 540. The trial court accordingly responded to the jury, with defense counsel’s agreement: “Please refer to the court’s instructions.” CP 63; 4RP 542-43. The jury thereafter returned a guilty verdict for second degree burglary. CP 65.

Jury instructions, read as a whole, “must make the relevant legal standard manifestly apparent to the average juror.” State v. Smith, 174 Wn. App. 359, 369, 298 P.3d 785 (2013) (quoting State v. Kyлло, 166 Wn.2d 856,

864, 215 P.3d 177 (2009)). When instructions are not clear and a deliberating jury seeks clarification, “[t]he judge should respond to the question in open court or in writing (if the question relates to a point of law, the answer should be written).” WPIC 151.00 cmt. The Washington State Jury Commission recommends judges should not merely refer the jury to the instructions without further comment, as it is a “primary source of juror confusion.” 11A WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL Appendix H, Recommendation 38 (4th ed. 2016).

In State v. Campbell, the trial court failed to instruct the jury regarding how it could properly answer “no” on a special verdict form.⁴ 163 Wn. App. 394, 397, 260 P.3d 235 (2011). During deliberations, the jury requested clarification on the issue, but the court merely referred the jury to the existing instructions. Id. at 398-99. The court of appeals held “the trial court abused its discretion in determining not to further instruct the jury.” Id. at 397.

The court explained that, “[i]n order for jury instructions to be sufficient, they must be ‘readily understood and not misleading to the ordinary mind.’” Id. at 400 (quoting State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968)). If reading the instructions as a whole does not cure the

⁴ Campbell was reversed on reconsideration because the underlying law at issue changes. The court’s discussion of the jury to make jury instructions manifestly clear remains good law.

deficiency in an individual instruction, then simply referring a confused jury to the existing instructions only “compound[s]” the problem. Id. at 401-02.

The Campbell court explained that, “even if the ambiguity of the instructions given was not apparent at the time they were issued, the jury’s question identified their deficiency.” Id. at 402. “[W]here a jury’s question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction.” Id.; see also State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015) (recognizing a jury question during deliberations revealed the jury was influenced by the prosecutor’s improper statement of law).

The initial instructions to the jury may not have appeared deficient. Nor did the parties consider this to be a multiple acts case. But, as in Campbell, the jury’s question identified the instructional deficiencies. Specifically, the question from the deliberating jury regarding the definition of “any fenced area” suggests the jury may have relied on the act of entering the Knigges’ yard to convict Garcia of burglary, rather than the act of entering the trailer. The Knigges’ yard was not fully fenced. Ex. D-55, D-61. Entry into the yard, even if unlawful, is therefore insufficient as a matter of law to sustain a burglary conviction. See Engel, 166 Wn.2d at 574-75, 580-81 (holding a private yard that was partially enclosed by a fence and

partially bordered by sloping terrain was not a “fenced area,” and was therefore insufficient to sustain a burglary conviction).

The trial court’s instruction to the jury to “refer to the court’s instructions” did nothing to clarify the definition of “any fenced area.” CP 63. Nor did it clarify for the jury that it had to unanimously agree as to which act it relied on to convict Garcia of burglary. There was essentially no dispute Garcia entered the Knigges’ yard, but some of the jurors may not have been convinced he entered the trailer. Absent a Petrich instruction, the jury could have reached a compromise verdict, with everyone agreeing Garcia entered the yard, but not everyone agreeing he entered the trailer. Or, absent a definition of “any fenced area,” the jury may have unanimously agreed as to the act of entry into the yard.

Failure to instruct the jury it must be unanimous requires reversal if a rational juror could have a reasonable doubt as to any of the incidents alleged. Kitchen, 110 Wn.2d at 411. This standard is met because the act of entering the yard is insufficient as a matter of law to convict for burglary. But the typical remedy for a Petrich error—reversal and remand for a new trial—is constitutionally inadequate given the particular facts of this case. Rather, double jeopardy requires dismissal because this Court cannot be sure the jury did not rely on an act not supported by sufficient evidence. The rule

of lenity requires this ambiguous verdict to be interpreted in Garcia's favor, necessitating dismissal.

Two cases are instructive. In State v. Kier, 164 Wn.2d 798, 808, 194 P.3d 212 (2008), the State argued Kier's assault and robbery convictions did not merge because they were committed against separate victims. Noting the case before it was "somewhat analogous to a multiple acts case," the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. The rule of lenity requires ambiguous jury verdicts to be resolved in the defendant's favor. Id. Therefore, because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdict was ambiguous and it would violate double jeopardy not to merge offenses. Id. at 814.

In State v. Whittaker, 192 Wn. App. 395, 400-01, 367 P.3d 1092 (2016), Whittaker was convicted of felony stalking and felony violation of a no-contact order. A no-contact order violation elevated the stalking offense to a felony. Id. at 415. At trial, the State introduced evidence of several instances when Whittaker violated the no-contact order. Id. at 416. The verdict was therefore ambiguous as to which of these multiple acts elevated stalking to a felony. Id. at 415. The rule of lenity required the conviction for violation of the no-contact order to merge into the stalking

conviction, because the jury may have relied on the same act to convict Whittaker of both offenses. Id. at 417.

As in Kier and Whittaker, there is no way to know whether the jury believed Garcia committed burglary by the insufficient act of entering the Knigges' partially fenced yard. Similarly, this Court cannot know whether the jury unanimously agreed as to which act—the sufficient or the insufficient one—supported Garcia's conviction. Double jeopardy bars retrial when a conviction is overturned on appeal for insufficient evidence. Hickman, 135 Wn.2d at 103. The rule of lenity therefore bars retrial in Garcia's case, where the verdict as ambiguous as to whether the jury relied on an insufficient act to convict Garcia of burglary.

A somewhat similar argument was raised in State v. Stark, 48 Wn. App. 245, 738 P.2d 684 (1987). Stark was convicted of first degree statutory rape. Id. at 250-51. The complaining witness described three separate instances of sexual abuse, two of which could have constituted "sexual intercourse." Id. at 246-47. The other instance was insufficient to support a statutory rape conviction. Id. at 251.

On appeal, Stark argued the verdict was defective because the jury did not specify the act upon which they agreed. Id. at 251. Therefore, Stark asserted, the court could not be sure the jury did not rely on the insufficient act. Id. The court of appeals disagreed because the jury was instructed they

must unanimously agree that “the same act of sexual intercourse had been proven beyond a reasonable doubt.” Id. The court presumed the jury followed this instruction, and concluded the jury could not have relied on the one act that did not come within the definition of “sexual intercourse.” Id.

Garcia’s case differs from Stark in two key ways. First, the jury was not instructed it had to unanimously agree the *same act of burglary* had been proven beyond a reasonable doubt. Second, this Court cannot presume the jury relied on the sufficient act to convict Garcia of burglary where the record suggests it may not have done so and where “any fenced area” was not defined, despite the jury’s inquiry.

Rather, State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), distinguished in Stark, provides a more apt analogy. There, the jury was instructed that in order to find Green guilty of first degree aggravated murder, it must find that he caused the victim’s death in the course of either (1) a first degree rape or (2) a first degree kidnapping. Id. at 230. The jury was not instructed, however, that it must agree upon which of the two underlying crimes had been committed. Id. at 233. There was insufficient evidence to support the kidnapping element. Id. at 230. Consequently, the jury’s general verdict of guilty was defective in two respects: first, it was possible the jury convicted without unanimously agreeing on which

underlying offense had been committed; and second, it was possible the jury relied on an element for which there was insufficient evidence. Id. at 233.

The jury's general verdict of guilty in Garcia's case is defective in the same two ways. As discussed, double jeopardy requires dismissal because the verdict is ambiguous as to whether the jury relied on an insufficient act. Alternatively, reversal and remand for a new trial is necessary where the instructions did not make it manifestly clear to the jury that it had to unanimously agree on an act sufficient to constitute the charged crime of burglary.

- b. To the extent defense counsel invited the error, counsel was constitutionally ineffective.

The State may argue defense counsel invited the above-described errors by either failing to object to the State's proposed instructions or acquiescing to the inadequate response to the jury question. This Court should reject any such argument. However, if this Court agrees with the State, then Garcia was denied his constitutional right to effective assistance of counsel.

Under the invited error doctrine, "a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 154,

217 P.3d 321 (2009). However, “failing to except to an instruction does not constitute invited error.” State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999). Nor does stipulating to or joining the State’s proposed instructions. State v. Hood, 196 Wn. App. 127, 134-35, 382 P.3d 710 (2016).

In Hood, the court recognized the invited error doctrine requires “affirmative actions by the defendant.” Id. at 135 (quoting In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723-74, 10 P.3d 380 (2000)). For example, in State v. Studd, the defendants were barred from challenging self-defense instructions that they proposed at trial. 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). By contrast, Hood “did not affirmatively request any particular instruction” where he merely joined and/or stipulated to the State’s instructions. Hood, 196 Wn. App. at 135. His challenge to a jury instruction was therefore not barred by the invited error doctrine. Id.

Garcia’s counsel did not propose any jury instructions. He did not object to the State’s failure to include any unanimity instruction. 4RP 460. In discussing WPIC 2.05, the alternative definition of building, counsel told the court: “we would have no problem with the new proposed WPIC 2.05. That seems appropriate.” 4RP 455. Defense counsel did not, however, propose the alternative building definition. Under Hood, simply agreeing to the State’s instruction does not implicate the invited error doctrine.

During deliberations, when the jury asked for the definition of “any fenced area,” the trial court proposed that it instruct the jury “[p]lease refer to your instructions[.]” 4RP 541. Defense counsel responded: “Maybe please rely upon the instructions as they’re set forth,” acknowledging, “I know it’s not super helpful, but that’s kind of where we’re at.” 4RP 542. Counsel reiterated, “Yeah, maybe that’s the appropriate answer, please refer to the instructions, as your Honor’s indicated. I’m happy with that.” 4RP 543. Again, defense counsel agreed to the trial court’s proposed instruction, but did not take affirmative action in setting up the error.

To the extent defense counsel affirmatively endorsed the deficient instructions, counsel was ineffective. State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007) (recognizing the invited error doctrine generally forecloses review of an instructional error created by defense counsel, “but does not bar review of a claim of ineffective assistance of counsel based on such instruction”). Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney’s performance was deficient and (2) the deficiency prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. A legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009).

Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id. The accused "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693.

As discussed, defense counsel's theory was that Garcia trespassed on the Knigges' property but did not commit burglary because he did not enter the trailer. Counsel therefore appeared to recognize entry into the Knigges' partially fenced yard was not sufficient to constitute a burglary. Counsel further noted the jury's potential confusion about the fenced area, given its question during deliberations. 4RP 541 ("You know, I'm wondering if they're thinking that -- there's a part of the Knigges' which is not fenced . . . maybe they're wondering if that's considered fenced."). Yet counsel took no action to resolve the jury's confusion or ensure the jury did not rely on an insufficient act to convict his client of burglary.

There can be no strategic reason for a defense attorney to allow his or her client to be convicted where the jury may have had a reasonable doubt as to the sufficiency of the State's evidence. That is precisely what defense counsel allowed here. The jury may have doubted Garcia entered the trailer, but agreed he entered the yard. A corrective instruction on the definition of "any fenced area" would have prevented the jury from convicting Garcia based on his entry into the yard. Counsel's failure to object or propose such an instruction was plainly deficient. See State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (counsel ineffective for offering instruction that allowed client to be convicted under a statute that did not apply to his conduct).

Defense counsel's deficient performance resulted in the jury being not properly instructed on Garcia's right to a unanimous verdict and his right to a verdict supported by sufficient evidence. The alternate definition of building was unnecessarily confusing and defense counsel took no appropriate action to correct the jury's confusion. Defense counsel's failure exposed Garcia to multiple constitutional violations. The jury's question suggested it had doubts about the State's proof of entry into the trailer. The jury may have acquitted or hung had it been properly instructed on the definition of a fenced area and that it needed to unanimously agree as to the act committed.

The deficient jury instructions undermine confidence in the outcome of Garcia's trial. Woods, 138 Wn. App. at 199-202 (counsel ineffective for offering a faulty self-defense instruction). This Court should reverse Garcia's burglary conviction and remand for a new trial because Garcia's counsel was ineffective in failing to object or propose adequate instructions. Id. at 202.

2. THE TRIAL COURT ADMITTED TESTIMONIAL STATEMENTS IN VIOLATION OF GARCIA'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

A person accused of a criminal offense has the right to confront the witnesses against him. U.S. CONST. amend. VI; CONST. art. I, § 22. The confrontation clause bars admission of testimonial statements by a witness who does not appear at trial, unless the witness is unable to testify and the accused had a prior opportunity for cross-examination. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Confrontation clause violations are reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012). The State bears the burden of proving a statement is nontestimonial. State v. Hurtado, 173 Wn. App. 592, 600, 294 P.3d 838 (2013).

Testimony is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Crawford, 541 U.S.

at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Testimonial statements subject to confrontation include ex parte in-court testimony or its functional equivalent, such as affidavits, depositions, prior testimony, or confessions. Id. at 51-52. Put another way, a testimonial statement is one “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Id. at 52 (internal quotation marks omitted).

In Melendez-Diaz v. Massachusetts, the U.S. Supreme Court addressed statements by laboratory analysts who declared a substance contained cocaine. 557 U.S. 305, 307, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The Court held the certificates of analysis were testimonial because they were “functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’” Id. at 310-11 (quoting Davis, 547 U.S. at 830). Admission of the statements violated the Sixth Amendment, which does not allow the State to prove its case through ex parte, out-of-court affidavits. Id. at 329.

Washington courts have applied Melendez-Diaz in the context of Department of Licensing records. In Jasper, the Washington Supreme Court held certifications declaring the existence or non-existence of public records are testimonial statements subject to the confrontation clause. 174 Wn.2d at 100. Applying the definition from Crawford, the court concluded the

certifications required the right to confront the witness who created them because “[t]hey were created, and in fact used, for the sole purpose of establishing critical facts at trial,” and “each certificate was ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” Jasper, 174 Wn.2d at 115 (quoting Melendez-Diaz, 129 S. Ct. at 2532).

In another context, the U.S. Supreme Court held a woman’s statements to be testimonial when police responded to a report of a domestic disturbance at her and her husband’s home. Davis, 547 U.S. at 819, 828 (considering the companion case, Hammon v. Indiana). When they arrived, the woman appeared somewhat frightened, but told them nothing was the matter. Id. at 819. There was no emergency in progress: the woman was not in any immediate danger, and the interrogating officer testified he heard no arguments or crashing and saw no one throw or break anything. Id. at 829. The Court explained the officer “was not seeking to determine (as in Davis) ‘what is happening,’ but rather ‘what happened.’” Id. at 830. “Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime.” Id.

When Corporal Tufte contacted Garcia in the trailer park, Garcia told Tufte he was there to visit a friend. 3RP 388. Tufte apparently talked to two residents of the trailer park, who claimed they did not know Garcia. CP 29;

3RP 366-67. Before Tufte's testimony, the State moved to admit evidence that Tufte "made attempts to corroborate the defendant's statement," given his contact with the residents. 3RP 365-66.

Defense counsel objected on hearsay and confrontation grounds, arguing "it characterizes Mr. Garcia as somehow lying." 3RP 367-73. Counsel emphasized he would have no opportunity to confront these witnesses: "I don't know who those people are. I don't know if they themselves are lying. Maybe they hate law enforcement." 3RP 368. Counsel reiterated, "It's going to make him look like a liar." 3RP 369.

The trial court acknowledged, "we're talking about violating Mr. Garcia's confrontation rights," but nevertheless admitted the testimony. 3RP 374-76. The court expressed its annoyance at "the direction this case has gone where it becomes a referendum on the police and did they send evidence, did they not . . . they could have fingerprinted the paint cans, they could have sent the footprints in to the crime lab to see if there's a match." 3RP 374-75. The court believed it was "appropriate" for the State to ask about corroboration because Garcia's explanation for being in the trailer park had already been admitted. 3RP 374.

The State then engaged in the following colloquy with Tufte:

A. I said we were investigating a call for service and that he matched the description of a suspect in that call.

Q. Did the defendant say anything at that point to you?

A. He said he was just there to visit a friend at the trailer park and he didn't know what I was talking about.

Q. Did you make an attempt to check out what the defendant told you?

A. Yes, I did.

Q. And were you able to do that?

A. No, I was not able to.

3RP 387-88.

While ostensibly not hearsay, the record demonstrates Tufte's testimony violated Garcia's constitutional right to confront the witnesses against him, because the residents' statements were testimonial. Tufte's "attempt to check out" what Garcia told him was speaking with residents of the trailer park. Those residents confirmed they did not know Garcia, which suggested to Tufte that Garcia was lying about visiting friends in the trailer park.

Hammon demonstrates that statements to an investigating police officer are testimonial when there is no ongoing threat of danger to the declarant, the police, or the public. Tufte was investigating Garcia's involvement in a burglary. Those circumstances should have led the residents to reasonably believe their statements to Tufte "would be available

for use at a later trial.” Crawford, 541 U.S. at 52. As in Jasper, the statements were requested and used to establish critical facts at Garcia’s trial, specifically whether his claim that he was visiting a friend in the trailer park was truthful.

The State did not establish the trailer park residents were unable to testify at Garcia’s trial. And Garcia had no prior opportunity to cross-examine them. As defense counsel pointed out, Garcia was deprived of any opportunity to confront the witnesses about their knowledge of Garcia, their motivations for talking to the police, or whether they were truthful. Though the trial court ordered the State to avoid hearsay, Tufte’s testimony served as an unconstitutional stand-in for the residents’ testimony. His testimony was “functionally identical to live, in-court testimony” of the trailer park residents, who Garcia had no opportunity to confront. Melendez-Diaz, 557 U.S. at 310-11 (quoting Davis, 547 U.S. at 830).

The trial court erred in admitting Tufte’s testimony in violation of Garcia’s confrontation right. Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id.

There error here was not harmless beyond a reasonable doubt. As discussed, the purpose of Tufte's testimony was to demonstrate Garcia lied to Tufte. Specifically, Garcia told Tufte he found the knives in a nearby field. 3RP 387. When Tufte told Garcia he matched a suspect's description, Garcia "said he was just there to visit a friend at the trailer park and he didn't know what I was talking about." 3RP 388. But Tufte testified was "was not able to" "check out" what Garcia told him, suggesting either no one could confirm Garcia's reasons or specifically disavowed Garcia's statements.

The State then used Tufte's testimony to this effect in closing. 4RP 489. The State argued Garcia's statements to Tufte were "half truths . . . to kind of distance himself from the crime, yet paint himself as cooperative with the police." 4RP 489. To support this argument, the State emphasized: "Keep in mind that Officer Tufte testified that he attempted to see about what the defendant's version was at that time, and couldn't come up with anything about the defendant having friends there at the trailer court." 4RP 489. In rebuttal, the State again emphasized Tufte's testimony: "He thought he was in a trailer court full of his friends, but the law enforcement officer couldn't verify that." 4RP 532.

Thus, the State exploited the improper testimonial statements not once but twice, including in rebuttal, where improper comments can be particularly prejudicial. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125

(2014) (recognizing improper statements made during rebuttal “increas[e] their prejudicial effect”); see also State v. Gauthier, 174 Wn. App. 257, 270-71, 298 P.3d 126 (2013) (finding constitutional error not harmless where prosecutor exploited it in closing argument, repeatedly emphasizing Gauthier’s refusal to consent to a DNA test). Combined with the lack of direct evidence regarding Garcia’s entry into the trailer, the State cannot demonstrate the confrontation error was harmless.

This Court should reverse Garcia’s convictions and remand for a new trial. Jasper, 174 Wn.2d at 120.

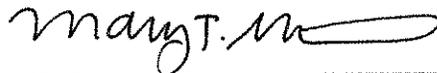
D. CONCLUSION

For the reasons stated above, this Court should reverse and remand for dismissal of Garcia’s burglary conviction with prejudice. Alternatively, this Court should reverse Garcia’s convictions and remand for a new trial.

DATED this 28th day of August, 2017.

Respectfully submitted,

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