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NO. 35040-1-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PATRICK MICHAEL GARCIA, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

The Honorable John D. Knodell, Judge

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

IS REMAND THE APPROPRIATE REMEDY WHEN INSTRUCTIONAL ERROR AND DEFENSE COUNSEL'S DEFICIENT PERFORMANCE DEPRIVED GARCIA OF HIS RIGHT TO A UNANIMOUS VERDICT, JEOPARDY HAS NOT TERMINATED, AND SUFFICIENT EVIDENCE SUPPORTS THE REMAINING ALTERNATIVE MEANS OF COMMITTING SECOND DEGREE BURGLARY? (ASSIGNMENT OF ERROR No. 1)

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II. STATEMENT OF THE CASE¹

The State adopts the facts as recited by appellant Patrick Michael Garcia and supplements those facts as follows. RAP 10.3(b).

Around 6:00 a.m., RP 233, on June 2015, April Lynn Knigge² was home with the family dog after her husband, Douglas Knigge, had gone to work. RP 251. The Knigge property was an acre and a half. RP 281. The Knigges' fifth wheel camper trailer was parked on their property. RP 107. Douglas always looked at the camper as he left their property and had not noticed any lights on inside the camper when he left for work around 5:00 that morning. RP 343-45.

¹ The State cites to the sequentially paginated, two volume verbatim report of trial proceedings as RP ____ and to the clerk's papers, as CP ____.

² The State refers to Mr. and Mrs. Knigge by their first names to avoid confusion, meaning no disrespect.

About an hour later, the dog's barking from inside the house alerted April to the presence of a young man in her back yard. RP 252–53. He was shirtless and wearing white, silky shorts and sneakers. RP 269. The man, who turned out to be Garcia, RP 268, was standing about 20 feet from the camper and was holding a little white waste basket, one of three the Knigges' kept in the camper. RP 253–54. He was dumping objects from the waste basket into a garbage can. RP 254. The objects were tissues and soda cans, refuse from the Knigges' recent camping trip. RP 255, 278. The waste basket and its refuse had been inside the camper. RP 278.

When April yelled at Garcia to leave, he responded: "Where am I going to go?" RP 255–56. Garcia dropped the waste basket into the garbage can. RP 300. April watched him walk down their driveway to the street, Marina Drive. RP 256–57. He walked past an empty lot to a small trailer court. RP 259–60. A second white waste basket was found in a garbage can at the front of the Knigges' driveway by Marina Drive. RP 311. April was able to observe Garcia from the time she told him to leave until he entered Marina Drive. RP 304. April did not see Garcia enter or leave the camper. RP 272.

The Knigges had last been in the camper around 7:00 the evening before, unloading from their recent camping trip. RP 264, 324. After

Garcia left their property, only one of the three white waste baskets remained in the camper. RP 307. The Knigges did not have any other white waste baskets like the three in their camper. RP 340. A number of objects had been moved around inside the camper. RP 262. The extension cord connecting the camper to the house's electricity was unplugged. RP 327. Items in the refrigerator were still cool, but not cold or frozen as they had been. RP 264. A kitchen utensil set was outside its regular storage area. *Id.* A board that had covered the sink now sat on the stove. *Id.* Items from the bathroom cupboard were lying in the sink. *Id.* The bed had been made up when the Knigges left the camper the night before, but the following morning the sheets, a blanket, and a comforter were piled in a heap on the bed. RP 327. April identified two knives and various toiletries and sundries taken from Garcia when he was arrested. RP 266. Her husband had owned the knives since before she met him. RP 267. They were kept in the bottom kitchen drawer of the camper. RP 317. April had not seen those items in Garcia's hands when she caught him emptying the waste basket. RP 273, 277.

Douglas saw footprints around the entries to a detached garage and a little "mother in law house" on their property. RP 351-52. There were no signs of attempted forced entry. RP 351. Someone had left some tools belonging to the Knigges near those outbuildings, along with a garbage

bag. RP 352–53.

Garcia was wearing sneakers when he was arrested. RP 269. The tennis shoe footprints around the camper were not April's or her husband's. RP 263. Nobody reported seeing Garcia entering or leaving the camper and no footprints were found inside. RP 207–08.

Garcia was arrested at a nearby trailer court about nine minutes after April's 911 call, holding Douglas's two knives. RP 382–84. Garcia was also holding a bottle of lotion, some cotton swabs, a new toothbrush in its package, and what appeared to be a new set of headphones. RP 386. Garcia's basketball shorts had pockets, RP 405, in which the arresting officer found a small, metal flashlight, a glass pipe, and some Sharpie markers during his pat-down search. RP 385–86. Garcia told the officer he found everything in a field. RP 406.

Garcia admitted he had picked up the extension cord outside the Knigges' camper but denied going inside. RP 163–64. He did not explain how he happened to have a waste basket from inside the camper and agreed that this fact, and his possession of the knives, looked suspicious. RP 164. Shoe prints on a path through a field near the Knigge property shared design characteristics with the prints left at the Knigges'. RP 184–85, 196. They also appeared similar to the pattern on Garcia's shoes. RP 217. The officer concluded there were insufficient "individual

characteristics” on Garcia’s shoes—wear designs, marks, cuts—to include in his report. RP 218. He suspected Garcia made the shoe prints around the sheds. RP 231.

At trial, State raised a prior limine ruling that prohibited the arresting officer from testifying that certain residents of the trailer court where Garcia was arrested denied knowing Garcia. RP 366–67. The State proposed asking the officer whether he was able to corroborate Garcia’s assertion he was at the trailer court to visit a friend. RP 366. When arrested, Garcia had gestured to a trailer to his right and told the officer his friends lived there. RP 366–67. Defense counsel objected on hearsay grounds. RP 367. The court responded it wasn’t hearsay because the officer was not going to testify to what anyone said, only that he was not able to corroborate Garcia’s statement. RP 368. When defense counsel argued that lack of corroboration would portray Garcia as a liar, the court responded: “Isn’t it just as likely the inference was just as likely there’s nobody home?” RP 368–70.

The State brought up that without the testimony “a very smart defense attorney could argue that the police did nothing about what Mr. Garcia told them at the site of - - between trailers eight and nine in this trailer park, that police didn’t care about the defendant’s side of it and didn’t do anything about what the defendant said.” RP 371. The State

argued the testimony was necessary to counter an allegation that law enforcement “didn’t attempt to check out the defendant’s version of events.” RP 372. The Court pointed out Tufte would be asked whether Garcia gave an explanation for being in the trailer park “and then it’s already in the evidence that shortly after he gave this explanation that he’s been arrested, that there’s already some inference that the jury could be drawing for the proposition that the officer did not believe him about that explanation.” RP 375.

When the court ruled the question would be allowed, defense counsel said: “just so I’m clear, there’s not going to be any hearsay.” RP 376. The court responded: “No hearsay, yeah. Oh, yeah, don’t do that. Because we’re talking about violating Mr. Garcia’s confrontation rights.” RP 376. Counsel responded: “So just so I’m clear, unable to corroborate that he was visiting friends at the trailer, and that’s it.” RP 376. The court then made certain everyone knew the rules:

okay, the setup is going to be, Mr. Garcia said he was visiting friends over in this area. [The State is] going to ask did you attempt to check that out, did you attempt to corroborate that? Answer, I was unable to check it out or corroborate. That’s as far as it goes.

RP 376. Defense counsel responded: “Thank you, your honor.” *Id.*

Tufte testified he told Garcia he matched the description of a suspect and Garcia responded that he was there to visit a friend at the

trailer park and did not know what Tufte was talking about. RP 388. The State asked: “Did you make an attempt to check out what the defendant told you?” *Id.* Tufte replied: “Yes, I did.” *Id.* The State asked: “And were you able to do that?” Tufte said: “No, I was not able to.” *Id.* Asked what happened next, Tufte said: “I took him over to the car, let [the other officer] know what items had been in his possession. . . . I told [Garcia] he was in custody. I put him in my car. I Mirandized him.” *Id.*

III. ARGUMENT

A. REMAND IS THE APPROPRIATE REMEDY WHEN INSTRUCTIONAL ERROR AND DEFENSE COUNSEL’S DEFICIENT PERFORMANCE DEPRIVED GARCIA OF HIS RIGHT TO A UNANIMOUS VERDICT, JEOPARDY HAS NOT TERMINATED, AND SUFFICIENT EVIDENCE SUPPORTS THE REMAINING ALTERNATIVE MEANS OF COMMITTING SECOND DEGREE BURGLARY.

1. *Instructional error violated Garcia’s right to a unanimous verdict as to which act the jury relied on to convict him of second degree burglary and defense counsel’s performance was deficient for failing to apprehend the import of the jury’s “any fenced area” question when uncontested evidence showed the property was not fully enclosed.*

The State concedes instructional error deprived Garcia of his right to a unanimous verdict when the property on which the camper sat was only partially fenced and the instruction defining the word “building” as it applies to second degree burglary included the phrase “any fenced area.” CP 53. The jury’s question concerning instruction 14—“what is the definition of ‘any 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. The State further concedes defense counsel's performance was deficient for failing to appreciate the import of the jury's question when uncontested evidence showed the property's fencing did not create an enclosed or contained area. *State v. Wentz*, 149 Wn.2d 342, 356, 68 P.3d 282 (2003).

2. *Double jeopardy principles do not apply under the circumstances of this case and do not necessitate dismissal.*
 - a. Jeopardy has not terminated.

A criminal defendant's right to be free of double jeopardy precludes prosecution of the same offense after acquittal, prosecution of the same offense after conviction, and multiple punishments for the same offense. *State v. Fuller*, 185 Wn.2d 30, 34, 367 P.3d 1057 (2016) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)). The prohibition applies when a defendant faces a subsequent prosecution for the same crime after jeopardy had previously attached and was terminated. *Id.* (quoting *State v. George*, 160 Wn.2d 727, 741, 158 P.3d 1169 (2007)).

Once attached, jeopardy "does not terminate until the defendant is expressly or implicitly acquitted or a conviction becomes unconditionally final." *State v. Hescok*, 98 Wn. App. 600, 604–05, 989 P.2d 1251(1999)

(citing *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306–07, 80 L. Ed. 2d 311, 104 S. Ct. 1805 (1984)). Garcia’s single burglary conviction is not unconditionally final. Jeopardy has not terminated.

- b. Garcia was deprived of a unanimous verdict; retrial does not place him twice in jeopardy for the same criminal act.

Instruction 14 gave multiple definitions of the word “building” to be applied to a single count of second degree burglary, charged as an alternative to the residential burglary charge on which Garcia was acquitted. CP 24–25. “A defendant charged and tried under multiple statutory alternatives experiences the same jeopardy as one charged and tried on a single theory. The defendant is in jeopardy of a single conviction and subject to a single punishment, whether the State charges a single alternative or several.” *State v. Wright*, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009).

Citing *State v. Kier*, 164 Wn.2d 798, 808, 194 P.3d 213(2008), Garcia argues the rule of lenity demands outright dismissal of the second degree burglary charge because the jury could have relied on an act not supported by sufficient evidence—his entry into a partially-fenced area. Br. of Appellant at 12–13. But *Kier* does not govern under the facts here. The ambiguous verdict supporting dismissal in *Kier* involved two alleged crimes, not one, and the question there was whether the charges merged

when the evidence was unclear whether a single person was the victim of one crime or both. *Id.* at 811–13. It was this ambiguity that required application of the rule of lenity in a double jeopardy context. *Id.* at 813–14.

The right to be free from double jeopardy differs from the right to a unanimous verdict. *State v. Ellis*, 71 Wn. App. 400, 404, 859 P.2d 632 (1993). The right against double jeopardy prohibits use of the same act as a factual basis for more than one count. *Id.* The right to a unanimous verdict requires that “all jurors must agree on the same act underlying any given count[.]” *Id.* The error in this case implicates juror unanimity, not double jeopardy. When multiple alleged acts support conviction for a single count, jurors must unanimously agree at least one of those acts has been proved beyond a reasonable doubt. *Id.* at 405 (citing *State v. Noel*, 51 Wn. App. 436, 440–41, 753 P.2d 1017, *review denied*, 111 Wn.2d 1003 (1988)). That did not happen here. 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.

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- c. Remand is the appropriate remedy when sufficient evidence supports at least one alternative means.

Garcia’s conviction requires reversal because the jury was instructed to consider an alternative means of entering a “building”—entry into a fenced area—that was unsupported by the evidence. “In alternative means cases where a conviction is reversed because one means lacks sufficient evidence (the functional equivalent of an acquittal), [the Washington Supreme Court] has remanded for a new trial based on the remaining valid means for which jeopardy never terminated.” *Fuller, supra*, 185 Wn.2d at 34 (citing *State v. Garcia*, 179 Wn.2d 828, 318 P.3d 266 (2014); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) (plurality opinion)). The *Fuller* court noted that in *Garcia*, insufficient evidence supported two of the three alternative means of kidnapping presented to the jury. *Id.* at 36–37. The *Garcia* court remanded for a new trial on the sole remaining alternative. *Garcia*, 179 Wn.2d at 844. Although reversal is required ““when it is impossible to rule out the possibility the jury relied on a charge unsupported by sufficient evidence . . . [the defendant] is entitled only to a new trial, not an outright acquittal, unless the record shows the evidence was insufficient to convict on any charged alternative.”” *Id.* (quoting *Wright, supra*, 165 Wn.2d at 803 n.12 (internal

citations omitted)). Here, as in *Fuller* and *Garcia*, the State is permitted to retry Garcia on the alternative definition of “building” for which sufficient evidence exists. *Fuller*, 185 Wn.2d at 37; *Garcia*, 179 Wn.2d at 844.

- d. Evidence of second degree burglary by entry into the Knigges’ camper is sufficient to support a finding of guilt beyond a reasonable doubt.

Evidence is sufficient to support a conviction when the it “could reasonably support *a finding of guilt beyond a reasonable doubt.*” *State v. Green, supra*, 94 Wn.2d at 221 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) (italics added in *Green*)). Whether the reviewing court believes the trial evidence established guilt is irrelevant. *Id.* “Instead, the relevant question is 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.*” *Id.* (quoting *Jackson v. Virginia, supra*, at 18)(italics added in *Green*)).

To convict Garcia of second degree burglary, the State must prove he unlawfully entered a building other than a vehicle or dwelling with the intent to commit a crime against property inside. RCW 9A.52.030(1). Although circumstantial, the evidence here is sufficient to convince 12 reasonable jurors Garcia did not merely rescue items of abandoned personal property found in a field, but also participated in their liberation

from the Knigges' camper.

April Knigge first saw Garcia tidying up as he emptied her own camping refuse from a little white waste basket that had been inside the camper the night before. RP 253–54. A matching white waste basket, also from the camper, was later found in a different garbage can close to the street. RP 311. A third waste basket remained in the camper. RP 307. Although it is possible more than one tidy burglar passed through the Knigges' property the night before, emptying waste baskets into a victim's garbage can seems a peculiar thing to do. It is reasonable to infer Garcia was emptying the waste basket because he intended to fill it with items from the camper. It is reasonable to conclude he had already done that with the waste basket found in the garbage can by the street, that he took those items elsewhere, and, knowing of the two remaining waste baskets, ditched the first carrying container on his way back for another load.

When April first saw Garcia, he was shirtless and wearing white, silky shorts and sneakers. RP 269. He was arrested about nine minutes after April called 911. RP 282. When he was arrested, he was carrying Douglas's two knives, along with various toiletries and sundries taken from the camper. RP 266. The knives had been kept in the bottom kitchen drawer of the camper. RP 317 April had not seen those items in Garcia's hands when she saw him emptying the waste basket. RP 273, 277. RP 277.

Garcia told the arresting officer he found the items in a field. RP 406. Viewed in a light most favorable to the State, this evidence supports a scenario in which Garcia carried various items in the waste basket found in the garbage can by the street to a separate location for later retrieval—a nearby field, perhaps. Shoe prints similar to Garcia’s were found on a path through a field near the Knigge property. RP 184–85, 196. The evidence indicates Garcia left the Knigge property empty-handed and managed to retrieve the knives and bathroom sundries before encountering the arresting officer at the trailer court nine minutes later.

Someone had spent a considerable amount of time in the camper overnight. Items were moved around. RP 262. Kitchen utensils were out of their regular storage area, a board covering the sink was on the stove, and bathroom items were removed from the cupboard and lay in the sink. RP 207. The bed—made up when the Knigges left the night before—was unmade with its bedding piled on top. RP 327.

Garcia admitted having been outside the trailer and having picked up the extension cord connecting the camper to the house’s electricity. RP 163–64. He was first seen emptying the contents of a waste basket that had been inside the camper, the second waste basket having been removed from the camper earlier that night. This supports an inference Garcia was uncommonly comfortable with the camper and its contents. He did not

enter the trailer, rummage around quickly, and get out of there fast. He emptied cupboards and tore up the bed. He made at least one trip with a waste basket, at least to the end of the Knigges' driveway, before being caught emptying another. He unplugged the electric cord to the house. On this evidence, reasonable jurors could find Garcia entered the Knigges' camper with an intent to steal property and did steal property.

Viewed in the light most favorable to the State, sufficient evidence supports a charge of second degree burglary based on Garcia's unlawful entrance into the Knigges' camper with an intent to steal property. The State is entitled to retry Garcia. *Fuller*, 185 Wn.2d at 37; *Garcia*, 179 Wn.2d at 844.

B. TUFTE'S TESTIMONY THAT HE WAS UNABLE TO CORROBORATE GARCIA'S EXCUSE FOR BEING IN THE TRAILER PARK IS NOT HEARSAY AND DID NOT VIOLATE GARCIA'S RIGHT TO CROSS-EXAMINE WITNESSES AGAINST HIM.

There is no hearsay here. "Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evidence Rule (ER) 801(c). "A 'declarant' is a person who makes a statement." ER 801(b). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." ER 801(a).

Garcia correctly identifies the affidavits offered lieu of a forensic

analyst's testimony in *Melendez-Diaz v. Massachusetts* to prove a substance was cocaine as "functionally identical to live-in-court testimony, doing 'precisely what a witness does on direct examination[.]'" *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11, 129 S. Ct. 2527, 174 L.Ed.2d 314 (2009) (quoting *Davis v. Washington*, 547 U.S. 813, 830, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (emphasis deleted)). As such, the affidavits were identifiable statements—"the substance is cocaine"—made to prove the matter asserted by a declarant who was not present at trial and was not subject to cross-examination.

Garcia's application of *Melendez-Diaz* to his own case is misplaced. "The 'matter asserted' is the matter set forth in the writing or speech on its face, not the matter broadly argued by the proponent of the evidence." *In re Pers. Restraint of Theders*, 130 Wn. App. 422, 432, 123 P.3d 489 (2005) (citing *State v. Esposito*, 223 Conn. 299, 613 A.2d 242, 251 (1992)). The goal of the Confrontation Clause is to ensure that reliability of evidence "be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). The matter at issue was not whether Garcia was visiting friends in the trailer court, or whether he knew anyone in the trailer court. The matter at issue was whether Tufte was able to corroborate Garcia's assertion. Tufte did not explain why he

could not corroborate Garcia's assertion, so his testimony did not implicate a statement or other testimonial behavior of an out-of-court declarant. Whether Garcia had friends at the trailer court was not critical to the State's case and could not have significantly helped Garcia either way. There was no question Garcia had been on the Knigges' property. April saw him there. He admitted being around the trailer and picking up the extension cord. The jury did not have to disbelieve his stated reason for being in the neighborhood because it did not excuse his odd presence on the Knigge property or explain how he happened to be holding items removed from the camper when he was arrested.

Tufte's inability to corroborate was also offered for the non-hearsay purpose of explaining Tufte's actions. As the State argued, without this testimony the jury would be left speculating about whether enforcement failed to follow up on Garcia's reasonable-sounding explanation for being where he was at 6:00 in the morning.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Redmond*, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003). As the trial court here pointed out, it was impossible to determine from Tufte's statement whether he contacted any trailer court resident. Citing Garcia's right of confrontation, the court carefully considered argument from both sides and crafted both the question and its answer. RP 376-77.

“You’re going to ask, did you attempt to check that out, did you attempt to corroborate that? Answer, I was unable to check it out or corroborate. That is as far as it goes.” *Id.* Neither the State nor Tufte stepped outside the trial court’s boundary fence.

This Court should find that allowing the question and answer was not an abuse of the trial court’s discretion and did not violate Garcia’s right to confront the witnesses against him.

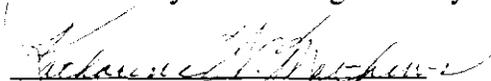
IV. CONCLUSION

This Court should reverse Garcia’s second degree burglary conviction and remand for a new trial in which the State will be allowed to ask whether the arresting officer was able corroborate Garcia’s explanation for his presence at the trailer court nine minutes after April Knigge demanded he leave her property.

DATED this 22nd day of December, 2017.

Respectfully submitted,

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DECLARATION OF SERVICE

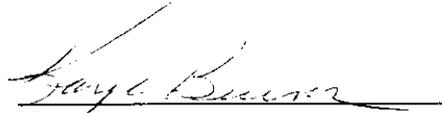
Under penalty of perjury of the laws of the State of Washington,
the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this
matter by e-mail on the following party, receipt confirmed, pursuant to the
parties' agreement:

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Dated: December 28, 2017.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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