

65836-1

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NO. 65836-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

PHILLIP GARCIA,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

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RESPONDENT'S BRIEF

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## **I. SUMMARY OF ARGUMENT**

Phillip Garcia was convicted by a jury of Burglary in the Second Degree, Kidnapping in the First Degree with a Deadly Weapon and Criminal Trespass in the First Degree for an incident where he broke into a convenience store on Christmas Eve and then fled holding a woman under threat of a knife in her residence until he could call a friend to get him.

Garcia contends there was insufficient evidence to support the burglary conviction. However, Garcia is in a videotape entering a convenience store and fled when the alarm tripped. Garcia also contends the prosecutor misrepresented the elements of the burglary of the gas station such that he is entitled to a new trial. Although a portion of the prosecutor's argument was an incorrect statement of the law, the failure to object and the minimal argument on that issue was harmless error. Garcia also contends that the trial court erred in denying his statements to the victim he held hostage. However, his own statements offered for the truth of the matter were properly excluded as hearsay. Garcia contends there was insufficient evidence to support the kidnapping. However, Garcia admitted he thought the police were looking for him from the burglary and he had gone to the victim's residence to call a friend to come get him. His actions inflicted extreme distress on her, restrained her to use a shield and assisted his flight from the burglary. There was sufficient for a trier of fact to find kidnapping.

Garcia next contends that the trial court erred in admitting his prior conviction. However, Garcia admitted his convictions on his own direct examination and did not preserve the issue. Garcia also contends he can raise an error in the deadly weapon instruction despite his failure to raise the issue below. Finally, he argues that the burglary and criminal trespass could have been from the same entry of the gas station, despite the instruction that directed the jury not to consider trespass of the gas station after finding him guilty of that burglary. Garcia's convictions and sentences must be affirmed.

## **II. ISSUES**

1. Where a defendant breaks a window to a convenience store and enters only to flee when the alarm is tripped is there sufficient evidence to support a conviction for Burglary in the Second Degree?
2. Did the prosecutor make a misstatement of the law in arguing that a burglary can be committed while outside of a building by a malicious mischief of the structure of the building?
3. Where defense did not object and the prosecutor's argument was directed on the argument based upon the entry into the building as evidenced on the video, was the error harmless beyond a reasonable doubt?
4. Did the trial court abuse its discretion in denying admission of the defendant's statements to the victim as hearsay?
5. Where the defendant was fleeing from a burglary, armed himself

with a knife and by implied threat, kept a woman in her house until he arranged for a ride to avoid arrest, was there sufficient evidence for a rational trier of fact to find the defendant guilty of Kidnapping in the First Degree?

6. Where the defendant admitted the existence of a prior conviction on direct examination, did he waive objection to the trial court's decision to admit the prior conviction by admitting the conviction himself.

7. Is an error regarding unanimity in application of a deadly weapon enhancement a manifest constitutional error which may be raised for the first time on appeal?

8. Where the jury instructions direct the jury not to consider criminal trespass of a convenience store, if they found him guilty of burglary, can an appellate court be certain that the criminal trespass was for a different event on the same evening?

### **III. STATEMENT OF THE CASE**

#### **1. STATEMENT OF PROCEDURAL HISTORY**

On December 29, 2009, Phillip Barrara Garcia, Jr., was charged with Burglary in the Second Degree, Burglary in the First Degree, and Kidnapping in the First Degree alleged to have occurred on December 24, 2009. CP 1-2. Garcia was alleged to have first broken into a gas station setting off an audible alarm, breaking into the nearby residence of Juliana Wilkins where he armed himself with a knife from the kitchen making

Wilkins fearful to leave the residence or call police, called people from Wilkins' cell phone and left when the ride he called for came. CP 4.

On May 24, 2010, the State amended the information to add deadly weapon allegations as to the charges of Burglary in the First Degree and Kidnapping in the First Degree. CP 6-7.

On June 7, 2010, the case proceeded to trial. 6/7/10 RP 4.<sup>1</sup> On June 10, 2010, Garcia was found guilty by a jury of Burglary in the Second Degree, Kidnapping in the First Degree with a Deadly Weapon Enhancement and Criminal Trespass in the First Degree. CP 56, 57, 60, 61.

On July 21, 2010, Garcia was determined to have an offender score of 12 and sentenced by the trial court to 173 months of confinement on the greatest charge of Kidnapping in the First Degree. CP 65, 66. Garcia's sentence included 24 months of time for the Deadly Weapon Enhancement. CP 66. On August 3, 2010, Garcia timely filed a notice of appeal. CP 85

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

|                   |   |
|-------------------|---|
| 3/25/10 RP        | Arraignment                                 |
| 5/9/10 RP         | Trial Continuance                           |
| Amended 6/6/10 RP | Advisement of Charges before Jury Selection |
| 6/7/10 RP         | Trial Day 1, Motions and Testimony          |
| 6/8/10 RP         | Trial Day 2, Testimony                      |
| 6/9/10 RP         | Trial Day 3, Testimony                      |
| 6/10/10 RP        | Trial Day 4, Closing Argument               |
| 7/21/01 RP        | Sentencing.                                 |

The transcripts from 6/7/10 to 6/10/10 contained sequentially numbered pages.

## 2. SUMMARY OF TRIAL TESTIMONY<sup>2</sup>

Stephanie Curry resided with her mother at 2626 Old Highway 99 South in Mount Vernon on December 24, 2009. 6/7/10 RP 18-20. Curry's dog started barking at 2:00 or 3:00 a.m. because it seemed like someone was trying to enter their house. 6/7/10 RP 20. Curry called 911. 6/7/10 RP 20.

Melanie Wells, Stephanie Curry's mother, was at home, when someone knocked on her door. 6/7/10 RP 43-4. Wells' dog started barking and she heard the knock on her door. 6/7/10 RP 44. Wells went to the door and saw a dark skinned, sweaty stranger. 6/7/10 RP 45. Wells started backing up and the person left. 6/7/10 RP 45. Wells identified the man in a photo montage. 6/7/10 RP 46.

Juliana Wilkins testified. 6/8/10 RP 96. Wilkins, normally a Florida resident, was in Mount Vernon in December of 2009, living at a trailer court taking care of her ill father. 6/8/10 RP 96-7. Wilkins' father had died on December 12, 2009, and she was staying at the mobile home in the trailer court cleaning it up and planning to leave late on December 24<sup>th</sup> to be home for Christmas. 6/8/10 RP 98. Wilkins was packing late and took a nap around 3:00 a.m. on the sofa. 6/8/10 RP 99. Wilkins left the front door unlocked, but closed since a niece might be coming home. 6/8/10 RP 176.

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<sup>2</sup> This statement of facts summarizes the testimony at trial, the pertinent statement of facts regarding particular issues is contained in each argument section below

Wilkins was wearing a T-shirt and pajama bottoms. 6/8/10 RP 178.

Wilkins awoke at 3:55 a.m. when she saw a man leaning over her tapping her on her upper thigh. 6/8/10 RP 99-100, 117. Wilkins thought she was having a nightmare and it took a few seconds before she realized it was real. 6/8/10 RP 100. Wilkins was terrified and tried to stay calm. 6/8/10 RP 100. The man's face was in her face and Wilkins had not seen him before. 6/8/10 RP 100-1. Wilkins sat up but stayed on the couch. 6/8/10 RP 101.

Wilkins described that the man was agitated, jumpy, out of breath, acting like on an adrenaline rush and very unpredictably. 6/8/10 RP 101. The man sat on the chair next to the couch five or six feet away. 6/8/10 RP 101. The man was wearing one of her father's blue and red flannel quilted shirts. 6/8/10 RP 103. The man repeatedly got up and down from the chair to look out the windows. 6/8/10 RP 104. The man displayed a knife which he had on the side pocket of his jeans. 6/8/10 RP 102. The man pulled the knife out and at one point held it two feet away from Wilkins. 6/8/10 RP 102. Wilkins felt terrified. 6/8/10 RP 103, 183.

Wilkins tried to remain calm during the incident because he was acting so agitated and amped up, she was afraid he could do anything. 6/8/10 RP 104. Wilkins offered the man cigarettes and water. 6/8/10 RP 105. Wilkins talked with Garcia so he would see her as a human being and for self preservation. 6/8/10 RP 185. Wilkins didn't try to make a run for it

because she was afraid to move, afraid of what could happen and feared for her life. 6/8/10 RP 105, 144. The man used both her land line and her cell phone to make phone calls. 6/8/10 RP 105. Wilkins told him to call the police. 6/8/10 RP 111. Wilkins said that Garcia had both her phones for the whole two hours he was there and was on the phone numerous times for a couple minutes each time. 6/8/10 RP 101, 120-1. At one point Wilkins gave directions to the residence to someone else. 6/8/10 RP 105, 167-8. The one time Wilkins got up was to give the man a religious sacrament by the back door when she thought he was leaving. 6/8/10 RP 106, 141. But he did not leave and came back. 6/8/10 RP 106. Wilkins became more worried at that point because she thought he would be more desperate. 6/8/10 RP 106. Wilkins said that the man's agitation increased as time wore on. 6/8/10 RP 107. The man became more and more anxious because he couldn't get a ride and because things weren't happening the way he wanted them too. 6/8/10 RP 107. Wilkins described she was very, very terrified. 6/8/10 RP 107. Wilkins' anxiousness and fear never declined while Garcia was in the residence fearing she might be killed. 6/8/10 RP 110-1. At one point, Garcia had wiped the knife on a box in the living room. 6/8/10 RP 111. Wilkins did not see Garcia return it to the butcher block. 6/8/10 RP 111. The man was in the trailer for two hours and only got off of the sofa one time during that time. 6/8/10 RP 101. Garcia offered to give Wilkins back the

religious sacrament, but she declined and gave him a hug as he left. 6/8/10 RP 109. Garcia left with Wilkins father's shirt he was wearing and Wilkins' cell phone. 6/8/10 RP 103, 179. Wilkins called 911. 6/8/10 RP 110. Garcia called back to Wilkins about an hour after she called the police. 6/8/10 RP 180. Wilkins identified Garcia as the man who had been inside the residence. 6/8/10 RP 109.

On cross-examination defense elicited that Garcia had asked her for a ride early on. 6/8/10 RP 134. Wilkins described Garcia as talking in hushed tones while making the phone calls. 6/8/10 RP 135. Defense elicited that Garcia was acting anxious because of the people he believed were after him. 6/8/10 RP 136. Wilkins also spoke with Garcia to calm him down and talked about choosing the right path in life. 6/8/10 RP 172-3.

Officer Joshua Maxwell of the Mount Vernon Police Department was working in the early morning of December 24, 2009, at about 2:00 a.m. when he was called to a report of a vehicle stuck on the tracks at South 3<sup>rd</sup> Street and Blackburn. 6/7/10 RP 50-1. Maxwell did not find a car there when he got to the scene. 6/7/10 RP 52. A train conductor reported a couple people moved the vehicle off the tracks. 6/7/10 RP 52. Maxwell saw a dark green Chevrolet Lumina in the area which had a flat tire and sparks coming from underneath. 6/7/10 RP 53. There was a lone female in the car, Laura Lane. 6/7/10 RP 54. Lane said she did not know how the flat tire happened.

6/7/10 RP 54. Because Lane had a suspended license and the vehicle was damaged, Maxwell had the vehicle towed at about 2:50 a.m. 6/7/10 RP 55. Later that morning, Maxwell was sent to a burglary call nearby at 2210 Old Highway 99 South, space 19, Mount Vernon at about 6:05 a.m. 6/7/10 RP 56-7. Maxwell was the first officer on the scene and contacted Juliana Wilkins. 6/7/10 RP 56. Wilkins reported to being woken up by a male who had broken into her residence. 6/7/10 RP 56. Maxwell called in other officers to respond because it was not known where the male was. 6/7/10 RP 57. Maxwell was at the scene over two hours, getting a description of what happened from Wilkins and collecting evidence. 6/7/10 RP 57-8. Maxwell took possession of a knife Wilkins described that the male had used which was located in a butcher block and a cordless phone. 6/7/10 RP 58-60, 65. Maxwell also gathered a water bottle from the scene. 6/8/10 RP 212-3. Maxwell had checked the caller ID on the phone for a call that Wilkins had received. 6/7/10 RP 61-2.

Cecelia Carr was the store manager of the Valero gas station at 2630 Henson Road in Mount Vernon. 6/7/10 RP 21-2. Carr got a call to go to the gas station at about 2:30 to 3:00 a.m. 6/7/10 RP 22. When Carr arrived, she found the front door shattered inward with glass inside the store. 6/7/10 RP 23. Carr found a cinder block inside that was not there earlier. 6/7/10 RP 23. Carr obtained a copy of the surveillance video and turned it over to the

police department. 6/7/10 RP 23-4. The video was admitted and played. 6/7/10 RP 24. Carr described that in the videos she had reviewed she saw the person come up to the door, kick it numerous times and when unable to enter, grabbed the block and threw it inside. 6/7/10 RP 25. Carr described that the person had entered the store, turned around and then walked out. 6/7/10 RP 27. The gas pumps are well lit and can be used at night, but the store closes at 10:00 p.m. 6/7/10 RP 27.

Pablo Andrade testified. 6/7/10 RP 31. Andrade recalled receiving a call from Phillip Garcia around 3:00 to 4:30 a.m on December 24, 2009. 6/7/10 RP 31-2. Andrade was at his girlfriend's house sleeping and went to pick up Garcia at a trailer park for older people. 6/7/10 RP 34. Andrade had gotten the directions from Garcia and a woman who didn't sound happy. 6/7/10 RP 35-7. Andrade drove inside the trailer park and turned around when Garcia got in. 6/7/10 RP 40. Andrade described that Garcia was acting just normal when he jumped in and they took off. 6/7/10 RP 40. Andrade did not remember his conversation with Garcia. 6/7/10 RP 41. Andrade went back to sleep when he got home and Garcia was there. 6/7/10 RP 42. By 9:00 the next morning Garcia was gone. 6/7/10 RP 42.

Trudy Lee lived at 2511 Old Highway 99 South in Mount Vernon. 6/8/10 RP 214. Lee testified that she found a shirt beside the garage near her house. 6/8/10 RP 216, 217-9. The shirt was later tested and found to have

Garcia's DNA. 6/8/10 RP 207.

Detective Shackleton of the Mount Vernon Police Department testified. 6/8/10 RP 75. Shackleton interviewed Ms. Wilkins on December 24<sup>th</sup>. 6/8/10 RP 77. Wilkins picked out Phillip Garcia from a photo montage. 6/8/10 RP 78. After selecting Garcia, Shackleton showed photographs from the videos at the Valero station to Wilkins, which she identified. 6/8/10 RP 80. The photographs were admitted into evidence. 6/8/10 RP 80-1. A few days after the incident, a lady brought in a bag of clothes found in a nearby driveway at 2511 Old Highway 99, Mount Vernon. 6/8/10 RP 83-4. The clothing was similar to that seen on the video from the Valero station. 6/8/10 RP 83. Phillip Garcia's mother was the registered owner of the car that Maxwell impounded. 6/8/10 RP 86. Photographs of the vehicle as well as Wilkins' residence were admitted. 6/8/10 RP 87. Shackleton also recovered a water bottle from inside Wilkins' residence. 6/8/10 RP 88. Shackleton turned focus to locate Garcia and spoke with Pablo Andrade on December 31, 2009. 6/8/10 RP 85. Shackleton also gathered a DNA sample from Garcia. 6/8/10 RP 201-2. Shackleton also received clothes provided by Trudy Lee to police and arranged for transport to the crime lab. 6/8/10 RP 221-6, 236-8, 239-40.

The State called Mariah Low from the crime lab to testify. 6/8/10 RP 189-90. Low received a water bottle and three clothing items, a red

jersey, a New York Yankee's jersey and a white tank top for testing. 6/8/10 RP 191, 194, 196, 199. Low compared samples from a DNA swab from Garcia with samples from the water bottle and white tank top. 6/8/10 RP 200-1, 204-5, 207. They matched. 6/8/10 RP 207.

The State called Garcia's mother, Efigenia Barrera, to testify. 6/8/10 RP 154-5. She let him use her Chevy Lumina late at night on December 23, 2009. 6/8/10 RP 155. Barrera found out the next day the car was in impound and paid the tow bill getting it back eight days later. 6/8/10 RP 156.

The defense case consisted of Garcia and two family members.

Garcia called his mother to testify that she had other children who lived in the Mount Vernon area and they shared cell phones. 6/8/10 RP 158-60. Ms. Barrera testified that there were messages on her cell phone on December 24, 2009. 6/8/10 RP 159, 162.

Garcia called his sister, Laura Salinas. 6/9/10 RP 258-9. Salinas testified about getting a number of phone calls to her house and her cell phone in December of 2009. 6/9/10 RP 259-60. Salinas said she relayed the content of the voice mails and text messages to her brother, Garcia. 6/9/10 RP 260-1. Salinas also said she talked on the phone with the people and relayed what was said to her brother. 6/9/10 RP 261.

Garcia testified on his own behalf. 6/9/10 RP 278. Garcia was 29 at the time of trial and lived in Anacortes on December 24, 2009. 6/9/10 RP

279. Garcia was driving after midnight on College Way in Mount Vernon, with four other people in the vehicle with him when three vehicles cut him off. 6/9/10 RP 279-80. He thought they appeared to get in front of, behind and beside him before they turned different directions. 6/9/10 RP 281-2. While on College Way, he thought he heard two gun shots when one vehicle was in front of him and two were behind him. 6/9/10 RP 283. Garcia did not get a good look at the vehicles to describe them. 6/9/10 RP 282. Garcia made some turns to get away, letting two passengers out at one point. 6/9/10 RP 283-4. His friend Laura stayed in the car. 6/9/10 RP 284-5. Garcia drove away, eventually getting to Blackburn Road over I-5 and driving down a hill. 6/9/10 RP 285. Garcia claimed he looked in his rearview mirror to see if anyone was following him and drove onto the railroad tracks, getting stuck. 6/9/10 RP 286. Garcia got out to move his car, but claimed he saw headlights so he panicked and ran, leaving Laura in the car. 6/9/10 RP 286. Garcia said he ran away to a dark area through sticker bushes, and fell in a ditch before ending up at the gas station. 6/9/10 RP 287-8.

At the gas station, Garcia said he tried to get in, pounding on the door. 6/9/10 RP 289-90. Garcia said he was waiting there about ten to fifteen minutes, before he thought people were nearby, so he decided to break the window with a cinderblock to set off the alarm. 6/9/10 RP 291. After he did that, he went inside to trip the alarm. 6/9/10 RP 292. He

claimed he did not wait around, because he had outstanding warrants and decided he did not want to be arrested. 6/9/10 RP 293.

Garcia said he went to another house, where he knocked on a door and claimed he told her he was being shot at. 6/9/10 RP 294. She said she would call the police. 6/9/10 RP 294. Garcia did not stay there either, and ran away because he did not want to go to jail. 6/9/10 RP 294. When Garcia was near another house, he took his clothes off. 6/9/10 RP 294-5. Near Juliana Wilkins's house, Garcia thought he heard voices in a field. 6/9/10 RP 296, 297. He described it was pitch black and he had a strange feeling. 6/9/10 RP 296. He did not see the people. 6/9/10 RP 298. He claimed he ran to Wilkins' trailer park to get help. 6/9/10 RP 298.

Nobody answered at the first trailer, so Garcia tried the door at Wilkins' trailer. 6/9/10 RP 298-9. Garcia claimed he couldn't knock on Wilkins' front door because of a screen, so he went around to the sliding door and found it ajar a couple inches. 6/9/10 RP 299-300. Garcia went inside. 6/9/10 RP 300. Garcia found a flannel coat inside and put it on. 6/9/10 RP 300. Garcia claimed that at first he did not see Wilkins. 6/9/10 RP 300. After he did he looked around the house a bit before waking her up by tapping her on her leg. 6/9/10 RP 300.

Garcia then testified that he told her that he was not there to hurt her, he had been shot at earlier, he believe people were after him and needed help

and a ride. 6/9/10 RP 301. He asked Wilkins for a ride but she said her husband was coming and couldn't give him a ride. 6/9/10 RP 301. Garcia thought to wait for the husband, but claimed when he realized he wasn't coming for a while, he decided to call for a ride. 6/9/10 RP 312. Garcia sat in a chair while Wilkins sat on the couch and Garcia used her phone to make calls. 6/9/10 RP 302. Garcia ended up using both her cell phone and house phone to make calls trying to get people to pick him up. 6/9/10 RP 311-2. Garcia testified that he had a conversation with her. 6/9/10 RP 303. Wilkins asked Garcia how he got in and he said by a window. 6/9/10 RP 303. Garcia went on to discuss the conversation about the sliding door versus the window and stated "And then when we got into details and figured out that her window, her sliding door was open and her telling me that she didn't leave it like that, it just kind of all too weird." 6/9/10 RP 304. Garcia claimed that he was thinking that there were people in the area, so he began checking the house while she stayed on the couch. 6/9/10 RP 304.

After checking the house, Garcia claimed that he then grabbed a knife from the butcher block in the kitchen and put it in the back pocket of his pants. 6/9/10 RP 305, 306-7. He claimed he did it for her safety and for his. 6/9/10 RP 306. He claimed he did not recall showing her the knife and said he remembered trying not to frighten her. 6/9/10 RP 306. But he did tell her that he had taken a knife from the kitchen. 6/9/10 RP 306. Garcia

claimed the only time he pulled out the knife was when he was going to leave, when he put it on the table. 6/9/10 RP 309-10.

Garcia said he went outside at one point to look to see if anyone was there, when Wilkins gave him the rosary. 6/9/10 RP 312-4. Garcia also testified he went to the bathroom at one point and closed the door leaving Wilkins in the living room. 6/9/10 RP 315-6. Garcia also said Wilkins offered him cigarettes and a bottle of water. 6/9/10 RP 316.

Garcia said that Wilkins did tell him to call the police at one point, and Garcia responded that he didn't want to go to jail because he had warrants. 6/9/10 RP 317. Garcia finally left the house when his friend Pablo showed up. 6/9/10 RP 318. Garcia said after he left, he realized he had her cell phone and called to arrange to return it. 6/9/10 RP 319.

On cross-examination, Garcia claimed that he had picked up his friend Laura Lane at a motel near the hospital in Sedro Woolley after her call. 6/9/10 RP 331. Garcia then said he and Lane went to a casino. 6/9/10 RP 331. Garcia then went to a friend's apartment in Mount Vernon, when his friends Andrew or Isaiah called him for a ride at about 12:00 to 1:00 a.m. 6/9/10 RP 333. Garcia did not know Andrew's or Isaiah's last name. 6/9/10 RP 330. Garcia drove them to the westside of Mount Vernon where they went in for a few minutes and then came out. 6/9/10 RP 334. Garcia claimed that on his way back the incident with the other cars occurred on

College Way. 6/9/10 RP 335. Garcia said the three cars pulled out of a nearby food store. 6/9/10 RP 338. Garcia did not recognize the cars. 6/9/10 RP 339. None of the cars occupants had rolled down their window, honked their horns, said anything or displayed a weapon. 6/9/10 RP 340-3, 356.

Garcia admitted again on cross-examination that despite being shot at and being scared, he did not call police because he had outstanding warrants. 6/9/10 RP 347. He also made Andrew and Isaiah get out of the car, but Laura Lane stayed. 6/9/10 RP 348, 351.

Garcia claimed he crashed on the railroad tracks when looking in his rearview mirror to see if people were following him. 6/9/10 RP 324. He admitted not seeing anyone. 6/9/10 RP 324. He said after trying for a few minutes to get the car off, he saw headlights coming down the hill. 6/9/10 RP 325-6. Garcia acknowledged that nothing particular about the headlights suggested they were involved with the earlier incident. 6/9/10 RP 327. Garcia stated Lane stayed in the car when he ran. 6/9/10 RP 350.

Garcia acknowledged falling in a ditch near the gas station. 6/9/10 RP 352. Garcia admitted being at the gas station for five or six minutes before he claimed three cars got off the freeway. 6/9/10 RP 353. He then waited a few more minutes before throwing the block through the Valero gas station window. 6/9/10 RP 353. Garcia did not go to two other nearby gas stations. 6/9/10 RP 359. Garcia admitted that despite throwing the block

through the window in order to draw attention to himself, he fled once the alarm was tripped. 6/9/10 RP 360. Garcia admitted going to the door of another house a block away, where he knocked but left there when they said they were going to call 911. 6/9/10 RP 361. Garcia said that he took off his clothes because they were too visible. 6/9/10 RP 362. Garcia admitted he took his shirts off so the police would not be able to see him. 6/9/10 RP 363.

Garcia admitted he entered Wilkins' trailer through the sliding glass door. 6/9/10 RP 365. Garcia denied getting his face close to Wilkins when he woke her up. 6/9/10 RP 367. Garcia claimed that Wilkins had gotten off the couch twice, once to get him a water bottle and once to search the house with him. 6/9/10 RP 372. Garcia admitted Wilkins tried to get him to call the police. 6/9/10 RP374. Garcia admitted that after about half-way through the time at Wilkins' house, he decided to leave. 6/9/10 RP 365. Garcia admitted that the incident with the vehicle and the gun shots happened an hour and a half to two hours before. 6/9/10 RP 365.

#### **IV. ARGUMENT**

- 1. WHERE A DEFENDANT BROKE A WINDOW TO A CONVENIENCE STORE AFTER HOURS, WENT INSIDE AND FLED WHEN THE ALARM WENT OFF, THERE WAS SUFFICIENT EVIDENCE FOR A RATIONAL TRIER OF FACT TO FIND THE DEFENDANT GUILTY OF BURGLARY IN THE SECOND DEGREE.**

Garcia contends that the Burglary in the Second Degree conviction should be reversed because there was insufficient evidence.

Since the defendant is on videotape entering the convenience store and fled when the alarm was tripped, there was sufficient evidence for a rational trier of fact to find the intent to commit a crime inside.

**i. There was sufficient evidence of the intent to commit a crime inside the gas station convenience store.**

The defendant is on videotape breaking the glass in the front door of the convenience store and entering the convenience store and fled when the alarm was tripped. 6/7/10 RP 233, 25 & 27. Garcia admitted throwing the block through the window and entering the store. 6/9/10 RP 292. In addition despite his claim of wanting to draw attention to himself he fled once the alarm was tripped. 6/9/10 RP 360.

**ii. Sufficiency of evidence standards for Burglary in the Second Degree.**

The test of sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of second degree burglary beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Wade was charged under former RCW 9A.52.030(1), which provides:

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

The State bears the burden of proving the entry was unlawful, *i.e.*, the person was not licensed, invited or otherwise privileged to enter or remain. RCW 9A.52.010(3); State v. Bergeron, 105 Wn.2d 1, 16, 711 P.2d 1000 (1985).

State v. Woods, 63 Wn. App. 588, 590, 821 P.2d 1235 (1991).

**iii. There was sufficient evidence for the trier of fact to believe that there was an intent to commit a crime inside.**

Garcia is on videotape entering the store and admitted to entering the store. 6/9/10 RP 360. Thus, the only issue regarding the sufficiency of the evidence to support a burglary charge is if a rational trier of fact could determine that Garcia had the intent to commit a crime therein.

Garcia contended that he did not have the intent to commit a crime there, but that his sole intent was to draw attention to himself because he was scared. 6/9/10 RP 360. Despite this claimed intention, he decided to flee after the alarm was tripped. 6/9/10 RP 360. In addition, Garcia then went to another residence to get assistance and again fled when he was told that law enforcement would be called. 6/9/10 RP 361. Shortly after that, Garcia admitted that after that he took off his clothes because they were too visible and so that the police would not be able to see him. 6/9/10 RP 362-3.

The jury could easily have determined that Garcia intended to commit a theft from inside the convenience store, decided to flee once he tripped the alarm and then removed his clothes so he would not be identified from the video and avoid arrest that evening.

Contrary to the requirements of drawing rational inferences in favor of the State, Garcia makes assertions that because he had free ability to commit a theft when inside and chose not to do so, he must not have had the

intent to commit a crime there. Appellant's Opening Brief at page 18. The State contends that the jury is free to disregard Garcia's claim he was being pursued and he had no intent to commit a crime inside the convenience store. The jury could have found that someone willing to throw a brick through the convenience store door acted with intent to commit burglary inside.

The present case falls closely to the facts of State v. Grayson, 48 Wn. App. 667, 739 P.2d 1206 (1987). In that case a homeowner woke up and found someone inside his residence. The homeowner yelled at the man, who then ran out of the kitchen. State v. Grayson, 48 Wn. App. at 669, 739 P.2d 1206 (1987). The kitchen door had been kicked in. The defendant tried to contend that there was insufficient evidence of the intent to commit a crime inside. The Court held:

There was sufficient evidence for the jury to rationally infer Mr. Grayson entered the house with the intent to commit a theft therein, given he: (1) knocked on Mr. Beanblossom's door on the morning of the crime, (2) was aware the house was occupied by a person he did not know, (3) forced open the kitchen door, and (4) fled immediately upon being discovered. *See Johnson*, 100 Wn.2d at 620, 625, 674 P.2d 145; Couch, 44 Wn. App. at 32, 720 P.2d 1387.

State v. Grayson, 48 Wn. App. 667, 671, 739 P.2d 1206 (1987). Similarly here, the jury could rationally infer that Garcia intended to commit a crime and fled once aware he would soon be discovered.

**2. SINCE GARCIA DID NOT OBJECT TO THE CLAIMED ERROR IN ARGUMENT THAT A BURGLARY CAN BE COMMITTED BY THE**

**BREAKING IN OF A WINDOW, AND THE ARGUMENT WAS BRIEF, ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT AND DOES NOT MERIT REVERSAL.**

Garcia contends that the prosecutor's argument suggesting that the burglary could be completed while outside merits reversal of his conviction. Although a person can commit a burglary while outside, as the facts of this case present the damage did not cause malicious mischief inside. That portion of the prosecutor's argument was in error. However, it was brief and there was no objection and was harmless given the evidence of entry.

**i. The prosecutor's argument was primarily that the entry was with the intent to commit a crime inside.**

Garcia summarizes the prosecutor's argument to assert that the prosecutor was arguing that the crime of burglary can occur without an entry. The prosecutor's primary argument was that there was the intent to commit a crime inside the convenience store. The prosecutor argued as follows:

What the evidence I believe shows is that Mr. Garcia was hanging around out there, decided to break in, which was the plan they had the first place, threw the brick through there, but what he didn't plan on was that audible alarm going off. Because remember, he testified it didn't go off right away. He got in the store. And all the sudden, whatever the sound is -- beep beep or whatever -- that went off. He freaked, and out he went, and down around the corner he went.

He didn't break in there to be safe. He broke in there to steal something, and that audible alarm spooked him, and he left. He intended to commit a crime when he went in there. He intended to commit a crime as he went in there, which is other way of committing Second Degree is by actually doing the malicious mischief, throwing the brick

through the window. It doesn't make it criminal trespass pass. It makes it Burglary in the Second Degree. It attracted too much attention for him.

The other thing that was a little inconsistent in the statement that he had is that he talked about, well, I got in, and it was going to be okay for the cops to come. Then he got in there, and it was not okay for the cops to come. But it was also not okay for the cops to come when he was being shot at up on College Way or right off of College Way. I don't know what happened here, but he didn't want anything to do with the cops. That's real clear.

The conclusion you draw from that is he committed that Burglary Second by either having the intent to steal something when he went in, when that alarm went off, or he intended to commit a crime by throwing the brick through the window.

Now, he's throwing the brick through the window, and who's coming? The cops are coming. I'm going to get out of here. There is no one in the area except the cops.

6/10/10 RP 399-401. The prosecutor later reiterated that the intent was to commit a crime in the gas station.

He didn't enter that Valero Gas Station to get safe. He entered that Valero Gas Station to commit a crime. He intended to commit a crime. He did intend and commit a crime by throwing a brick through the window. He intended to commit a crime when he entered the gas station.

6/10/10 RP 405-6.

**ii. The intent can be inferred from action.**

A charge of burglary can be supported by an underlying crime of malicious mischief. In State v. Murbach, 68 Wn. App. 509, 510, 843 P.2d 551 (1993), the defendant was convicted of residential burglary for entering a garage attached to a dwelling and damaging a vehicle inside the garage.

The word “enter” is defined in RCW 9A.52.010(2) as including “the entrance of the person, or the insertion of any part of his body, or any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person or to detach or remove property.” In State v. Couch, 44 Wn. App. 26, 720 P.2d 1387 (1986), the court found that evidence indicating that a trap door from a basement level had been pushed open could justify a rational jury's conclusion that the defendant “entered” the upper floor of the building. Couch, 44 Wn. App. at 31–32, 720 P.2d 1387. In State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985), on the other hand, a finding of no entry was upheld where the defendant threw a rock through a window and slid it open. Bergeron, 105 Wn.2d at 3, 19, 711 P.2d 1000.

Here, evidence of the insertion of a finger to remove pieces of glass is sufficient to justify the court's conclusion that a rational jury could find that Adamson unlawfully “entered” the Borgford home. Under these circumstances, therefore, the giving of the inference of intent instruction was not error.

State v. Bassett, 50 Wn. App. 23, 27, 746 P.2d 1240 (1987).

“The word ‘enter’ when constituting an element or part of a crime, shall include the entrance of the person, or the insertion of any part of his body.” RCW 9A.52.010(2). Therefore the evidence could justify a rational jury's conclusion that Couch “entered” the upper floor of the tavern, even if he never set a literal foot there.

State v. Couch, 44 Wn. App. 26, 31-32, 720 P.2d 1387, 1390 (1986).

Intent may be inferred from all the facts and circumstances. State v. Bergeron, 105 Wn.2d at 19, 711 P.2d 1000. Although intent may not be inferred from patently equivocal conduct, it may be inferred from conduct that clearly indicates such intent as a matter of logical probability. State v. Lewis, 69 Wn.2d 120, 124, 417 P.2d 618 (1966).

Here, defendant's actions were not patently ambiguous. He entered unlawfully, having no consent or permission; he entered surreptitiously via an unusual and

concealed route; he took flight immediately upon discovery, and offered a lame or implausible explanation for being in the area

State v. Couch, 44 Wn. App. 26, 32, 720 P.2d 1387 (1986).

**iii. The prosecutor's un-objected to error was harmless beyond a reasonable doubt.**

The state's primary argument was that Garcia had intended to commit a crime against property inside the Valero gas station by breaking the window and entering to commit a theft of property. 6/10/10 RP 399-400. But in two unclear portions of the argument, the prosecutor apparently suggested that burglary could be committed by committing the malicious mischief of the window.

He intended to commit a crime as he went in there, which is other way of committing Second Degree is by actually doing the malicious mischief, throwing the brick through the window. It doesn't make it criminal trespass pass. It makes it Burglary in the Second Degree.

6/10/10 RP 400. This portion of the argument actually indicates that person who has the intent "to commit a crime as he went in there" properly refers to the element the State is required to prove. But the second portion of the sentence muddies the argument by suggesting that by actually doing the malicious mischief of the window a person could be committing a burglary. Read with the first clause which suggests proof of intent to commit a crime as he went in, the statement was not inappropriate.

The second unclear argument addresses proof of the crime inside

suggesting that burglary could be completed by “intending to commit a crime by throwing the brick through the window.” 6/10/10 RP 401.

The State acknowledges that this statement by itself is an incorrect statement of the law. However, this does not merit reversal.

We have stated on other occasions, a case will not be reversed for improper argument of law by counsel, unless such error is prejudicial to the accused, State v. Estill, *supra* 80 Wn.2d at 200, 492 P.2d 1037, and only those errors which may have affected the outcome of the trial are prejudicial. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Weber, 99 Wn.2d at 165, 659 P.2d 1102.

State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecutor’s statement was not objected to by defense, so the trial court was not given the opportunity to cure the error. In addition, that portion of the argument was not the primary argument relied upon by the State to support the burglary charge. In addition, the jury was specifically instructed to “disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions.” CP 30. Since the argument was not supported by the instructions given by the court requiring proof of evidence of a crime “against a person or property therein,” this Court can determine that the jury did not follow that argument. CP 35, 37.

Garcia relies in part on State v. Reeder, 46 Wn. 2d 888, 285 P.2d 884 (1955). In Reeder, the prosecuting attorney repeated three times a statement to the effect that the defendant had threatened his first wife with a gun although there was no evidence in the record before the jury. This is not such a situation where the prosecutor asserted facts outside the record.

Futhermore, when the prosecutor summed up the proof of the issue of the proof of intent to commit a crime inside, the prosecutor correctly argued the evidence supported the intent to commit a crime inside. 6/10/10 RP 405-6. The prosecutor's error in argument was harmless and does not merit reversal.

**3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE ADMISSION OF THE DEFENDANT'S OUT OF COURT STATEMENTS TO THE VICTIM.**

Garcia contends that the trial court unreasonably impaired his ability to challenge the State's evidence by precluding him from asking Ms. Wilkins about statements that Garcia made throughout his restraint of Wilkins in the residence because they were hearsay.

The State contends the trial court did not abuse its discretion in denying admission of the defendant's statements to Wilkins which were offered for the truth of the matter asserted. In addition, Garcia never did offer to the trial court what Wilkins would have actually testified to, Garcia was permitted to ask Wilkins about a number of statements he made to

Wilkins and Garcia was allowed to testify to everything he told Wilkins and the content of their conversations because the prosecutor did not object to this despite the ability to object as hearsay.

- i. The trial court evaluated statements individually to evaluate whether they were being offered for the truth of the matter asserted.**

At the start of the trial, the State moved to exclude the defendant's statements to the victim as hearsay. 6/7/10 RP 4-5. The prosecutor was concerned about Garcia establishing his claims of the event without testifying. 6/7/10 RP 5. After some argument, the trial court provisionally ruled that the statements would be hearsay, but determined it could not make a complete ruling as a motion in limine and determined that it would have to be dealt with objection by objection. 6/7/10 RP 11, 12.

During testimony, defense counsel asked Wilkins if Garcia was asking for help when he knocked on her back door. 6/7/10 RP 48. After Wilkins testified that Garcia was asking for help, the State objected but then withdrew the objection. 6/7/10 RP 48-9. Wilkins testified that Garcia said someone was trying to kill him, but didn't say anything else. 6/7/10 RP 49.

During the cross-examination of Wilkins' defense counsel asked "did he say anything to you" while discussing when she was awoken. 6/8/10 RP 118. The State objected and the objection was sustained. 6/8/10 RP 118. Defense counsel asked Wilkins if Garcia asked her for a ride to which the

State objected. 6/8/10 RP 119. That objection was sustained. 6/8/10 RP 119. Defense counsel later asked Wilkins if Garcia asked for a ride. 6/8/10 RP 122. Over the State's objection the court allowed defense to elicit from Wilkins that Garcia had asked for a ride from the start. 6/8/10 RP 122.

At this point, a further discussion was held outside the presence of the jury and the trial court permitted defense to elicit the fact that Garcia had been seeking a ride because Wilkins had testified on direct examination that Garcia was agitated because he couldn't get a ride. 6/8/10 RP 123. The trial court had indicated it had reviewed case law and perceived that Garcia's statements were being offered more for the truth of the matter asserted than being offered to show his state of mind. 6/8/10 RP 125. The parties went on to clarify the situation but the court determined that things would need to be handled case by case. 6/8/10 RP 131.

Thereafter the objections which were sustained were if he said he was going to check out the window and if he asked to go the bathroom. 6/8/10 RP 138, 143. Objections were also sustained to whether Garcia made statements about someone else being outside the house and whether he was going to use the knife, harm Wilkins or hold her for ransom. 6/8/10 RP 164-5, 170-2, 177. The trial court held that the content of Garcia's phone call about an hour after was not admissible. 6/8/10 RP 179-80.

Garcia was able to admit that Wilkins was scared to go outside after

Garcia left because she was afraid that others were outside, but not afraid at that point that Garcia was there. 6/8/10 RP 182.

After Wilkins was through testifying, defense was offered a chance to put other things on the record and did not do so. 6/8/10 RP 188.

When later addressed by defense counsel the next day, the trial court explained that the reason for the ruling was that "the case law that I read said if - - the only real basis for offering those is to prove that they're true, then it is really not coming in for state of mind but for actually advocating for a position that he was taking. 6/8/10 RP 232. The court went on to explain:

THE COURT: I told you at sidebar that you could ask general questions, like were any threats made, and that question simply wasn't asked, but I gave you that broad category.

I did not want specific words stated. The prosecution didn't want specific words stated by him coming in through her testimony because those are hearsay, and in many cases, self-serving hearsay that, although, perhaps offered for a different reason, for example, his state of mind, the case law that I read said that if -- the only real basis for offering those is to prove that they're true, then it's really not coming in for state of mind but for actually advocating a position that he was taking.

For example, that someone was chasing him. And that if he wants to advocate a self-serving position, basically he needs to take the witness stand -- and I realize all that goes with that -- as opposed to having her testify to those statements. When they're really only being offered to prove the truth of the matter asserted therein, they're not really being offered from a logical sense to show his state of mind. Because his state of mind would be only if the truth of the matter asserted were true.

MS. RIQUELME: Right.

THE COURT: So any statements offered by another witness to say what someone else said are hearsay, and they're simply not allowed under our Court Rules, except for very narrow exceptions. But certain hearsay statements did come in. That didn't open the door to all hearsay statements.

6/8/10 RP 232-3. Defense counsel did not further offer what was excluded.

6/8/10 RP 233. Thereafter the defendant testified and did so without objection by the State and his testimony included his statements made to Wilkins. 6/9/10 RP 278-321.

**ii. The trial court had discretion to evaluate whether Garcia's statements were offered for the truth of the matter asserted.**

Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. Maehren v. City of Seattle, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

State v. Castellanos, 132 Wn. 2d 94, 97, 935 P.2d 1353, 1354 (1997).

**(c) Hearsay.** "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.

ER 801.

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." ER 801(c). Whether a statement is hearsay depends upon the purpose for which the statement is offered. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay. State v.

Collins, 76 Wn. App. 496, 498-99, 886 P.2d 243 (1995).

State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000).

**iii. The trial court did not abuse its discretion denying hearsay statements of the defendant.**

The trial court properly exercised its discretion in denying Garcia's request to admit the statements he made to Wilkins because they were being offered for the truth of the matter asserted. A party's own out-of-court statement offered by the party itself is hearsay when offered for the truth of the matter asserted. ER 801(d)(2); State v. King, 71 Wn.2d 573, 577, 429 P.2d 914 (1967). As held by the trial court, Garcia was trying to establish the fact he was being pursued by others and was trying to do so by admitting his statements to Wilkins to show this. 6/8/10 RP 232-3.

Furthermore, defense was able to ask Wilkins about a number of statements that Garcia did make. 6/7/10 RP 48 (request of Wilkins to ask for help when he entered), 6/8/10 RP 123 (Intent to call for a ride).

Defense counsel also did not make a record about what Wilkins would have testified to in response to any of the objections sustained. 6/8/10 RP 233. Thus, this Court cannot evaluate whether the statements actually would have had an impact on the case. "The general rule is also that in order to obtain appellate review of a trial court action excluding evidence, there must be an offer of proof made." State v. Vargas, 25 Wn. App. 809,

816-17, 610 P.2d 1 (1980) *citing*, Mason v. Bon Marche Corp., 64 Wn.2d 177, 179, 390 P.2d 997 (1964). “The offer of proof must be sufficient to advise the appellate court whether the party was prejudiced by the exclusion of the evidence.” State v. Vargas, 25 Wn. App. 809, 816-17, 610 P.2d 1 (1980) *citing* Donald W. Lyle, Inc. v. Heidner & Co., 45 Wn.2d 806, 814, 278 P.2d 650 (1954). Without explaining what was excluded this Court does not have an adequate record to review.

Finally, as to this claim Garcia fails to note that he testified without objection from the prosecutor and was fully able to admit the statements he made to Wilkins. Even these statements could have been excluded if offered for the truth of the matter asserted. Given Garcia’s ability to explain what occurred, there was no error and reversal on this basis is not merited.

Garcia suggests that the res gestae doctrine permits the admission of Garcia’s statements based upon State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009). In Pugh, the Supreme Court had held that the statements of the victim in a 911 call were admissible as excited utterances and did not violate the state’s confrontation clause. State v. Pugh, 167 Wn.2d at 828-9, 225 P.3d 892 (2009). In so ruling the Pugh court traced this history of the excited utterance exception to the res gestae doctrine.

Res gestae statements “raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter

as to exclude the presumption that they are the result of premeditation or design.” Heg v. Mullen, 115 Wn. 252, 256, 197 P. 51 (1921) (internal quotations omitted). Cross-examination is unnecessary when the action speaks for itself.

State v. Pugh, 167 Wn. 2d 825, 837-38, 225 P.3d 892 (2009). Garcia never argued before the trial court or this Court that his statements should have been admitted as excited utterances. His statements do not fall within that category explained in Pugh.

The statements made by Bridgette Pugh to the 911 operator fall within the res gestae doctrine as it existed when our state constitution was adopted. *See Beck*, 200 Wn. at 9–10, 10–11, 92 P.2d 1113. They were natural statements growing out of the assault on her, **not merely a narrative of what had happened**, and they explained events that had occurred within minutes as well as present and continuing circumstances. They were statements of fact, **not opinion**. **They were spontaneous utterances dominated and evoked by the events themselves without premeditation or reflection**. They were made at a time and **under circumstances that exclude any presumption, based on passage of time, that they were the result of deliberation**. They were made by a participant—the victim—of the transactions described.

State v. Pugh, 167 Wn. 2d 825, 843, 225 P.3d 892 (2009) (emphasis added).

Garcia’s statements were his opinions made afterwards, not a narrative of what had happened. They were properly excluded.

#### **4. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT KIDNAPPING IN THE FIRST DEGREE.**

Garcia contends that there was insufficient evidence to support a finding that any of the three alternatives means of committing kidnapping

existed in this case. Appellant's Opening Brief at page 26. The State contends there was sufficient evidence to support the alternative means.

**i. The instructions and evidence provided a scenario for the jury to consider the instructed means of kidnapping.**

The evidence at trial showed that Garcia had committed the burglary of the gas station convenience store, had fled because he was concerned about being arrested and took his clothes off to avoid arrest. 6/7/10 RP 45, 6/8/10 RP 25, 6/8/10 RP 216-9, 6/8/10 RP 83-4, 6/9/10 RP 293-4, 361, 363.

Once Garcia came to Wilkins' residence, he entered without knocking, armed himself with a knife, showed it to Wilkins and used her cell phone and land line to make calls to get a ride away from the residence close to the location of the burglary. 6/8/10 RP 99-102, 105, 111, 117. Garcia told Wilkins he was anxious because he believed people were after him. 6/8/10 RP 136. Wilkins was afraid to make a run for it or move, because she feared for her life. 6/8/10 RP 105, 144. Wilkins described that Garcia's agitation grew because things weren't working out the way he wanted them to. 6/8/10 RP 107. Wilksin described being terrified. 6/8/10 RP 107.

At the close of the State's case defense counsel moved for dismissal of the kidnapping charge based upon a claim of lack of evidence of abduction. 6/9/10 RP 246-7. Defense did not make a motion regarding proof of any of the alternative means. The State conceded there was no

evidence that Wilkins was held for ransom or reward. 6/9/10 RP 247.

The trial court's ruling on restraint on motion at close of State's case found there was evidence supporting that there was restraint by the implied use of force. 6/9/10 RP 250-1. Defense did not object to the instructions including the elements instruction for kidnapping. CP 48, 6/10/10 RP 387.

The jury instruction on the charge of Kidnapping in the First Degree read in pertinent as follows:

To convict the defendant of the crime of Kidnapping in the First Degree, each of the following three elements must be proved beyond a reasonable doubt:

- (1) That on or about December 24, 2009, the defendant intentionally abducted Juliana Wilkins,
- (2) That the defendant abducted that person with intent
  - (a) to hold the person as a shield or hostage, or
  - (b) to facilitate the commission of Burglary in the Second Degree or flight thereafter, or
  - (c) to inflict extreme mental distress on that person
- (3) That any of these acts occurred in the State of Washington.

CP 48. Defense did not object to the proposed instruction and did not propose a different instruction. 6/10/10 RP

**ii. Law regarding sufficiency of the evidence.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99

(1980).

State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

**Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *rev. denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily. State v. Tocki, 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied*, 98 Wn.2d 1004 (1982).**

State v. Prestegard, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001)

**iii. The evidence could support a finding that the abduction was with the intent to hold Wilkins as a shield or hostage.**

The State could not locate any Washington cases interpreting the definition of a shield or hostage under the kidnapping statute. Cases from other jurisdictions suggest that putting the person between themselves and others suffices. Bassie v. State, 726 N.E.2d 242, 243-4 (Ind. 2000) (pointing a gun at the victim and placing the victim between himself and police constituted a shield), State v. Hankerson, 34 Kan. App. 2d 629, 635, 122 P.3d 408, 413 (2005) (grabbing victim and forcing her inside at gun point showed intent to hold victim as shield or hostage).

The State contends that there need not be the actual use of the person as a shield or hostage, only that there be the intent by Garcia to do so.

Garcia admitted he believe he was being pursued and admitted he believed officers were after him. In doing so, his arming himself with a knife, showing it to her and acting agitated and excited to Wilkins could have led the jury to find he acted with intent to hold her as a shield or hostage. The jury was free to disregard Garcia's claim he was being pursued by others. The jury did not need to find that Wilkins was actually used as a hostage.

**iv. The evidence could support a finding that the aduction was with the intent to facilitate flight from the burglary.**

The jury found that Garcia had committed the burglary of the Valero gas station convenience store. CP 56. The entry into Wilkins' residence was done after the burglary of the store and Garcia's stated purpose in entering Wilkins' residence was to get a ride. 6/9/10 RP 301. Garcia admitted he believed police were after him and he took his clothes off to avoid being detected by police. 6/9/10 RP 362-3. This evidence to support that Garcia restrained Wilkins in her house so he could call friends to come and get him and avoid arrest on the burglary.<sup>3</sup>

**v. The evidence could support a finding that the aduction was with the intent to inflict extreme mental distress on Wilkins.**

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<sup>3</sup> Garcia's contention that the burglary that the jury could have considered was the burglary of Wilkins' residence is unsupported by the record. Appellant's Opening Brief at page 30, 32-3. As explained below in argument section 7, the jury found Garcia guilty of the burglary of the Valero station and criminal trespass for Wilkins' residence. Therefore, the jury would not have considered that the burglary of Wilkins' residence sufficed.

Here, Wilkins described how she feared for her life and was terrified by Garcia's actions early that Christmas eve. 6/8/10 RP 100, 103, 117. She was awakened with Garcia's face in her face. 6/8/10 RP 100-1. Later Garcia displayed a long kitchen knife to her within two feet of Wilkins. 6/8/10 RP 102. Throughout the two hours, Wilkins described how Garcia became more agitated. 6/8/10 RP 107. Her anxiousness never declined and was terrified, feeling she might be killed. 6/8/10 RP 107, 100-1.

Thus, the facts actually establish that Wilkins suffered from the extreme mental distress from Garcia's invasion of her home. *See State v. Saunders*, 120 Wn. App. 800, 823, 86 P.3d 232 (2004) (evidence sufficient to support separate criminal offense of kidnapping by inflicting extreme emotional distress in handcuffing and shackling murder victim causing bruising around wrist and ankles).

The evidence suggesting that Garcia lacked the intent to inflict extreme mental distress comes from Garcia's claims that his only intent was to get away and that he told Wilkins he did not intend to hurt her. 6/9/10 RP 301. As stated in numerous argument sections above, in evaluating the sufficiency of the evidence, all rational inferences are drawn in favor of the State and the jury is free to disregard Garcia's claim of lack of intent.

There was sufficient evidence to support a jury's finding of intent to inflict extreme emotional distress.

**5. SINCE THE DEFENDANT ADMITTED HIS PRIOR CONVICTIONS ON HIS DIRECT EXAMINATION, THE DEFENDANT WAIVED ANY OBJECTION TO ADMISSION OF THE PRIOR CONVICTIONS.**

Garcia contends on appeal that the trial court erred in admission of his prior convictions contending the prior burglaries were not established to be crimes of dishonesty.

However, Garcia actually admitted the fact of prior felony convictions for crimes of dishonesty and the prosecutor did not question Garcia on the fact. Garcia's admission on direct examination precludes raising this issue on appeal.

**i. Garcia admitted his prior convictions under direct examination by his counsel.**

The trial court addressed the admission of Garcia's prior burglary conviction as a crime of dishonesty. 6/9/10 RP 252. The trial court initially determined the conviction was not a crime of dishonesty. 6/9/10 RP 257. After reviewing some authority the trial court decided that for burglary convictions that the records behind the conviction could be reviewed to determine if there was a crime of dishonesty. 6/9/10 RP 266. Those records indicated a co-defendant had said they had planned to break into houses and rob people to take their things. 6/9/10 RP 267. The police report of the prior conviction was made part of the record. 6/9/10 RP 277. The court subsequently found that the facts did support that the burglary did involve

the intent to steal and therefore was admissible. 6/9/10 RP 274.

The trial court subsequently sanitized the convictions only allowing the fact that Garcia had convictions for crimes of dishonesty. 6/9/10 RP 275--7. The court excluded that they were felonies. 6/9/10 RP 276-7.

In the defense direct examination of the defendant defense counsel asked Garcia if he had the two prior felony convictions for dishonesty. 6/9/10 RP 309. Garcia admitted the prior convictions. 6/9/10 RP 309. The question was presented as follows:

Q: "Mr. Garcia, don't you have two prior felony convictions for dishonesty?"

A: "Yes, I do."

6/9/10 RP 309.

**ii. Garcia cannot raise an issue of evidence which he sought to admit.**

**(a) Effect of Erroneous Ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

...

ER 103.

Case law provides that to preserve an issue of the claimed erroneous admission of a prior conviction, a defendant must testify.

In Luce, the United States Supreme Court held that in order to raise and preserve for review a claim of improper

impeachment with a prior conviction, a defendant must testify. The Court reasoned that it must know the precise nature of the defendant's testimony in order to properly rule on whether the prosecution could use a prior conviction to impeach that testimony. Luce, 469 U.S. at 41, 105 S.Ct. 460. Our Supreme Court followed Luce and held that requiring a defendant to testify and admit or face impeachment with his prior criminal conviction in order to preserve his challenge to the court's preliminary ruling admitting this evidence does not infringe on his right to testify on his own behalf. State v. Brown, 113 Wn.2d 520, 533-34, 782 P.2d 1013, 1021-22 (1989).

State v. Mezquia, 129 Wn. App. 118, 127-28, 118 P.3d 378, 383 (2005).

But when a defendant testifies on direct examination as to the existence of a prior conviction, this permits the State to admit facts pertaining to the prior conviction.

In addition, the issue of prior convictions was first raised by the defendants on direct examination, and they cannot complain that the state went into the matter further on cross-examination. State v. Ryan, 192 Wn. 160, 165, 73 P.2d 735 (1937); Walker v. Herke, 20 Wn.2d 239, 244-45, 147 P.2d 255 (1944).

State v. Hultenschmidt, 87 Wn.2d 212, 215, 550 P.2d 1155 (1976). Where a witness testifies on direct examination about his criminal history, the opposing party may elicit information regarding this criminal history on cross-examination, regardless of whether the conviction was admissible under ER 609. See State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 *cert. denied*, 459 U.S. 842 (1982) (where a defendant testifies on direct examination about his rape conviction, which the trial court had ruled was

inadmissible for impeachment purposes, he opens the door to allow cross-examination about the offense).

In the present case, despite objecting to the admission of the prior convictions, the defense offered the fact that Garcia had the two prior convictions asking: “Mr. Garcia, don’t you have two prior felony convictions for dishonesty.” Garcia answered: “Yes, I do.” 6/9/10 RP 309.

A party must object and maintain the objection in order to preserve the issue. Testimony admitted without objection is not reviewable on appeal. State v. Bezemer, 169 Wn. 559, 14 P.2d 460 (1932). Garcia’s admission of the fact of prior conviction precludes him from raising an issue that he did not preserve below RAP 2.5(a).

The prosecutor showed restraint in not questioning Garcia as to the facts of the prior convictions where he admitted the convictions on direct examination.

**6. WHERE THE DEFENDANT FAILED TO OBJECT TO THE UNANIMITY INSTRUCTION BELOW AND CONCEDED HE POSSESSED A KNIFE, HE SHOULD BE PRECLUDED FROM RAISING THE ISSUE ON REVIEW AND ANY ERROR IS HARMLESS.**

Garcia contends that the instruction for the special verdict form erroneously informed the jury that it had to be unanimous to enter “no” to the question asked and this violated his right to a unanimous jury.

The State contends that Garcia’s failure to object to the unanimity

instruction proposed in the trial court should preclude raising the issue for the first time on appeal. In addition, given his admission to possession of a knife, any error was harmless.

**i. The special verdict form instruction language provided the jury must be unanimous to complete the instruction.**

The special verdict form instruction read as follows:

You will be given special verdict forms for the crimes of Burglary in the First Degree and Kidnapping in the First Degree for the crimes charged in counts II and III of the Amended Information. If you find the defendant not guilty of these crimes of Burglary in the First Degree and Kidnapping in the First Degree, do not use the special verdict forms. If you find the defendant guilty of these crimes of Burglary in the First Degree and Kidnapping in the First Degree, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 54. The defense had no objection to the instructions given by the trial court. 6/10/10 RP 387. No defense instruction was proposed for the deadly weapon verdict. CP 11-26.

**ii. Whether a claimed error in jury instructions can be raised for the first time on appeal has not yet been clarified by Washington appellate courts.**

In State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) a special interrogatory instructed jurors that they needed to be unanimous to answer

the interrogatory either “yes” or “no.” Id. at 147. The Washington Supreme Court concluded that requiring unanimity for a “no” answer violated a common law right recognized in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). State v. Bashaw, 169 Wn.2d at 147, 234 P.3d 195 (2010). Goldberg, had involved an instruction requiring unanimity to return a “yes” finding, and instructing the jury that if it had a reasonable doubt about the matter, it should answer “no .” State v. Goldberg, 149 Wn.2d at 893, 72 P.3d 1083 (2003).

In a decision after Bashaw, Division III of the Court of Appeals recently held that failure to object to a Bashaw-type of special verdict form prevents the issue from being considered for the first time on appeal because it does not involve manifest constitutional error. State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 *rev. granted*, 172 Wn. 2d 1004, 258 P.3d 676 (2011); RAP 2.5(a). Subsequently, Division One of this court has disagreed with Nunez. State v. Ryan, 160 Wn. App. 944, 252 P.2d 895 *rev. granted*, 172 Wn. 2d 1004, 258 P.3d 676 (2011).

In addition a different panel of Division 1 of the Court of Appeals has followed Nunez decision of Division III in determining that the claimed instructional error was waived and should not be permitted to be raised for the first time on appeal. State v. Morgan, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, (2011) (67130-8-I, 2011 WL 3802782 Wash. Ct. App. Aug. 29, 2011).

Since review was granted in both Nunez and Ryan by the State Supreme Court, the State believes a decision on this portion of the case should be stayed pending the outcome of the decisions in those cases.

**iii. The defendant failed to object to the proposed instruction.**

The State contends that as provided Nunez and Morgan, Garcia should be precluded from raising the issue of juror unanimity in the enhancement by his failure to raise the issue below.

**7. WHERE THE INSTRUCTIONS AND VERDICT FROM SEPARATELY ADDRESSED COUNTS, THE JURY'S VERDICT AS TO THE LESSER CHARGE DOES NOT CONSTITUTE DOUBLE JEOPARDY.**

Garcia contends that this Court cannot determine that the lesser offense of Criminal Trespass in the First Degree did not constitute a separate finding from the Burglary in the Second Degree of the gas station convenience store. Appellant's Opening Brief at pages 47, 49-50.

The State contends that the trial court's instructions establish that trespass was not a lesser finding of the convenience store burglary.

**i. The jury instructions and verdict forms describe separate charges.**

At the very start of the case when jury selection commenced, the jury was read the information and told that count 1 was the burglary of the Valero Gas station and that count 2 was the burglary of the building of Juliana Wilkins. Amended 6/7/2010 RP 6.

At the close of the case, the jury was instructed that in the burglary in

the second degree charge, they were considering the burglary of the Valero gas station. CP 37 (Instruction No. 7). The jury was instructed that there was a lesser offense of criminal trespass to the Burglary in the Second Degree. CP 38 (Instruction No. 8). The jury was given the elements of the lesser charge of Criminal Trespass in the First Degree. CP 41 (Instruction No. 11). The concluding instruction instructed the jury to first consider the Burglary in the Second Degree of the Valero gas station and if they did not find him guilty, to use verdict form A. CP 53 (Instruction No. 22). The concluding instruction told the jury that if they found him not guilty or unable to agree, they would then consider the lesser charge of Criminal Trespass in the First Degree. CP 53. The jury returned a verdict of guilty on the charge of Burglary in the Second Degree as charged in count 1. CP 56 (Verdict Form A). Therefore, there was no consideration of the verdict form B which would have been a lesser to the Burglary in the Second Degree.

The jury was given the instruction on Burglary in the First Degree for entry of building. CP 44 (Instruction No. 14). The instruction included the elements that required the jury to find that the defendant was armed with a deadly weapon. CP 44. The jury was instructed that there were lesser offenses of Burglary in the Second Degree and Criminal Trespass to the Burglary in the First Degree. CP 45 (Instruction No. 15).

The concluding instruction instructed the jury to first consider the Burglary in the First Degree of the Valero gas station and if they did not find him guilty, to use verdict form C. CP 53 (Instruction No. 22). The concluding instruction told the jury that if they found him not guilty or unable to agree as to the Burglary in the First Degree, they would then consider the lesser charges of Burglary in the Second Degree and Criminal Trespass in the First Degree. CP 53. The jury returned verdicts of not guilty as to the Burglary in the First Degree as charged in count 2 and the lesser of Burglary in the Second Degree. CP 58 (Verdict Form C), 60 (Verdict Form D). However as instructed, the jury reviewed the lesser degree offense to Burglary in the First Degree of Criminal Trespass in the First Degree and found Garcia guilty of that offense. CP 60.

**ii. The jury is presumed to follow the court's instructions as to the law.**

On review, appellate courts presume that the jury followed the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001), State v. Swan, 114 Wn.2d 613, 661–62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991). As the facts above indicate separate acts were attributed to each burglary.

Garcia relies in part on State v. Berg, 147 Wn. App 923, 198 P.3d 539 (2009) to support the contention that the acts were not specifically made

clear to be separate and distinct by the instructions, and the instruction were identical, double jeopardy may be present. The Court in Berg indicated that the arguments presented cannot remedy a double jeopardy violation. State v. Berg, 147 Wn. App. at 936, 198 P.3d 539 (2009). This analysis of Berg has specifically been disapproved by the State Supreme Court.

While the Court of Appeals in both Berg and Carter recognized that the faulty jury instructions created only the possibility of a double jeopardy violation, Berg, 147 Wn. App. at 935, 198 P.3d 529; Carter, 156 Wn. App. at 568, 234 P.3d 275, it did not look beyond the jury instructions or engage in further inquiry, *see, e.g.*, Berg, 147 Wn. App. at 935, 198 P.3d 529 (“[T]he double jeopardy violation at issue here results from omitted language in the instructions, not the State's proof or the prosecutor's arguments.”). We disapprove of such limited review.

State v. Mutch, 171 Wn. 2d 646, 663-64, 254 P.3d 803 (2011).

**iii. Reviewing the record as a whole, the verdict of the lesser offense of Criminal Trespass in the First Degree was to the burglary alleged of Wilkins' residence.**

The jury instruction specifically directed that if the jury found Garcia guilty of the Burglary in the Second Degree of the gas station, that it was not to consider the lesser degree of Criminal Trespass in the First Degree of the gas station. “If you find the defendant guilty on Verdict Form A, do not use Verdict Form B.” CP 53 (Instruction 22). By these instructions the jury was directed not to enter a verdict as to criminal trespass of the gas station.

In addition, the jury's verdict of guilty as to the lesser charge of

Criminal Trespass in the First Degree was as to the lesser offense of Burglary in the First Degree as charged in count 2. CP 60 (Verdict from E), CP 53. There was no argument from either side that the burglary of the gas station also sufficed for criminal trespass. In fact, in closing argument, Garcia's trial counsel conceded that he was guilty of the lesser offense of Criminal Trespass in the First Degree of both the Valero gas station and Ms. Wilkin's residence. 6/10/10 RP 433.

On the entire record, this Court can be certain that the verdict of guilty on the Criminal Trespass in the First Degree did not amount to double jeopardy.

**V. CONCLUSION**

For the foregoing reason, Phillip Garcia's convictions and sentence must be affirmed.

DATED this 30th day of September, 2011.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ] United States Postal Service; [ ] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Nancy Collins, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 30th day of September, 2011.



KAREN R. WALLACE, DECLARANT