

90334-4

No.
Court of Appeals No. 69935-1-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NELSON STRUNK,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4 Nelson Strunk asks this Court to accept review of the Opinion in *State v. Strunk*, 69935-1-I.

B. OPINION BELOW

The Court of Appeals concluded the deputy prosecutor did not commit misconduct when telling the jury that they did not need to be unanimous in determining which alternative means was proved in this case.

C. ISSUE PRESENTED

Article I, section 21 and Article I, section 22 together provide the right to a unanimous jury in all criminal trials. This right in turn requires that in cases in which the State alleges a single crime may have been committed by alternative means, the court must instruct the jury it must unanimously agree upon a single alternative means. The prosecutor affirmatively misstated this standard, telling the jurors they need not unanimously agree. Does the prosecutor's misconduct require reversal of Mr. Strunk's conviction?

D. STATEMENT OF THE CASE

Mr. Strunk and his acquaintance, Dave, spent a good portion of the day drinking beer. 1/22-23/13 RP 88. While they were at a drug

store, Mr. Strunk allowed Dave to borrow his phone. *Id.* at 88-89. Dave left Mr. Strunk at the store and did not return. *Id.* Trying to find Dave and his phone, Mr. Strunk eventually attempted to retrace his steps to Dave's girlfriend's house where he had been previously. *Id.* at 89-90.

However, instead of Dave's girlfriend's home, Mr. Strunk was in fact the home of Hillary Hermes's family. Believing it was Dave's girlfriend's house, Mr. Strunk walked in. 1/22-23/13 RP 90. Mr. Strunk found what he thought to be Dave's girlfriend's phone and used it to dial his phone. *Id.* at 91. He walked out of the house while doing so, believing Dave's girlfriend was close by. *Id.* at 92.

Ms. Hermes testified she was getting ready to go to work when Mr. Strunk simply walked in the front door and down the hallway to one of the bedrooms. 1/22-23/13 RP 37. He then looked in a second bedroom and immediately picked up her phone. *Id.* at 38-41. Ms. Hermes left the house, waved down a passing motorist and called police. *Id.* at 42. While she was outside, Ms. Hermes saw Mr. Strunk walk out of the house and walk down the street. *Id.* at 43-44.

When police stopped Mr. Strunk a short time later a few blocks from the house, he was walking with the phone to his ear. 1/22-23/13 RP 66. Officers noticed a strong smell of alcohol on Mr. Strunk's

breath. *Id.* at 77. When police returned the phone to Ms. Hermes she noticed a several calls had been made to one number. *Id.* at 45-47. Mr. Strunk told officers the number was for his phone. *Id.* at 72.

The State charged Mr. Strunk with residential burglary. CP 60-61. A jury convicted him as charged. CP 26-28.

E. ARGUMENT

Prosecutorial misconduct deprived Mr. Strunk of a fair trial and denied him his right to a unanimous jury.

The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. Art. I, § 21. When the State alleges a defendant has committed a crime by alternative means, the right to a unanimous jury is offended unless the State elects the means upon which it is relying or the jury is instructed that it must unanimously agree on a single means. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). This court has previously held “in certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the *means* by which the defendant is found to have committed the crime.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

The Court explained further

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary **to affirm** a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction **will not be affirmed**.

Id. at 707-08 (Internal citations omitted, italics in original, bold added.) It is plain from the language in bold that this Court was speaking of the standard of appellate review. Thus, whether each alternative is supported by sufficient evidence is an appellate question. It is not proper to tell a jury they need not unanimously agree

Burglary consists of alternative means – unlawfully entering or unlawfully remaining. *State v. Klimes*, 117 Wn. App. 758, 766, 73 P.3d 416 (2003), *overruled in part*, *State v. Allen*, 127 Wn. App. 125, 110 P.3d 849 (2005).¹

Contrary to the clear holding of *Ortega-Martinez*, the deputy prosecutor told the jury:

¹ *Allen* overruled only that portion of *Klimes* which concluded the unlawfully-remains alternative was limited to circumstances in which the person had entered lawfully but subsequently exceeded their license.

. . . in fact, six of you can come back guilty that he intended to enter the house to commit a crime. Six of you can come back and believe that he remained with the intent to commit a crime. That's fine. It's either/or.

1/22-23/13 RP 138. Mr. Strunk immediately objected to this misstatement of the law. *Id.* The court responded to Mr. Strunk's objection by telling the jury to refer to their instructions. *Id.* However, the jury was not instructed that it must unanimously agree as to the alternative means. Thus, there were no instructions which could cure the prosecutor's misstatement of the law.

The Court of Appeals affirmed the conviction concluding the prosecutor's statements were consistent with *Ortega-Martinez*. Opinion at 2-3. But nothing in *Ortega-Martinez* permits a prosecutor to tell a jury they need not be unanimous as to the means. In fact, *Oretga-Martinez* concluded unanimity is required as to the means. 124 Wn.2d at 707. The Court of Appeals conflates the appellate standard, *i.e.*, when a conviction must be reversed in the absence of a "particularized finding of unanimity, with the requirement of unanimity in the first instance.

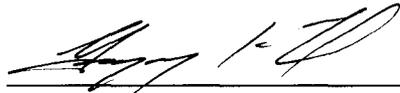
The opinion of the Court of Appeals is contrary to his Court's decision in *Ortega-Martinez*. This Court should accept review under RAP

13.4

F. CONCLUSION

For the reasons above this Court should reverse Mr. Strunk's conviction.

Respectfully submitted this 23rd day of May, 2014.



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that he intended to enter the house to commit a crime. Six of you can come back and believe that he remained with the intent to commit . . . a crime. That's fine. It's either/or.

Defense counsel objected. The objection was overruled.

Jury verdicts in criminal cases must be unanimous as to the crime charged. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994), citing WASH. CONST. art 1, § 21. Strunk relies on State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988), and State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). But Kitchen and Petrich are multiple acts cases, not alternative means cases. In a multiple acts case, all 12 jurors must agree on the particular act the defendant committed. Kitchen, 110 Wn.2d at 409. In contrast, unanimity is not required in an alternative means case where all alternative means are supported by sufficient evidence:

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means.

Ortega-Martinez, 124 Wn.2d at 707-08.

Residential burglary is an alternative means crime—it can be committed by *entering* unlawfully with intent to commit a crime or *remaining* unlawfully with intent to commit a crime. RCW 9A.52.030(1); State v. Allen, 127 Wn. App. 125, 131, 110 P.3d 849 (2005). Where sufficient evidence supports each alternative means, the jury need not unanimously decide on one. Ortega-Martinez, 124

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Wn.2d at 707-08; State v. Spencer, 128 Wn. App. 132, 141-44, 114 P.3d 1222 (2005) (applying this rule to residential burglary).

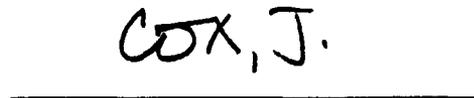
Strunk did not argue below, and does not argue now, that the evidence was insufficient to support one of the alternative means. The prosecutor did not misstate the law.

Affirmed.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Schneider", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "Becker, J.", written over a horizontal line.

A handwritten signature in cursive script, appearing to read "COX, J.", written over a horizontal line.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69935-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Mara Rozzano, DPA
Snohomish County Prosecutor's Office
- petitioner
- Attorney for other party


MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 23, 2014

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