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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2014 FEB 28 PM 4:40

No. 70769-8

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

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STATE OF WASHINGTON,

Respondent,

v.

GENEROUS SONY,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The jury was instructed on an alternative means of committing residential burglary that was not supported by substantial evidence, violating Mr. Sony's constitutional right to a unanimous jury verdict.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The constitutional right to a unanimous jury verdict requires the jury be instructed only on those alternative means of committing the crime that are supported by substantial evidence. Was Mr. Sony's constitutional right to jury unanimity violated where the jury was instructed on an alternative means of committing the crime of residential burglary that was not supported by substantial evidence?

C. STATEMENT OF THE CASE

Generous Sony grew up on an island in Micronesia. 7/10/13RP 28. He came to the United States on March 3, 2013. 7/10/13RP 29. Upon his arrival in this country, he lived in an apartment in Seattle with his sister, her husband, their two children, and two young men from his brother-in-law's family named "Rudy" and "Bronson." 7/10/13RP 38-39.

Late in March, Mr. Sony, Rudy and Bronson drove to Salem, Oregon to attend several church services there. 7/10/13RP 29-30, 41-

42. They stayed overnight in a motel. 7/10/13RP 41-42. On the evening of March 31, at around 8 or 9 p.m., they left Salem to drive back to Seattle. 7/10/13RP 43. Before leaving, they bought two cases of beer and drank the beer in the car on the ride home. 7/10/13RP 30-31, 43. Mr. Sony drank all the way back to Seattle. 7/10/13RP 31. By the time they arrived, he was tired and drunk. 7/10/13RP 31. He intended to go straight to his room and go to bed. 7/10/13RP 32. He did not remember anything else that happened that night. 7/10/13RP 33-36.

Ashley Gicewicz, her boyfriend Juan Parrondo, and their three children live in an apartment that is right across the hall from the apartment where Mr. Sony and his family lived. 7/09/13RP 31-32, 40. On the evening of March 31, Ms. Gicewicz did some laundry in the laundry room down the hall. 7/09/13RP 32. The last time she returned to her apartment from the laundry room, she forgot to lock the apartment door. 7/09/13RP 35, 40. Later, she fell asleep in her bedroom. 7/09/13RP 33-34. Mr. Parrondo fell asleep on the couch in the living room while watching television. 7/10/13RP 18.

At around 3 a.m., Ms. Gicewicz woke up to see Mr. Sony enter her bedroom. 7/09/13RP 33. She had never seen him before, although

she had seen his other family members who lived in the apartment with him. 7/09/13RP 37. Mr. Sony came in and out of her bedroom about three times. 7/09/13RP 33. He was talking and mumbling and said something about “policia” and that he believed in God. 7/09/13RP 33. He told her to sit down and asked her to give him her hand, then left the room. 7/09/13RP 34.

Ms. Gicewicz heard Mr. Sony go into the kitchen. 7/09/13RP 34. Mr. Parrondo also heard a noise in the kitchen, which caused him to wake up. 7/10/13RP 18. It sounded like coins falling on the floor and drawers being opened. 7/10/13RP 18. Mr. Parrondo got up and saw Mr. Sony in the kitchen. 7/10/13RP 18. He chased him out of the apartment. 7/10/13RP 19. Ms. Gicewicz called 911. 7/09/13RP 34.

When the police arrived, they found Mr. Sony in the bushes near the parking lot of the apartment building. 7/09/13RP 46-48. He was arrested without incident. 7/09/13RP 49. The police found \$440 in cash and several quarters on Mr. Sony when they searched him. 7/09/13RP 15. Four hundred and forty dollars was missing from Mr. Parrondo’s wallet, which he had planned to use to pay the rent. 7/10/13RP 19. Also, several quarters—Ms. Gicewicz’s laundry money—had been taken from the kitchen counter. 7/10/13RP 19.

Mr. Sony was charged with one count of residential burglary, RCW 9A.52.025.<sup>1</sup> CP 10. The State alleged he entered and remained unlawfully in Mr. Gicewicz's and Mr. Parrondo's apartment "with intent to commit a crime against a person or property therein." CP 10.

At the jury trial, Mr. Sony explained he was so intoxicated that night, he could not remember anything that happened. 7/10/13RP 34-35. He did not intend to enter the apartment or commit any crime inside.<sup>2</sup> 7/10/13RP 36.

The jury was instructed it could convict Mr. Sony of residential burglary if it found he entered or remained unlawfully in a dwelling "with intent to commit a crime against a person or property therein." CP 28.

The jury found him guilty of residential burglary as charged. CP 45.

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<sup>1</sup> The State also alleged the aggravating factor that Mr. Sony "committ[ed] the current offense while the victim of the burglary was present in the building or residence during the crime, under the authority of RCW 9.94A.535(3)(u)." CP 10. Although the jury found the State proved the aggravating factor, CP 46, the State did not seek an exceptional sentence at sentencing. RP 3.

<sup>2</sup> The jury was instructed that "evidence of intoxication may be considered in determining whether the defendant acted intentionally." CP 33.

#### D. ARGUMENT

MR. SONY'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED WHEN THE JURY WAS INSTRUCTED ON AN ALTERNATIVE MEANS OF COMMITTING RESIDENTIAL BURGLARY THAT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

1. In order to safeguard the constitutional right to a unanimous jury verdict, the jury in a criminal case may be instructed only on those alternative means of committing the crime that are supported by substantial evidence.

Criminal defendants in Washington have a fundamental constitutional right to a unanimous jury verdict. Const. art. I, §§ 21, 22; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). When the crime charged can be committed by more than one means, jury unanimity is not required as to the means by which the crime was committed only if substantial evidence supports each of the relied-upon alternatives. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). Thus, the jury should be instructed on only those means for which there is substantial evidence. State v. Franco, 96 Wn.2d 816, 824, 639 P.2d 1320 (1982) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)).

The two purposes of the alternative means doctrine are to prevent jury confusion about what criminal conduct must be proved



beyond a reasonable doubt, and to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, and then leaving it to the jury to pick freely among the various means in order to obtain a unanimous verdict. State v. Smith, 159 Wn.2d 778, 789, 154 P.3d 873 (2007).

An “alternative means case” is one in which the State alleges and the jury is instructed on more than one means of committing the crime. Id. at 790. The question on review is whether substantial evidence supports each of the means presented to the jury. State v. Randhawa, 133 Wn.2d 67, 74, 941 P.2d 661 (1997). The substantial evidence test is satisfied only if the reviewing court is convinced that a rational trier of fact could have found each means proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 410-11.

If the evidence is insufficient to support each means, either the prosecutor must elect the means supported by the evidence, or the court must instruct the jury to rely on only that means during deliberations. State v. Gonzales, 133 Wn. App. 236, 243, 148 P.3d 1046 (2006).

2. Committing a burglary with intent to commit a crime against a person and with intent to commit a crime against property are two alternative means of committing the crime.

Burglary is an alternative means crime. In State v. Tresenriter, 101 Wn. App. 486, 490-92, 4 P.3d 145 (2000), the Court held that committing a burglary with intent to commit a crime against a person, and with intent to commit a crime against property, are two distinct alternative means of committing the crime. In Tresenriter, the information charging first degree burglary alleged only that the accused, while armed with a firearm, entered or remained unlawfully in a building “with intent to commit a *crime against a person* therein.” Id. at 490 (emphasis in original). But the jury instructions stated the accused could be found guilty if the jury found that he entered or remained unlawfully in a building “with the intent to commit a *crime against a person or property* therein.” Id. (emphasis in original). The Court held the information was constitutionally deficient because it did “not charg[e] the alternative means of committing a burglary, i.e., with intent to commit a crime against property.” Id. at 492.

3. The conviction must be reversed because the jury was instructed on an alternative means that was not supported by substantial evidence.

Here, at least two alternative means of committing the crime of residential burglary were charged and submitted to the jury. The information alleged that Mr. Sony “did enter or remain unlawfully in the dwelling of Ashley Gicewicz and Juan Parrondo, . . . with intent to commit a crime *against a person or property* therein.”<sup>3</sup> CP 10 (emphasis added). In addition, the jury was instructed it could find Mr. Sony guilty if it found he entered or remained unlawfully in the dwelling “with intent to commit a crime *against a person or property* therein.” CP 28 (emphasis added). The prosecutor did not elect either of the alternative means in closing argument. See RP 55-61, 69-72. The prosecutor told the jury it could find “that the defendant entered or remained with the intent to commit a crime *against a person or property* therein.” RP 56 (emphasis added).

Although two alternative means of committing the crime were presented to the jury, only one of them was supported by substantial evidence. Mr. Sony testified that he did not intend to enter the

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<sup>3</sup> The residential burglary statute, RCW 9A.52.025(1), provides: “A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.”

apartment at all, much less commit any crime inside. 7/10/13RP 34-36.

The State's evidence tended to show only that Mr. Sony intended to commit a crime against property—not against a person—inside the dwelling. The police found \$440 in cash and several quarters on Mr. Sony when he was arrested, and Mr. Parrondo testified that cash was missing from his wallet and quarters were missing from the kitchen counter. 7/10/13RP 19.

Given the evidence presented, no rational trier of fact could have found beyond a reasonable doubt that Mr. Sony entered or remained in the residence with the intent to commit *a crime against a person*. Nonetheless, the jury was instructed it could rely upon this alternative and therefore it is possible that one or more of the jurors *did* rely upon it, despite the paucity of evidence. For example, any one of the jurors could have concluded that because Mr. Sony entered the apartment and Ms. Gicewicz's bedroom, in the middle of the night, and spoke to her and asked her to give him her hand, he had an intent to commit a crime against a person.

Because it is impossible to say that the jury unanimously agreed on the only alternative that could legally sustain the conviction, Mr. Sony's constitutional right to a unanimous jury verdict was violated.

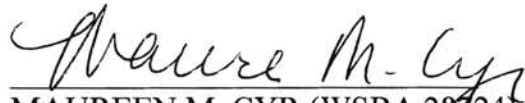
See Smith, 159 Wn.2d at 789. If substantial evidence does not support each of the alternative means submitted to the jury, the remedy is reversal. Randhawa, 133 Wn.2d at 74; Kitchen, 110 Wn.2d at 410-11. Mr. Sony's conviction for residential burglary must be reversed.

E. CONCLUSION

The jury was instructed on an alternative means of committing residential burglary that was not supported by substantial evidence.

The conviction must be reversed.

Respectfully submitted this 28th day of February, 2014.

  
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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 70769-8-I
	)	
GENEROUS SONY,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] GENEROUS SONY 10300 DES MOINES MEMORIAL DR S SEATTLE, WA 98108	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2014.

X \_\_\_\_\_ 

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