SUPREME COURT NO. 95624-3

NO. 75554-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRETT RONALD CHASE,

Appellant.

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

The Honorable George N. Bowden, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Brett Chase asks this Court to grant review of the court of appeals' unpublished decision in State v. Chase, No. 75554-4-I, 2018 WL 824527, filed February 12, 2018 (Appendix A).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted under RAP 13.4(b)(3) and (b)(4) to determine whether the State violates Washington and federal principles of Double Jeopardy where it charges two counts of burglary on the basis of one act occurring in a building nested within another building?

2. Is this Court's review warranted under RAP 13.4(b)(2) because the decision of the court of appeals conflicts with the published case of State v. Thomson, 71 Wn. App. 634, 861 P.2d 492 (1993) (citing RCW 9A.04.110(5)), which reasons that the State may of reference the statute defining "building" and elect to define a particular location as a "building" under one of two approaches: either under the enclosed area clause or under the individual units of a multi-unit structure clause, but may not use both approaches at the same time.

3. Is this Court's review warranted under RAP 13.4(b)(1) because the decision of the court of appeals conflicts with the Washington State Supreme Court case of State v. Bobic, 140 Wn.2d 250, 260-62, 996 P.2d 610 (2000), which asserts that the "double jeopardy protects a

defendant from being convicted twice under the same statute for committing just one unit of the crime." Bobic, 140 Wn.2d at 261 (internal quotations omitted).

C. STATEMENT OF THE CASE

1. Charges

The State charged Brett Chase with the following four counts of burglary, alleging he had entered or attempted to enter buildings with intent to commit a crime therein:

- Count I: second degree burglary, for entry into the Public Storage facility as a whole;
- Count II: second degree burglary, for entry into the Public Storage facility's storage locker #382, rented to tenant David Stuhr;
- Count III: attempted second degree burglary, for attempted entry into the Public Storage facility's storage locker #520, rented to tenant Anthony Wens; and
- Count IV: attempted second degree burglary, for attempted entry into the Public Storage facility's storage locker #521, rented to tenant Mark Lewis.

CP 90-91.

2. Pretrial Motions

In pre-trial briefing, the defense moved to dismiss count I arguing that charging burglary for both the facility as a whole and for individual storage units within the facility was duplicative, as well as "unsound and severely punitive." CP 81 (citing State v. Miller, 91 Wn. App. 869, 870-71,

960 P.2d 484 (1998)); 3RP 4.[1] Defense counsel also raised the motion at a pre-trial hearing, arguing the State's theory would permit the irrational outcome of two burglary charges on the basis of any analogous entry into a yard and then a house within the yard. 3RP 4. However, both defense counsel and the court appeared to conclude this was an issue that could be addressed at sentencing. 3RP 5-6. The issue was not re-addressed at sentencing. See 3RP 393-404.

3. Trial Evidence

At the jury trial, the State presented testimony of the storage facility manager and several facility customers and police officers to establish the following.

Public Storage is a facility in Bothell, Washington that contains over 500 storage lockers for rent. 3RP 39. The facility is completely enclosed by a metal chain-link fence. 3RP 31, 52. Access is restricted by a gate and passcode, and is generally limited to staff and customers. 3RP 32-36. Renting customers also secure their storage lockers with their own locks; the storage facility does not retain keys or access to rented lockers. 3RP 33-34. Customers cannot share lockers; the facility requires each account to have one person listed as the primary customer. 3RP 34-35. However,

[1] This petition refers to the Verbatim Report of Proceedings as follows: 1RP (04/14/16); 2RP (06/10/16); 3RP (06/13/16, 06/14/16, 06/15/16, 07/14/16, 07/21/16, 08/18/16).

customers can register additional names to the account and share their gate access code and padlock key in order to grant access to a storage locker and the facility. 3RP 35.

On July 24, 2015, Chase came to the facility and asked to rent a storage locker. 3RP 41, 46. Facility manager, Corey Compton, escorted him around the property and the two had a conversation about what type of storage space would be appropriate for his needs. 3RP 45-46. However, after running a check of his driver's license, Compton saw Chase still owed the facility money from a previous rental. 3RP 46. He told Chase he could not rent another unit until he had paid the balance. 3RP 46-47. Compton did not see Chase again that day. 3RP 47.

The next day, Compton was escorting another prospective tenant around the facility when he heard drilling noises. 3RP 47-48. Compton and the customer observed Chase and another individual outside the property by the fence. 3RP 48, 141. Compton (and later officers) observed that several wire loops connecting the chain-link to the poles had been cut and so the fence could be lifted up allowing a person to enter. 3RP 52-53; also 3RP 151, 198. Chase and the other individual departed through a wooded area behind the building carrying what looked like several tool cases. 3RP 31, 53.

Compton called police, who later arrested Chase in a park-and-ride nearby. 3RP 54, 143, 188-90. A search of Chase's pockets revealed a large thumb tack-like item, which one officer testified was a "grinding tool." 3RP 190, 193, 207.

The locks on lockers #520 and #521, rented to customers Anthony Wens and Mark Lewis respectively, had been drilled out but not defeated. 3RP 201; also 3RP 285-88. These lockers were directly behind the area where the fence had been compromised. 3RP 53. On the ground in front of these lockers, there were metal shavings and a grinding bit similar to the one found in Chase's pocket. 3RP 194.

A K-9 unit was taken to the location where the locks had been drilled out, and was instructed to follow the scent. 3RP 200. The K-9 unit discovered piles of clothing and tools in the wooded area behind the facility. 3RP 204.

Later that day, Compton found the lock on a third locker, #382 rented to customer David Stuhr, had been defeated. 3RP 60, 209. Stuhr later identified several, but not all, of the tools found by the K-9 unit as originating from his storage locker. 3RP 210-11.

Chase was not authorized to be on the property or to access any of the storage lockers named in the complaint. See 3RP 32-36, 46-47, 258, 283, 285-88.

Chase did not present evidence or testify at trial. 3RP 311.

In summary, the only allegation of a separate crime occurring in the common area involved whether Chase had cut the fence enclosing the Public Storage facility. However, evidence at trial regarding who had cut the fence was mixed and disputed. Chase and another individual were observed outside the property near the fence. 3RP 48, 141. Upon later inspection, the ties holding the chain link fence to the poles were found to be cut. 3RP 52-53; also 3RP 151, 198.

4. Jury Instructions, Closing Argument, and Verdict

The trial court provided Jury Instruction Nos. 6 and 7 to the jury, which stated that to convict Chase of burglary under counts I and II, they must find he had "entered or remained unlawfully in a building ... with intent to commit a crime ... therein" and defined a "building" as the facility as a whole and as Stuhr's storage locker #382, respectively. CP 67-68.

In closing, the State relied on evidence of the damaged but undefeated locks on Lewis's and Wen's lockers to support the attempted robberies in counts III and IV. 3RP 344-43. The State argued the completed robberies in counts I and II were based on Chase's entry into two different buildings: the storage facility as a whole for count I, and the storage locker rented to David Stuhr for count II. 3RP 341-43. The State specifically argued that because the facility was a "fully fenced area," it constituted a

building under the statute, and because each storage locker was "separately secured," each was also a "a separate building" under the statute. 3RP 344.

During closing, the State argued it had proven Chase intended to commit a crime in both the facility as a whole and in Stuhr's locker, because the evidence showed Chase had taken items from Stuhr's locker. 3RP 342-43. The State did not rely on any other criminal conduct by Chase within the Public Storage facility generally, such as cutting the fence, to support count I. See 3RP 341-44. In fact, the jury was never asked to consider whether Chase had broken the fence. 3RP 341-44.

The defense theory of the case included argument that Chase was in the wrong place at the wrong time and some other person had previously cut the fence. 3RP 351, 354. As defense counsel pointed out in closing, no one directly observed Chase cutting the fence. 3RP 354. Even if the jury believed Chase had damaged and stolen from Stuhr's locker, given the above, it is probable some members of the jury would have believed Chase had not cut the fence, but had merely taken advantage of a preexisting opening.

Chase was found guilty of all four counts, including two counts of completed burglary and two counts of attempted burglary. 3RP 382-83. The court calculated his offender score as 7 and sentenced him to 33 months

of prison for counts I and II, and 30 months for counts III and IV, to be served consecutively. 3RP; CP 25. Chase timely appealed. CP 20-21.

5. Appellate Arguments and Decision

On appeal, Chase argued in his opening brief that contrary to the arguments of the State, Washington and federal principles of double jeopardy do not tolerate two counts of burglary based upon one act in one location. Br. App. at 6-10. More specifically, Chase argued that applying both of the statute's definitions of "building" to one location simultaneously is contrary to Legislative intent evident from the language of the statute, from statutory history, and from decades of jurisprudence interpreting the statute. Br. App. at 10-21.

The case of State v. Thomson established the correct way to interpret the statute. Thomson created a mutually exclusive framework that permits the prosecution to apply one of two approaches defined in the statute. Br. App. at 17-18. Under the first and more general clause, a "building" includes any fully fenced area meant to house persons or goods. Br. App. at 10-11 (citing Thomson, 71 Wn. App. at 645 (discussing RCW 9A.04.110(5))). Under the second clause, the individual units of a multi-unit building may be considered separate buildings if they are "separately secured or occupied." Br. App. at 11 (citing RCW 9A.04.110(5); Thomson, 71 Wn. App. at 645). Chase argued that the Thomson Court's reasoning

and examples, in addition to decades of jurisprudence since Thomson, established that one or the other approach may be used on a given location, but the prosecution cannot layer approaches to charge two counts for acts occurring in a building within a building. Br. App. at 12-19. This mutually exclusive framework is necessary to avoid strained consequences. Br. App. at 19-21.

Chase argued that in the alternative, if the court were to find the statute ambiguous, the rule of lenity must be applied in favor of finding one count rather than two. Br. App. at 21-22 (citing State v. Barbee, 187 Wn.2d 375, 383, 386 P.3d 729 (2017)).

In his opening brief, Chase also specifically noted that the State relied only on the act of breaking into Stuhr's locker to support both counts I and II. Br. App. At 6 (citing 3RP 342-43). The State did not rely on any other acts within the general fenced area of the storage facility to support count I. Br. App. at 6 (citing 3RP 341-44).

In response, the State argued double jeopardy was not violated for the following reasons. First, because the fenced area and storage locker represented "separate privacy interests," double jeopardy was not violated. Br. Resp. at 6; see also Br. Resp. at 9 (reasoning "the burglary statute is focused on recognizing and protecting privacy rights"); Br. Resp. at 16 ("absurd" to interpret statute to result in "Public Storage losing its privacy

interest"). Second, the State argued that both the fenced area and the storage locker were "building[s]" under the statutory definition. Br. Resp. at 8-9. Because mere entry into a "building" – with intent to commit a crime therein – was sufficient to support a separate count of burglary, two counts of burglary did not violate double jeopardy. Br. Resp. at 8. The State conceded the act of entering and remaining on the property as a whole was "overlapping" with the other counts, but that it nonetheless supported a separate count. Br. Resp. at 15.

The State also argued that as a factual matter, Chase "broke into Public Storage's fenced yard with intent to commit a theft therein" and "gained entry by dismantling a 6-foot chain link fence." Br. Resp. at 12 (emphasis added), 15 (emphasis added). The State reasoned that by doing so with intent to commit a crime therein, this act supported a separate count of burglary. Br. Resp. at 12. The State also argued the rule of lenity did not apply. Br. Resp. at 15-16.

In his reply brief, Chase argued the State's privacy-based theory was a proxy for a victim-based unit of prosecution, and this theory had already been rejected by Washington courts. Reply Br. App. at 1-3 (citing State v. Brooks, 113 Wn. App. 397, 400, 53 P.3d 1048 (2002)).

Chase also argued, in his opening and reply briefs, that the State's theory—that mere entry and remaining on the property as a whole was

sufficient to support a separate count of burglary—failed because it proved too much. Br. App. at 19-20; Reply Br. App. at 4-5. Such a theory would allow a person to be charged, for example, with 5 counts of burglary, for mere entry (with no breaking) into a box within a room within a floor within a building within a fenced area. Br. App. at 19-20. Similarly, the State's victim-/privacy-interest-based unit of prosecution also proved too much because under this theory, mere entry into the public storage facility (with the requisite intent) could result in upwards of 500 counts, where there were potentially over 500 tenants, each with a privacy interest in the common area of the property. Reply Br. App. at 4-5.

In response to the State's argument that the facts showed Chase had cut the fence, and that this supported a separate burglary count, Chase again pointed out that the jury had not been asked to resolve this fact. Reply Br. App. at 6-7 (citing 3RP 341-44). Chase explained that because the fact was disputed, and because the prosecutor made an election not to rely on this disputed fact, the jury was never asked to consider it and it was not part of the jury's verdict. Reply Br. App. at 7. Neither the State, nor the Court of Appeals, could now take it upon themselves to find this fact and use it to support the conviction for count I. "To do so would violate Chase's right to jury unanimity where the fact was disputed at trial and the jury was not asked to consider it." Reply. Br. App. at 7-8 (citing State v. Carson, 184

Wn.2d 207, 216-17, 357 P.3d 1064 (2015) (citing State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984))).

On appeal, Division I affirmed both convictions. The court reasoned that mere entry into two separate building (with the requisite intent) was sufficient to support two counts and did not violate double jeopardy. State v. Chase, No. 75554-4-I, 2018 WL 824527, *5. The court did not consider this to represent strained or absurd results. Id. at *13 (considering "entry" into fenced area as sufficient to support count I). The court interpreted Thomson to mean that both the storage facility as a whole and each individually secured unit could be charged as a separate count of burglary. Id. at *6-10. The court reasoned the statutory definition of "building" was clear and the rule of lenity did not apply. Id. at 13. Despite Chase's arguments in both the opening and reply briefs, the court also reasoned, "[i]n his reply brief Chase argues ... that the jury was never asked to consider whether he cut through the fence" and the court declined to consider this argument "because it was not timely raised." Id. at 14.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE WHETHER PRINCIPLES OF DOUBLE JEOPARDY PERMIT THE STATE TO CHARGE TWO COUNTS OF BURGLARY BY ELECTING BOTH A BUILDING AND A SECOND BUILDING NESTED WITHIN THE FIRST BUILDING AS THE UNIT OF PROSECUTION.

This case presents the issue of whether double jeopardy permits multiple counts of burglary where a defendant merely passes through multiple, nested areas that could each be defined as a "building," with intent to commit one crime therein.

Under the theory articulated by the State and accepted by the court of appeals, a defendant who hops a fence, walks through an open door to a normally locked common area, and breaks into one apartment unit would be guilty of three counts of burglary.

As discussed in both the opening and reply briefs, and the court of appeals' factually erroneous comment on timeliness notwithstanding, the State elected in closing not to attempt to prove to the jury that Chase had cut the fence, and elected not to rely on this allegation to support the charges. Thus, the fact was not found by the jury, is not part of the verdict, remains disputed, and cannot be relied upon for resolution of this case without violating Chase's right to a unanimous verdict.

The decision of the court of appeals warrants review by this Court because the issue presents a novel and significant question of constitutional magnitude and of substantial public interest. See RAP 13.4(b)(3), (4). The court of appeals' analysis also conflicts with the published court of appeals decision of State v. Thomson, 71 Wn. App. 634, 861 P.2d 492 (1993), and with Washington and U.S. Supreme Court precedent articulating

fundamental principles of double jeopardy. See RAP 13.4(b)(1), (2); State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998) (quoting Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)).

1. This case presents a significant question of constitutional law under RAP 13.4(b)(3).

This case presents a significant question of constitutional law, involving double jeopardy principles articulated in both the Washington and U.S. Constitutions. (RAP 13.4(b)(3)). As discussed above, the issue in this case is whether the Fifth Amendment and article I, section nine permit the State to layer units of prosecution on top of one another. U.S. CONST., AMEND. V.; WASH. CONST., ART. I, § 9. The issue of whether a prosecutor may "divid[e] a single crime into a series of temporal or spatial units" bears directly on the limitations imposed by principles of double jeopardy. Brown, 432 U.S. at 169. This Court should accept review under RAP 13.4(b)(3).

2. The court of appeals' decision presents a conflict with published court of appeals precedent under RAP 13.4(b)(2).

The court of appeals' decision in Chase's case conflicts with the analysis in the published court of appeals decision of State v. Thomson, 71 Wn. App. 634 (citing RCW 9A.04.110(5)).

As discussed in detail in Chase's opening brief, the holding of Thomson does not squarely address the issue presented by Chase's case.

However, the Thomson Court extensively analyzed the Legislative intent of the relevant statute, thoughtfully explored the definition of a "building" contained in that statute, and articulated a comprehensive framework for applying the definition to future cases. Given the depth of analysis, and the liberal use of hypotheticals, the Thomson Court's reasoning is currently the only case in Washington jurisprudence providing holistic guidance on how to interpret the relevant statute, particularly in the context of buildings containing other buildings. The hypotheticals discussed in Thomson directly bear on the facts of Chase's convictions.

Yet, the theory adopted by the court of appeals in this case abrogates much of the Thomson Court's reasoning and stands in direct conflict with the hypothetical relevant to Chase's case.

This Court should accept review under RAP 13.4(b)(2).

3. The court of appeals' decision presents a conflict with Washington State Supreme Court jurisprudence under RAP 13.4(b)(1).

Long-standing Washington Supreme Court jurisprudence recognizes that double jeopardy does not tolerate "multiple convictions based upon spurious distinctions between the charges" and "'is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.'" Adel, 136 Wn.2d at 635 (quoting Brown, 432 U.S. at 169).

As discussed above, the court of appeals' decision violates double jeopardy precisely because it permits "spurious distinctions" and division of one crime into "'a series of temporal or spatial units.'" Adel, 136 Wn.2d at 635 (quoting Brown, 432 U.S. at 161)). The court's reasoning is in direct conflict with the fundamental principles of double jeopardy articulated in Adel and Brown and should not be permitted to stand.

This Court should accept review under RAP 13.4(b)(1).

4. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

Although the court of appeals' decision is unpublished, it is easily searchable in Westlaw and other databases, and may be relied upon as persuasive, if not binding, authority by other Washington courts. The State's novel theory, adopted by the court of appeals' decision, would encourage other prosecutors bringing burglary charges to determine whether the "building" entered could be divided into multiple buildings, and thus, could support multiple counts.

As discussed above, this spacial and temporal division of crimes by overzealous prosecutors is precisely what double jeopardy was designed to prevent. Without these protections, many Washington defendants face exposure to an unprecedented, unreasonable, and arbitrary number of

counts for one act, such as breaking through one locked door. As discussed thoroughly in briefing, such a result is contrary to Legislative intent.

As discussed in the briefing and in the Thomson Court's thorough treatment of the Legislative history of the relevant statute, the Legislature originally modified the definition of building to include "dwelling houses" when such multi-unit housing was a novelty. In modern society, a large percentage of persons and goods are now housed in multi-unit buildings. This means that at larger number of buildings could potentially be subdivided into buildings within buildings within buildings. Thus, the issue presented by Chase's case is likely to arise again, is likely to impact a large number of Washington residents, and warrants treatment by this Court.

This Court should accept review under RAP 13.4(b)(4).

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E. CONCLUSION

For the aforementioned reasons, Chase respectfully asks this Court to grant review under RAP 13.4(b)(1), (2), (3), and (4).

DATED this 14th day of March, 2018.

Respectfully submitted,

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Appendix A:

State v. Chase, No. 75554-4-I, 2018 WL 824527, filed February 12, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 75554-4-I
Respondent,	)	DIVISION ONE
v.	)	
BRETT RONALD CHASE,	)	UNPUBLISHED
Appellant.	)	FILED: February 12, 2018

Cox, J. — Brett Chase appeals his convictions for two counts of second degree burglary. He argues that these convictions violate double jeopardy because they are allegedly based upon "one act of theft in one location." Because the convictions are based on separate unlawful entries into separate "buildings" with the requisite intent, there is no double jeopardy violation. We affirm.

Public Storage is a facility that rents out individual storage units. The facility is completely enclosed by a 6-foot chain-link fence. Access to this facility is restricted by a gate and passcode. Only staff and customers renting storage units are able to obtain access outside of normal business hours. Customers who rent units secure those units with locks that they supply.

Chase visited Public Storage on July 24, 2015, attempting to rent a storage unit. Edward Compton, Public Storage's property manager, refused to rent to Chase because Chase had an outstanding bill. Compton did not see Chase again that day. When Compton did a security check that night, he saw that the fenced area was intact.

The next day, Compton heard drilling noises and saw two men standing outside of the fence, carrying tool cases. He recognized Chase as one of the men. Both men fled the scene.

Compton noticed that the fence was no longer intact because the wires holding the fencing to the poles had been removed. Compton then discovered that the locks on three storage units had been drilled, and there were metal shavings and a drill bit in front of storage units 520 and 521. He called the police.

Police officers immediately responded and found Chase on the embankment behind Public Storage. When Chase saw the officers, he ran across the highway and was finally arrested in a park and ride lot. In a search incident to arrest, officers found a grinding tool in Chase's pocket that matched the drill bit found in front of storage units 520 and 521. These locks were not defeated.

David Stuhr rented storage unit 382. He saw that his lock had been drilled out and destroyed and that items were missing from his unit. Police recovered some of Stuhr's missing power tools along with other tools that did not belong to him in the area behind Public Storage.

The State charged Chase with two counts of burglary and two counts of attempted burglary. Count 1 charged Chase with second degree burglary based on unlawfully entry of "the building of Public Storage" with the intent to commit theft. Count 2 also charged him with second degree burglary, but was based on Chase's unlawful entry into unit 382 with the intent to commit theft.

The two charges for attempted burglary were based upon attempted entry into units 520 and 521 with the intent to commit theft. These latter two charges are not at issue in this appeal, and we need not further discuss them.

The jury convicted Chase on all charged counts. The trial court sentenced him accordingly.

Chase appeals.

DOUBLE JEOPARDY

Chase argues that his convictions for two counts of second degree burglary violate double jeopardy. Because this record shows that two units of prosecution for second degree burglary are proper under these circumstances, we disagree.

"The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution provide protections against double jeopardy."[1] "Double jeopardy is violated when a person is convicted multiple times for the same offense."[2] When a defendant raises a double jeopardy challenge based on such multiple convictions, this court must first determine the

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[1] State v. Brown, 159 Wn. App. 1, 9, 248 P.3d 518 (2010).

[2] State v. Barbee, 187 Wn.2d 375, 382, 386 P.3d 729 (2017).

unit of prosecution that the legislature intended.[3] Once the court determines the unit of prosecution, it analyzes the facts of the case to determine whether more than one unit of prosecution is present.[4]

We review de novo a double jeopardy claim.[5]

In determining the unit of prosecution, this court first looks at the plain meaning of the criminal statute in question.[6] "The meaning of a plain and unambiguous statute must be derived from the wording of the statute itself."[7] If the statute is ambiguous, the court may consider legislative history.[8] If the statute is still ambiguous, the court will apply the rule of lenity and construe any ambiguity in favor of the defendant.[9] Finally, "[w]hen engaging in statutory interpretation, the court must avoid constructions that 'yield unlikely, absurd or strained consequences."[10]

We also review de novo issues of statutory interpretation.[11]

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[3] Id.; State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

[4] Barbee, 187 Wn.2d at 383.

[5] Id. at 382; State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005).

[6] Barbee, 187 Wn.2d at 383.

[7] State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

[8] Id.; see Barbee, 187 Wn.2d at 383.

[9] Barbee, 187 Wn.2d at 383.

[10] Id. at 389 (quoting Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002)).

[11] State v Brooks, 113 Wn. App. 397, 399, 53 P.3d 1048 (2002).

"A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling."[12]

For purposes of the burglary statute, the word "building" is separately defined:

> in addition to its ordinary meaning, [as] includ[ing] any dwelling, ***fenced area***, . . . cargo container or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; ***each unit of a building consisting of two or more units separately secured or occupied is a separate building.***[13]

In this case, the charging documents for the two second degree burglary counts specify that Chase unlawfully entered separate spaces, Public Storage and storage unit 382.[14] Each charge also alleged intent to commit theft.

Chase correctly acknowledges that the "fenced area" that completely encloses the storage facility is a building under the first part of the above emphasized definition. Likewise, he acknowledges that each storage locker is also a building under the second part of the above emphasized definition.

But he then states the issue is whether one may "apply both parts of the [definition] at the same time to one act of theft in one location . . . ."[15] He argues that these two definitions of "building" are mutually exclusive. He appears to

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[12] RCW 9A.52.030(1).

[13] RCW 9A.04.110(5) (emphasis added).

[14] Cf. State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

[15] Appellant's Opening Brief at 12.

argue that even though the statutory definition of "building" encompasses both the fenced area and the storage unit, the State had to choose to either prosecute him for unlawful entry of the fenced area or Stuhr's storage unit, not both. We disagree.

The first problem with this argument is his misstatement of the issue. The two counts at issue were for burglary, not theft. The former does not require commission of theft, only the ***intent*** to commit "a crime" coupled with unlawful entering or remaining in a building. Accordingly, the first issue for double jeopardy purposes is what did the legislature intend as the unit of prosecution for the crime of burglary.[16] The next issue is whether the facts of this case support more than one unit of prosecution.[17]

The unit of prosecution for burglary is each entry into "a building."[18] While Chase acknowledges that each entry into a building constitutes a separate unit of prosecution, he argues, without citation to authority, that the use of a semicolon to separate the two statutory definitions of building at issue in this case is intended to make those definitions mutually exclusive, requiring an election between the two.[19] Because he fails to cite any authority for this proposition, on

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[16] Barbee, 187 Wn.2d at 382; Adel, 136 Wn.2d at 634.

[17] Barbee, 187 Wn.2d at 383.

[18] RCW 9A.52.030(1); Brooks, 113 Wn. App. at 400.

[19] See RCW 9A.04.110(5).

this basis alone, we could reject this argument.[20] In any event, a semicolon separates phrases or clauses that are of equal importance.[21]

Chase then argues that case law supports the conclusion that the legislature intended the two parts of the statute to be mutually exclusive. We again disagree.

Chase chiefly relies on State v. Thomson to support this argument, but his reliance is misplaced.[22]

In Thomson, Division Two of this court considered the definition of building in the last portion of RCW 9A.04.110(5), which follows the semicolon. The question in that case was whether the locked bedroom within a house constituted a separate building from the house for purposes of the first degree rape statute. That statute required felonious entry into the building where the victim was situated.[23] There, Thomson had permission to enter the house and spend the night in a guest room, but he broke into the victim's locked bedroom and raped her.[24]

The State claimed that Thomson was guilty of first degree rape because the locked bedroom was a separate building as defined in the last portion of

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[20] See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171, cert. denied, 439 U.S. 870, 99 S. Ct. 200, 58 L. Ed. 2d 182 (1978).

[21] State Dep't Labor & Indus. v. Slaugh, 177 Wn. App. 439, 448, 312 P.3d 676 (2013).

[22] 71 Wn. App. 634, 645, 861 P.2d 492 (1993).

[23] Id. at 636 (citing RCW 9A.44.040(1)(d)).

[24] Id.

RCW 9A.04.110(5). Specifically, it argued that the bedroom was a building because it was at least one room and was separately locked at the time of the crime. Thus, Thomson feloniously entered the "building" where the victim was located.[25]

The court disagreed. It concluded that the definition was ambiguous because "there are two possible approaches to the term 'building.'" One was that advanced by the State. The other was that a "building" included a structure where two or more rooms were occupied or intended to be occupied by different tenants separately. Either meaning encompassed buildings such as hotels and the like. But only the meaning advanced by the State encompassed a house like that wholly occupied by one person or family.

The court than examined the legislative history of the statute, which included the former Orange Code, the colloquial name of the proposed Revised Washington Criminal Code.[26] After this examination, the court concluded that the legislature intended that "the second part of RCW 9A.04.110(5) apply to buildings in which two or more rooms were occupied or intended to be occupied by different tenants separately."[27]

The court recognized that the determination of whether a building should be classified as one building or many for purposes of the burglary statute

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[25] Id. at 642.

[26] Id. at 643.

[27] Id. at 644.

depends on privacy rights.[28] The court observed that in a single family dwelling, every family member living in the house has a similar privacy interest in the entire house and therefore burglarizing different bedrooms is all part of the burglary of one "building."[29] Conversely, in a multi-unit structure, "each tenant has a privacy interest in his or her room or apartment, and that interest is separate from the interests of other tenants."[30] Therefore, each room or apartment is a separate building.[31]

Since that 1993 decision, the legislature has not modified the definition of building in the statute. We assume that the legislature has acquiesced to that decision's reading of its intent.[32]

Applying the rationale of Thomson to the facts of this case, we conclude that the individual storage units at Public Storage fall within the last portion of the definition because each is "separately secured or occupied."[33] Each customer renting a unit has a separate privacy interest from any other customer. Likewise, each customer has a separate privacy interest from Public Storage, the owner of the facility entirely enclosed by the fence.

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[28] Id. at 645.

[29] Id.

[30] Id.

[31] Id.

[32] McKinney v. State, 134 Wn.2d 388, 403, 950 P.2d 461 (1998); State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988).

[33] See Thomson, 71 Wn. App. at 644; RCW 9A.04.110(5).

Chase argues that Thomson also supports his contention that the legislature did not intend the first part of RCW 9A.04.110(5) to apply to a multi-unit facility such as Public Storage. He is wrong.

In Thomson, the entire house, including the bedroom, was occupied by the victim.[34] Thus, the court decided that the victim's privacy interest extended to the entire house, not just the room where the crime occurred. In doing so, it contrasted that situation with a multi-unit structure, where each tenant has a privacy interest in his or her room or apartment that is separate from the privacy interests of other tenants. Thus, in the latter situation, the court concluded that it made sense to characterize separate rooms as separate "buildings."

Here, Public Storage has a privacy interest in the fenced area. But the customers renting storage space have separate privacy interests in their respective storage units. Therefore, these respective areas that evidence separate privacy interests are necessarily separate buildings within the statute.

Chase further argues that post-Thomson cases support his claim that the State cannot proceed to prosecute him for multiple counts of burglary by relying on both definitions in RCW 9A.04.110(5). But none of those cases support his argument.

In State v. Deitchler, the court held that an evidence locker in a police office building was not a separate building because the police department was the sole tenant.[35] Dustin Deitchler was lawfully in the police station when he tried

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[34] Id. at 646.

[35] 75 Wn. App. 134, 136-37, 876 P.2d 970 (1994).

to steal items from the evidence locker.[36] Because the evidence locker belonged to the police department and because Deitchler was lawfully in the station, he did not unlawfully enter a "building" when he broke into the locker.[37]

Deitchler is distinguishable because there was uniformity of privacy interests in the building and the evidence locker. If, as in Deitchler, Chase had unlawfully entered the fenced area and then unlawfully entered Public Storage's own building, there would be a similar unity of privacy interests. On this record, however, there is no such unity of privacy interests.

For the same reason, Chase's citation to State v. Miller is not persuasive.[38] In that case, James Miller was lawfully on the premises of the car wash when he broke into the coin boxes that were owned by, and thus "occupied" and secured by, the same entity as the car wash itself.[39]

In sum, all of the cases cited by Chase in support of his argument involve buildings with identical privacy interests, be it a home as in Thomson, a police station as in Deitchler, or a car wash as in Miller. Thus, none of them support Chase's argument that charges based on unlawful entry into the fenced area and unlawful entry into the individual storage unit violate double jeopardy.

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[36] Id. at 135, 137 n.4.

[37] Id. at 137.

[38] 90 Wn. App. 720, 954 P.2d 925 (1998).

[39] Id. at 725, 729.

In State v. Daniel Miller, Division Two of this court addressed the burglary of a multi-unit building with distinct areas of occupancy and privacy interests.[40] Daniel Miller was convicted of two counts of burglary for breaking into a tenant's storage locker and into a locked workroom, both of which were located in the laundry room of an apartment building.[41] Miller claimed there was insufficient evidence to convict him of burglary of the tenant's storage room.[42] The court disagreed.

The court concluded that the tenant had a separate privacy interest because the storage locker had a separate padlock that secured it from other tenants or the building owners.[43] The court distinguished Deitchler because there "the police department was the only tenant with a privacy interest in both the station and the secured evidence locker" and thus, the locker was not a separate building.[44]

Unlike the locked workroom and the storage locker in the Miller case on which Chase relies, the fenced area here does not exclude those who rent individual storage units. But because Public Storage has a separate privacy interest in this fenced area that is secured from persons other than employees

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[40] 91 Wn. App. 869, 960 P.2d 464 (1998) (We use the defendant's first and last name in the citation to avoid confusion.).

[41] Id. at 871.

[42] Id.

[43] Id. at 873.

[44] Id.

and customers renting storage units, that area is a building as defined in the first part of RCW 9A.04.110(5).

Chase further argues that the two clauses in RCW 9A.04.110(5) must be mutually exclusive to avoid absurd or strained results.[45] He argues that if his one act of theft in one location can support two burglary charges, for a "building within a building, then it logically follows that [one] act can also support three charges for a building within a building within a building," and "[t]here is no reasoned limitation" to the number of counts supported by one act in one place.[46] This argument is unpersuasive.

First, we already explained that burglary does not require a completed act of theft. Rather, the elements are unlawful entry with the requisite criminal intent.

Second, contrary to Chase's argument, the two counts at issue on appeal are not based on one act in one place. Chase committed one act of burglary by unlawful entry of the fenced area of Public Storage with the requisite criminal intent. He committed the other act of burglary by unlawful entry of the storage locker belonging to David Stuhr with the requisite criminal intent. On this record, the two are not the same.

Finally, because the language contained in the statute defining building is not ambiguous, the rule of lenity does not apply.[47] We reject his argument to the contrary.

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[45] See Barbee, 187 Wn.2d at 389.

[46] Appellant's Opening Brief at 19-20.

[47] Barbee, 187 Wn.2d at 383; Tili, 139 Wn.2d at 115.

In his reply brief Chase argues that the State improperly relied on evidence that he broke into Stuhr's storage unit to support both counts of burglary. He argues that the jury was never asked to consider whether he cut through the fence. We decline to consider this new argument because it was not timely raised.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Mann, J.

Leach, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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