SUPREME COURT NO. 96309-6

NO. 35040-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

PATRICK GARCIA,

Petitioner.

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

The Honorable John Knodell, Judge

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# PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Patrick Garcia asks this Court to grant review of the court of appeals' unpublished decision in State v. Garcia, No. 35040-1-III, filed August 2, 2018 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

Is this Court's review warranted under RAP 13.4(b)(3) to determine the appropriate remedy—retrial or dismissal—when there is evidence in the record to suggest the jury relied on an insufficient act to convict the accused, making the verdict ambiguous and triggering the rule of lenity?

C. STATEMENT OF THE CASE

The State charged Garcia with one count of residential burglary, one count of second degree burglary in the alternative, and one count of third degree theft.[1] CP 24-27. The State further alleged Garcia was armed with a deadly weapon in commission of the alternative burglary charges. CP 24-26. The jury found Garcia not guilty of residential burglary, but guilty of second degree burglary and third degree theft. CP 64-67; 4RP 551-58. The jury further found Garcia was not armed with a deadly weapon in commission of the burglary. CP 66; 4RP 555-56.

[1] The State also charged Garcia with four counts of tagging and graffiti, but those counts were all dismissed before the jury began deliberating. CP 36, 81; 2RP 7; 4RP 452.

1. Trial Evidence

April and Douglas Knigge live in a house in Moses Lake. 3RP 249-50, 313. Around 6:00 a.m. on June 8, 2015, Ms. Knigge heard their dog barking and went to their mud room, a glass room that looks out onto their yard and driveway, where their fifth wheel trailer is parked. 2RP 91-92; 3RP 251. Ms. Knigge explained they used the trailer for camping the previous weekend, but otherwise did not live in it. 3RP 264, 273.

She saw a young man, later identified as Garcia, near their trailer dumping a small white wastebasket into their large garbage bin. 3RP 253-55. Ms. Knigge told Garcia he needed to leave, so he walked down the driveway and towards a nearby trailer park. 3RP 255-60. Ms. Knigge did not see anything in Garcia's hands as he left and agreed it was unlikely he had anything concealed under his clothes, given what he was wearing at the time: no shirt and silk shorts. 2RP 113; 3RP 253-55, 268-77. She then called the police and described Garcia. 3RP 256-57.

Sergeant Dean Gaddis and Corporal Thomas Tufte were dispatched to the scene. 2RP 91-92; 3RP 381-82. Tufte saw a man matching Garcia's description in the nearby trailer park. 3RP 383-84. Tufte announced his presence and when Garcia turned around, he had several items in his hands, including two large bowie knives and miscellaneous toiletries. 3RP 386-87.

Tufte asked Garcia where he got the items, to which Garcia responded he found them in a nearby field. 3RP 387. Tufte acknowledged there was vacant land near the Knigges' home that could be described as a field. 4RP 429. Tufte told Garcia he matched the description of a suspect. 3RP 388. Garcia explained he was at the trailer park to visit a friend and he did not know what Tufte was talking about. 3RP 388. After being unable to confirm Garcia's statement, Tufte arrested Garcia and took him to the Knigge residence, where Gaddis was. 3RP 388-90.

Ms. Knigge identified Garcia as the man who was in her yard earlier that morning. 3RP 268-69. She further identified the toiletries as having come from inside the trailer. 3RP 266-67. Mr. Knigge later identified his bowie knives and explained he kept them in their trailer kitchen. 3RP 316-19. The Knigges also explained they kept several small white wastebaskets inside their trailer. 3RP 253-55, 338-40.

Gaddis asked Garcia what he was doing by the Knigges' house. 2RP 162-63. Garcia said he was picking up garbage but did not explain why he was doing so. 2RP 162-63. Garcia told Gaddis that he did not go inside the camper. 2RP 163-64. The officers found shoeprints on the Knigges' property similar to Garcia's shoes, but did not find any footprints inside the trailer. 2RP 108-09, 132-37; 3RP 208, 396.

All witnesses agreed they did not see Garcia go in or out of the trailer. 3RP 207-08, 272, 343-46. Ms. Knigge also agreed the items could have been outside the trailer because of someone else, and she did not see Garcia carry anything from their property. 3RP 273-74. Mr. Knigge did not believe he locked the trailer door the previous night and acknowledged he did not know how many people went inside or how long they were there. 3RP 324, 343-46.

2. Parties' Theories and Jury Deliberations

To convict Garcia of burglary, the State needed to prove beyond a reasonable doubt that he entered a dwelling (residential burglary) or a building (second degree burglary) with intent to commit a crime against a person or property therein. CP 51, 54; RCW 9A.52.025(1), .030(1). The State's theory of the burglary was that Garcia entered the fifth wheel trailer with intent to steal. 4RP 488. The State contended the trailer was either a building, within its ordinary meaning, or a dwelling. 4RP 482-84. Though there was direct evidence that Garcia was on the Knigges' property, the State acknowledged there was only circumstantial evidence that he entered the trailer. 4RP 479-80.

The defense theory admitted Garcia was trespassing on the Knigges' property but pointed to the lack of evidence regarding Garcia's entry into the trailer: "Was he on the property? Yes, he trespassed. Is there evidence that

he went inside? No." 4RP 499-511. Defense counsel pointed to Garcia's statement that he was never inside the trailer and found the knives in a nearby field. 4RP 499-502. Counsel emphasized Ms. Knigge did not see Garcia carry anything off her property. 4RP 503. Shoeprints and Ms. Knigge's visual observation of Garcia placed him on the property, but no shoeprints, DNA, or fingerprints placed him inside the trailer. 2RP 132; 3RP 208. All witnesses agreed no one saw him go in or come out of the trailer. 3RP 207-08, 272, 343-46.

Despite the State's theory that Garcia entered the trailer, the jury was instructed: "Building, in addition to its ordinary meaning, includes any fenced area, railway car or cargo container. Building also includes any other structure used mainly, for carrying on business therein." CP 53 (emphasis added); see also RCW 9A.04.110 (5) (defining "building"); 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 2.05 (4th ed. 2016) (WPIC) (same). The note on use for WPIC 2.05 specifies to "[u]se this definition only if the term 'building' has other than its ordinary meaning." The jury was not instructed that it had to be unanimous as to which act of burglary it relied on to convict Garcia.

During deliberations, the jury asked: "What is the definition of 'any fenced area.'" CP 63. Case law holds that a "fenced area" is limited to "an area that is completely enclosed either by fencing alone or . . . a

combination of fencing and other structures." State v. Engel, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009). The State acknowledged this case law and noted "[t]here's no evidence that the Knigges' property is completely fenced." 4RP 540. But the State opposed defining the term for the jury because "the state's not relying on that theory in this case." 4RP 540. The trial court accordingly responded to the jury, with defense counsel's agreement: "Please refer to the court's instructions." CP 63; 4RP 542-43. The jury thereafter returned a general verdict of guilty for second degree burglary. CP 65.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO DETERMINE THE APPROPRIATE REMEDY WHEN THE VERDICT IS AMBIGUOUS AS TO WHETHER THE JURY RELIED ON AN INSUFFICIENT ACT TO CONVICT THE ACCUSED.

The State's theory of the burglary was that Garcia entered the trailer with intent to commit the crime of theft therein. However, the record suggests the jury may have relied on entry into the Knigges' yard to convict Garcia of burglary. The Knigges' yard was not completely enclosed by fencing and so entry was insufficient as a matter of law to support a burglary conviction. Given the deficient jury instructions, Garcia argued on appeal that the verdict was ambiguous as to whether the

jury relied on a sufficient act and unanimously agreed on a particular act to convict him of burglary. Br. of Appellant, 5-16.

The initial instructions to the jury may not have appeared deficient. Nor did the parties consider this to be a multiple acts case. But the jury's question identified the instructional deficiencies. See State v. Campbell, 163 Wn. App. 394, 402, 260 P.3d 235 (2011) ("[E]ven if the ambiguity of the instructions given was not apparent at the time they were issued, the jury's question identified their deficiency."). Specifically, the question from the deliberating jury regarding the definition of "any fenced area" suggests the jury may have relied on the act of entering the Knigges' yard to convict Garcia of burglary, rather than the act of entering the trailer. The Knigges' yard was not fully fenced. Ex. D-55, D-61. Entry into the yard, even if unlawful, was therefore insufficient as a matter of law to sustain a burglary conviction. See Engel, 166 Wn.2d at 574-75, 580-81 (holding a private yard that was partially enclosed by a fence and partially bordered by sloping terrain was not a "fenced area," and was therefore insufficient to sustain a burglary conviction).

The trial court's instruction to the jury to "refer to the court's instructions" did nothing to clarify the definition of "any fenced area." CP 63. Nor did it clarify for the jury that it had to unanimously agree as to which act it relied on to convict Garcia of burglary. See Campbell, 163

Wn. App. at 402 ("[W]here a jury's question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction."). There was essentially no dispute Garcia entered the Knigges' yard, but some of the jurors may not have been convinced he entered the trailer. Absent a Petrich[2] instruction, the jury could have reached a compromise verdict, with everyone agreeing Garcia entered the yard, but not everyone agreeing he entered the trailer. Or, absent a definition of "any fenced area," the jury may have unanimously agreed as to the insufficient act of entry into the yard.

Generally, failure to instruct the jury it must be unanimous as to the specific act that constitutes the crime requires reversal if a rational juror could have a reasonable doubt as to any of the incidents alleged. Kitchen, 110 Wn.2d at 411. This standard is met because the act of entering the yard was insufficient as a matter of law to convict for burglary. But, Garcia argued, the typical remedy for a Petrich error—reversal and remand for a new trial—was constitutionally inadequate given the particular facts of his case. Br. of Appellant, 12-16. Rather, Garcia asserted double jeopardy required dismissal because the reviewing court could not be sure the jury did not rely on an act not supported by

[2] State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

sufficient evidence. The rule of lenity requires the ambiguous verdict to be interpreted in Garcia's favor, necessitating dismissal.

The State conceded the instructional error "deprived Garcia of his right to a unanimous verdict," agreeing "the property on which the camper sat was only partially fenced." Br. of Resp't, 7-8. The State disagreed, however, as to the appropriate remedy. The State claimed a new trial would be adequate, essentially because Garcia's act of entering the yard and act of entering the trailer were alternative means of committing burglary. Br. of Resp't, 9, 11 ("[T]he jury was instructed to consider an alternative means of entering a 'building'—entry into a fenced area—that was unsupported by the evidence.").

The court of appeals accepted the State's concession that reversal was necessary. Opinion, 5. The court noted "the parties agree that the Knigge property is only partially fenced." Opinion, 6. The court further noted the parties "also agree that the jury's inquiry concerning the meaning of 'fenced area' suggested that some members of the jury may have believed that a burglary was committed other than by entering the camper trailer." Opinion, 6. "In such a circumstance," the court concluded, "Mr. Garcia correctly argues that jurors may have returned a verdict on a multiple acts case without agreeing on the same action." Opinion, 6.

The court of appeals, however, rejected Garcia's dismissal argument and agreed with the State that a new trial was sufficient. Opinion, 7-8. The court reasoned "[t]he problem established here was possible lack of unanimity, an error that is remedied by granting a new trial." Opinion, 7. The court analogized to the "situation where jury unanimity was not ensured because of legally insufficient evidence of one of the alternate means." Opinion, 7. In such circumstances, "the remedy also is a new trial on the legally sufficient means." Opinion, 7. The court found "no reason to create a special rule for Mr. Garcia's case." Opinion, 7. The court accordingly reversed Garcia's second degree burglary conviction and remanded for a new trial.[3] Opinion, 8.

The question presented is whether a new trial is an adequate remedy in circumstances, like here, where the verdict is ambiguous as to whether the jury relied on an insufficient act to convict the accused. No reported Washington decision has answered this question. This Court's review is therefore warranted under RAP 13.4(b)(3), as this case implicates several constitutional rights, including the right to due process, the right to be free

[3] Garcia also argued his counsel was ineffective by either failing to object to the State's proposed instructions or acquiescing to the inadequate response to the jury question. Br. of Appellant, 16-21. The State agreed defense counsel's "performance was deficient for failing to appreciate the import of the jury's question." Br. of Resp't, 8. The court of appeals did not address Garcia's ineffective assistance argument, as it agreed with Garcia that his right to a unanimous jury verdict was violated. Opinion, 6.

from double jeopardy, and the right to a unanimous jury verdict. Br. of Appellant, 6-7 (discussing these rights).

Two cases are instructive. In State v. Kier, 164 Wn.2d 798, 808, 194 P.3d 212 (2008), the State argued Kier's assault and robbery convictions did not merge because they were committed against separate victims. Noting the case before it was "somewhat analogous to a multiple acts case," the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. The rule of lenity requires ambiguous jury verdicts to be resolved in the defendant's favor. Id. Therefore, because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdict was ambiguous and it would violate double jeopardy not to merge offenses. Id. at 814.

In State v. Whittaker, 192 Wn. App. 395, 400-01, 367 P.3d 1092 (2016), Whittaker was convicted of felony stalking and felony violation of a no-contact order. A no-contact order violation elevated the stalking offense to a felony. Id. at 415. At trial, the State introduced evidence of several instances when Whittaker violated the no-contact order. Id. at 416. The verdict was therefore ambiguous as to which of these multiple acts elevated stalking to a felony. Id. at 415. The rule of lenity required the conviction for violation of the no-contact order to merge into the stalking

conviction, because the jury may have relied on the same act to convict Whittaker of both offenses. Id. at 417.

As in Kier and Whittaker, there is no way to know whether the jury concluded Garcia committed burglary by the insufficient act of entering the Knigges' partially fenced yard, rather than entry into the trailer. Double jeopardy bars retrial when a conviction is overturned on appeal for insufficient evidence. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The rule of lenity therefore bars retrial in Garcia's case, where the verdict was ambiguous as to whether the jury relied on an insufficient act to convict Garcia of burglary.[4]

A somewhat similar argument was raised in State v. Stark, 48 Wn. App. 245, 738 P.2d 684 (1987). Stark was convicted of first degree statutory rape. Id. at 250-51. The complaining witness described three separate instances of sexual abuse, two of which could have constituted "sexual intercourse." Id. at 246-47. The other instance was insufficient to support a statutory rape conviction. Id. at 251.

[4] The rule of lenity, as articulated in Kier and Whittaker, is not limited to merger. See, e.g., State v. Jacobs, 154 Wn.2d 596, 603-04, 115 P.3d 281 (2005) (reversing because rule of lenity required ambiguous statute to be interpreted in the defendant's favor); United States v. Baker, 16 F.3d 854, 857-58 (8th Cir. 1994) (when imposing sentence based on ambiguous verdict susceptible to two interpretations, court may not impose alternative producing higher sentence range)

On appeal, Stark argued the verdict was defective because the jury did not specify the act upon which they agreed. Id. at 251. Therefore, Stark asserted, the court could not be sure the jury did not rely on the insufficient act. Id. The court of appeals disagreed because the jury was instructed they must unanimously agree that "the same act of sexual intercourse had been proven beyond a reasonable doubt." Id. The court presumed the jury followed this instruction, and concluded the jury could not have relied on the one act that did not come within the definition of "sexual intercourse." Id.

Garcia's case differs from Stark in two key ways. First, the jury was not instructed it had to unanimously agree the *same act* of burglary had been proven beyond a reasonable doubt. Second, this Court cannot presume the jury relied on the sufficient act to convict Garcia of burglary where the record suggests it may not have done so and where "any fenced area" was not defined, despite the jury's inquiry.

In sum, the verdict was ambiguous in Garcia's case because we do not know which act the jury relied on to convict him of burglary, one of which was insufficient as a matter of law. The State acknowledged this ambiguity:

> Here, there is no way to determine from the record whether the jurors convicted Garcia of second degree burglary because they unanimously agreed he entered the Knigges' partially-fenced property, unanimously agreed he entered the camper, or because some jurors thought he entered both the

> property and the camper and some thought he entered only the property.

Br. of Resp't, 10. The State articulated the very reason why dismissal is necessary. The jury may have relied on an insufficient act to convict Garcia of burglary. The rule of lenity requires the reviewing court to presume that it did. Double jeopardy principles require that a jury verdict not supported by sufficient evidence be reversed and the charge dismissed with prejudice. Hickman, 135 Wn.2d at 103. This Court's review is warranted to decide this issue.

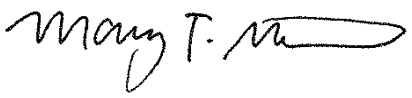
E. CONCLUSION

For the reasons discussed above, Garcia respectfully requests that this Court grant review, reverse his conviction, and remand for dismissal of the charge with prejudice rather than a new trial.

DATED this 28th day of August, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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# Appendix

**FILED**
**AUGUST 2, 2018**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>PATRICK MICHAEL GARCIA,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 35040-1-III<br><br><br><br><br><br>UNPUBLISHED OPINION |

KORSMO, J. — Patrick Garcia appeals from his convictions for second degree burglary and third degree theft, arguing that an erroneous jury instruction violated his right to a unanimous verdict and also prevents a retrial. We reverse the second degree burglary conviction due to the instructional error and remand for a new trial.

## FACTS

The charges arose from an incident occurring on the property of April and Douglas Knigge in Moses Lake. About 6:00 a.m. on June 8, 2015, April Knigge was alerted by her barking dog to the presence of an unknown young man in the couple's backyard. Ms. Knigge saw Mr. Garcia, whom she identified at trial, standing about 20

feet from the camper trailer parked in their yard.[1] He was dressed in silky white shorts and sneakers, but had no shirt on. She saw Mr. Garcia empty into a garbage can the contents of a small white wastebasket that belonged in the camper trailer.

Ms. Knigge ordered Mr. Garcia off the property and then called the police. She watched the man walk past an empty lot and continue on toward a small trailer court. Two officers responded and one spotted Mr. Garcia in the nearby trailer park. Corporal Thomas Tufte contacted Mr. Garcia and observed toiletry items and two large bowie knives in his hands. A pat-down search of Mr. Garcia's shorts' pockets revealed additional items. Mr. Garcia told the officer that he had found the items in the nearby vacant lot and that he was at the trailer park to visit a friend.

Sergeant Jeffery Dean Gaddis questioned Garcia about the Knigge trailer. Mr. Garcia denied entering the trailer, but did state that he had picked up garbage and had picked up an extension cord outside the camper. He did not explain how he possessed a wastebasket from inside the trailer. Meanwhile, Corporal Tufte made inquiries around the trailer park but was unable to corroborate Mr. Garcia's claim that he was visiting a friend.

[1] From the descriptions in the record, it appears that part of the Knigge property was enclosed to some degree by a fence, but that the camper trailer was not in a fenced area.

Although originally charging one count of first degree burglary, by amended information the prosecutor charged one count of residential burglary and an alternative charge of second degree burglary, both accompanied by deadly weapon allegations, as well a charge of third degree theft.[2] The case eventually proceeded to jury trial.

The trial court granted a defense motion in limine to prevent Corporal Tufte from repeating any hearsay statements he obtained during his interview of trailer park residents. However, the court permitted the prosecutor over defense objection to ask the officer if he had been able to corroborate Mr. Garcia's statement that he was visiting a friend. Tufte testified that he attempted to check out the statement, but "was not able to."

The State argued the case to the jury on the theory that Mr. Garcia had committed residential burglary of the camper trailer and that it constituted a "dwelling" because the Knigges had used it on a recent camping trip. The items stolen from the trailer established Mr. Garcia's presence in the trailer. The defense argued that no evidence put Mr. Garcia inside the camper and that the evidence established only that Mr. Garcia was guilty of the uncharged offenses of trespassing and possession of stolen property discovered in the adjoining field. The defense also argued that the camper was not a dwelling because the Knigges were living in their house rather than in the camper.

[2] Four charges of "tagging and graffiti" in violation of the Grant County criminal code also were filed. One charge was dismissed prior to trial and the other three counts were dismissed during trial.

The jury was given standard instructions relating to the two burglary charges. Instructions 12 and 15 displayed the differing elements of the two competing charges—burglary of a "dwelling" constituted residential burglary, while burglary of a "building" other than a "dwelling" was second degree burglary. Clerk's Papers (CP) at 51, 54. Instruction 14 defined the term building:

> Building, in addition to its ordinary meaning, includes any fenced area, railway car or cargo container. Building also includes any other structure used mainly, for carrying on business therein.

CP at 53.

During deliberations, the jury sent out a question: "Instruction 14, what is the definition of 'any fenced area'?" The court discussed the question with counsel, with the prosecutor pointing out that he was not relying on the fenced area theory of "building" and defense counsel suggested that the best response was simply to refer the jury back to the instructions. The court agreed and directed the jury to review its instructions.

The jury subsequently returned a not guilty verdict on the residential burglary charge, and guilty verdicts on the charges of second degree burglary and third degree theft. The jury also rejected the deadly weapon finding on the burglary count.

After the trial court imposed a bottom end sentence of 22 months in prison, Mr. Garcia appealed to this court. A panel considered the matter without argument.

ANALYSIS

This appeal presents two issues. The first issue concerns the second degree burglary verdict and the jury's inquiry. The second issue involves the admissibility at the retrial of evidence of the police investigation into Mr. Garcia's explanation for being in the trailer park. We address the issues in that order.

*Burglary Verdicts and Instructions*

The parties agree that the burglary count should be reversed due to the jury's possible reliance on a theory of burglary not supported by the evidence. They disagree on whether retrial is the correct remedy. However, our case law is clear that this type of error results in a new trial.

To satisfy the commands of art. I, § 21 of our state constitution, Washington requires that a jury verdict in a criminal case be unanimous. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). In some instances, that means proof of unanimity of means when the jury is instructed on alternative means of committing a single crime. *Id*. When a jury considers an alternative means that was not supported by the evidence, the remedy is to reverse the conviction and remand for a new trial on the alternative means that was supported by the record. *State v. Green*, 94 Wn.2d 216, 235, 616 P.2d 628 (1980). In "multiple acts" cases where more different criminal actions were proved than were alleged, the constitution requires that the jury either be instructed on the need to agree on the specific act proved or the State must elect the specific act it is relying upon

in order to ensure that a unanimous verdict was returned. This type of error requires a new trial unless shown to be harmless beyond a reasonable doubt. *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); *State v. Kitchen*, 110 Wn.2d 403, 405-406, 414, 756 P.2d 105 (1988).

Here, the parties agree that the Knigge property is only partially fenced.[3] They also agree that the jury's inquiry concerning the meaning of "fenced area" suggested that some members of the jury may have believed that a burglary was committed other than by entering the camper trailer.[4] In such a circumstance, Mr. Garcia correctly argues that jurors may have returned a verdict on a multiple acts case without agreeing on the same action.[5]

However, Mr. Garcia argues that the remedy should not be a new trial as typically is required in multiple acts cases such as *Kitchen* and *Camarillo*. Rather, because the

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[3] Our record does not describe the fencing on or about the property, although it appears from the transcript that some of the exhibits, which were not transmitted to us, display fencing.

[4] Instruction 14 is derived from *11 Washington Practice: Washington Pattern Jury Instructions: Criminal* 2.05, at 40 (4th ed. 2016) (WPIC). It is questionable whether the definition was needed in this case: "Use this definition only if the term 'building' has other than its ordinary meaning." Notes on Use, WPIC 2.05. If used for illustrative purposes in the next trial, the court should at least excise the "fenced area" definition to avoid the possibility of jury confusion.

[5] *I.e.*, some jurors may have believed that Mr. Garcia burglarized the camper while others may have believed he entered into the incompletely fenced property with the intent to commit a crime such as stealing the extension cord. Since the entire property was not fenced, it did not constitute a "building" within the meaning of the statute.

property was not fully fenced, he fears that a jury member may have convicted him on the legally insufficient grounds that he burglarized the property rather than the camper trailer. *E.g.*, *State v. Engel*, 166 Wn.2d 572, 210 P.3d 1007 (2009); *State v. Wentz*, 149 Wn.2d 342, 68 P.3d 282 (2003). Evidence is insufficient to support a burglary conviction if the fenced area is not totally enclosed, resulting in reversal of the conviction. *Engel*, 166 Wn.2d at 580-581. Likening his situation to that one, Mr. Garcia speculates that because some juror may have voted for conviction based on a legally insufficient theory, his conviction also should be reversed.[6]

His analogy fails. The problem established here was possible lack of unanimity, an error that is remedied by granting a new trial. *Kitchen*, 110 Wn.2d at 414. In the more analogous situation where jury unanimity was not ensured because of legally insufficient evidence of one of the alternate means, the remedy also is a new trial on the legally sufficient means. *Green*, 94 Wn.2d at 235; *State v. Maupin*, 63 Wn. App. 887, 822 P.2d 355 (1992). We see no reason to create a special rule for Mr. Garcia's case. The possibility of a legally insufficient basis for conviction was the reason that the jury may not have been unanimous; it was not proof that the verdict was returned on an insufficient

[6] Mr. Garcia, understandably, does not argue that the acquittal on the residential burglary count has any effect on his case. *See Currier v. Virginia*, No. 16-1348 (June 22, 2018); *Dowling v. United States*, 493 U.S. 342, 347-352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970) (double jeopardy barred conviction on related later case due to collateral estoppel effect of acquittal on first case).

basis. There was ample evidentiary support for the theory of burglary elected by the prosecutor. In that circumstance we believe that the normal rule still applies—the remedy for a potentially nonunanimous verdict is a new trial. As in the instance of a legally insufficient *means* of committing the crime, the new trial must be limited to an *act* that is legally sufficient to support the burglary charge.

Accordingly, the second degree burglary conviction is reversed and the matter is remanded for a new trial on that charge.

*Evidentiary Issue*

Since the issue may arise at the retrial, we briefly address Mr. Garcia's claim that the court erred in authorizing testimony concerning police efforts to corroborate Mr. Garcia's explanation for his presence in the neighborhood. Although there were alternative methods of addressing this issue, including exclusion of the topic, the trial court did not abuse its considerable discretion in the handling of this issue.

Generally speaking, trial court judges have great discretion with respect to the admission of evidence and will be overturned only for manifest abuse of that discretion. *State v. Luvene*, 127 Wn.2d 690, 706-707, 903 P.2d 960 (1995). Discretion is abused where it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401. Relevant evidence is generally admissible at trial,

but can be excluded where its value is outweighed by other considerations such as misleading the jury or wasting time. ER 402; ER 403.

The defense successfully moved in limine to prevent Corporal Tufte from repeating any hearsay relating to his investigation of Mr. Garcia's explanation for being in the trailer park. The defense did not challenge the relevance of the information, however, nor otherwise attempt to prevent the State from exploring the topic.[7] Thus, the trial court had very tenable reasons to allow the limited testimony that it permitted, consistent with the ruling in limine against elicitation of hearsay statements. Mr. Garcia prevailed on the motion and is not in a position to posit error.

The answer given by Corporal Tufte did not violate the motion in limine. His inability to corroborate the claim could be explained by several possibilities other than statements made by local residents. Perhaps no one talked to the corporal, or perhaps the person Mr. Garcia identified (if he even did name a specific person) could not be located. Other possible explanations can be imagined. The trial court did not err in authorizing the answer that it did.

[7] If the quality of the police investigation was not relevant to the trial, Mr. Garcia's statement about his reason for being at the trailer park could have been excluded from evidence and the parties foreclosed from arguing that topic or about the investigation. If the defense deemed the statement important to support its defense, which in part turned on the failure of police to discover evidence of Mr. Garcia's presence in the camper, it was quite understandable that the prosecutor would want to establish that efforts were made to attempt to corroborate the story.

The trial court is free to reconsider this issue at the next trial in light of the evidence and argument of the parties during that proceeding. Its handling of the matter at the first trial did not constitute error.

Affirmed in part, reversed in part, and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, C.J.

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

**August 29, 2018 - 3:21 PM**

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