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NO. 65836-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

COURT OF APPEALS
2011 MAY 26 PM 1:16

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP GARCIA,

Appellant.

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. INTRODUCTION.

Late one evening, Phillip Garcia noticed that three cars were aggressivly pursuing him and he searched for someone to help him. He purposefully broke a window at a gas station's store, hoping it would bring someone to help him. He knocked on a stranger's door, asking for help. He entered Juliana Wilkins' home, asked her for a ride, and stayed there until he arranged for a friend to pick him up.

As the result of his behavior, Garcia was charged with burglary based on the theory that he entered the gas station store unlawfully, even though he did not try to commit any crimes inside the store. The trial judge agreed with the prosecutor that breaking a window outside the building satisfied burglary's requirement that the perpetrator "intend to commit a crime therein."

Garcia was also charged with first degree kidnapping. At his trial, the court ruled that what Garcia said to Wilkins was inadmissible hearsay and would not let Garcia cross-examine Wilkins about what he said during the incident. This undermined his ability to show that he did not intend to restrain Wilkins, use her as a shield or hostage, or inflict extreme distress. Due to multiple instructional and evidentiary errors, coupled with the State's efforts

to garner convictions based on misstatements of the law, Garcia was denied a fair trial.

B. ASSIGNMENTS OF ERROR.

1. By encouraging the jury to convict Garcia of second degree burglary based on an incorrect explanation of the law, the State denied Garcia a fair trial by jury.

2. The court erred by permitting the prosecutor to argue a legally flawed theory of how Garcia committed burglary and by denying the defense motion to dismiss the charge based on insufficient evidence.

3. There was insufficient evidence of second degree burglary.

4. The court's restrictions on Garcia's cross-examination denied him his right to present a defense as guaranteed by the Sixth Amendment and article I, section 22.

5. The prosecution did not present sufficient evidence to support a verdict on each alternative means of committing first degree kidnapping.

6. The court improperly admitted evidence that Garcia had two prior convictions for crimes of dishonesty when the State did

not prove the offenses qualified as crimes of dishonesty by reliable evidence.

7. The deadly weapon enhancement rests on a flawed unanimity instruction which denies Garcia his right to due process of law.

8. The court's failure to clearly instruct the jury that the burglary and trespass convictions must rest on unanimous agreement that Garcia unlawfully entered two different buildings barred the court from treating the offenses as separate convictions for purposes of double jeopardy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The legal definition of burglary requires that a person intend to commit a crime inside a building. The prosecution told the jury that Garcia committed burglary by breaking a window on the outside of a building, arguing that the crime that enables a person to enter a building constitutes a crime "therein." Did the State encourage the jury to convict Garcia based on an incorrect explanation of the essential element of burglary that the perpetrator must intend to commit a crime inside the building?

2. To find sufficient evidence of a burglary, there must be some indication that the perpetrator intended to commit a crime

inside the building. A videotape showed that Garcia walked into and then out of the building. He did not try to take any property or disturb anything inside the building. Is it unreasonable to infer Garcia intended to commit a crime inside the building when the surveillance cameras show he did not try to commit any crimes inside even though he had the opportunity to do so?

3. When the State charges alternative means of committing a crime, there must be sufficient evidence of each alternative or a clear jury finding that the verdict rested on a single, proven, alternative. The jury did not specify which alternative means of first degree kidnapping it found, and none of the three alternative ways of committing first degree kidnapping are supported by substantial evidence. Was there insufficient evidence of the alternative means for first degree kidnapping?

4. The right to present a defense and confront witnesses requires the trial court to allow the accused to fully explore the alleged incident when cross-examining the complaining witness. The trial court substantially inhibited Garcia's ability to cross-examine the complainant in the kidnapping by prohibiting him from eliciting his statements during the incident, finding they were inadmissible hearsay. Did the court misapply the rules of evidence

and deny Garcia his right to present a defense by incorrectly limiting his cross-examination of the complainant about the incident?

5. Evidence of an accused person's prior burglary convictions are admissible as crimes of dishonesty only when unambiguous evidence shows the burglary was based on the intent to commit a crime of dishonesty. Garcia's two prior convictions for burglary-related offenses did not specify what crime he intended to commit but the court relied a police report in which a suspect said he had intended to commit theft. Did the court improperly rely on unproven and unsworn allegations of another suspect to conclude Garcia's convictions were crimes of dishonesty?

6. A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. The trial court instructed the jury that it could not find the State had failed to meet its burden of proof for the deadly weapon enhancement unless it reached this decision unanimously. Where the deliberative process requires accurate instructions on the requirement of unanimity, does the incorrect instruction undermine the jury's special verdict finding?

7. When the prosecution alleges a person committed the same offense on multiple occasions, the jury instructions must clearly explain the requirement that its verdict rest on "separate and distinct acts," to guard against a double jeopardy violation. The State charged Garcia with two counts of burglary, but the jury instructions asked the jury whether Garcia entered "a building," and did not explain that its verdicts must rest on separate acts. When the jury convicted Garcia of one count of burglary and a lesser offense of trespass, and there is a potential that the jury did not unanimously find Garcia committed to separate acts, does it violate double jeopardy to impose multiple punishments?

D. STATEMENT OF THE CASE.

While driving through Mt. Vernon at night, Philip Garcia became concerned that three cars were following, harassing, and threatening him. RP 279.[1] He did not see who was driving, but perceived the cars as pursuing him and boxing him in. RP 279. Garcia heard two gunshots. RP 282. When Garcia noticed that the cars were no longer immediately behind him, he tried to

[1] The verbatim report of proceedings ("RP") from the trial are consecutively paginated.

escape. RP 284. His car became stuck on railroad tracks and he abandoned the car, fleeing on foot. RP 286.

As Garcia ran, he again thought he saw the cars looking for him and he made his way to a Valero gas station near an I-5 exit ramp. RP 289. He had fallen into a ditch while running and he was wet, nervous, and scared. RP 289. The gas station was "very well lit" and Garcia thought it was open. RP 27, 290. The door to the store was locked and no one was there. RP 290. After several minutes of banging on the door, Garcia picked up a cinderblock from the ground and broke the glass door. RP 25, 291. He thought that if the alarm went off, someone would come and help him. RP 291.

A surveillance videotape shows Garcia both inside and outside the store. RP 23, 27. The videotape shows Garcia "just walked in [the store] and turned back out." RP 27. Inside the store, he did not pick up any items, try to use any property, or go anywhere near the cash register. RP 27. After a short period of time, he left. RP 27. When he heard the alarm, Garcia decided the police might come and he did not want to encounter the police due to his own outstanding warrants. RP 292-93.

Garcia made his way to a nearby home and knocked on a door. RP 45, 293. A large dog barked loudly and brought the home owner. RP 45, 49. Garcia asked for help. RP 48-49, RP 294-95. The homeowner thought Garcia "seemed scared." RP 49. She said she would call 911. RP 47. She did not open the door. Garcia heard voices in the area and felt scared. RP 295, 297-98.

Garcia ran to a trailer park where many homes were situated close together. RP 144-45. He saw lights and a television on in one home and found a sliding glass door slightly ajar. RP 299. Garcia went inside.

Juliana Wilkins was sleeping on the sofa in the living room, with the television on. RP 99, 117. Garcia tapped her leg to wake her up. RP 117. He asked her for a ride, explaining he needed help getting out of the area. RP 122, 136, 138, 301. Wilkins said she could not give him a ride but her husband would be back and perhaps he could do so. RP 301. Garcia sat in a chair and smoked cigarettes with Wilkins. RP 101, 119-20.

Garcia asked to borrow Wilkins' telephone and made a number of calls trying to find someone to pick him up. RP 121. He was not able to locate anyone who could give him a ride and became more and more panicked. RP 106, 122, 132. He thought

he heard voices outside and feared that the people who had chased him were outside. RP 107, 136. He repeatedly looked out the window to see if he saw anyone. RP 134. Because he thought it was possible someone else had entered Wilkins's home, he picked up a knife from the kitchen and put it in his pocket in case anyone had come inside the house. RP 302, 306. Although Wilkins only saw the knife briefly, it scared her. RP 170-72, 309.

Wilkins tried to remain calm. RP 100. She was afraid that Garcia's panic could turn dangerous if she became visibly upset. She spoke with Garcia about her children and husband, in hopes she could encourage him to calm down and out of a belief that she would be less likely to be harmed if she personalized herself. RP 172. Garcia thought Wilkins was friendly and understanding. RP 314, 321.

At one point, Garcia decided to leave on his own and Wilkins went with him to the door. RP 106. She took off a scapular she was wearing, a necklace with religious significance, and she gave it to Garcia. RP 106. She told him the scapular reminds us to lead a good life and do the right thing. RP 141. Garcia was afraid to leave and he stayed in Wilkins' home, trying again to telephone someone who could give him a ride. RP 139, 142.

Garcia eventually reached his friend Pablo Andrade by telephone. Andrade realized that he had missed three earlier calls from Garcia during the night. RP 36. He agreed to pick up Garcia from Wilkins' home. RP 37. Andrade got lost as he tried to find Wilkins' home and called Wilkins for directions. RP 37. Wilkins calmly explained how he could get to her house. Andrade eventually arrived and took Garcia home. RP 32. When Garcia left, Wilkins hugged him and said Merry Christmas. RP 109. He tried to return the necklace he gave him but she insisted he keep it. RP 109.

The State charged Garcia with second degree burglary relating to the gas station, and first degree kidnapping and first degree burglary relating to Wilkins. CP 6-7. The jury convicted him of burglary for the gas station, found him not guilty of the other count of burglary, convicted him of a lesser offense of trespass, and convicted him of first degree kidnapping while armed with a deadly weapon. CP 56-62. He received a 173 month standard range sentence. CP 66. Pertinent facts are explained in more detail in the relevant argument sections below.

E. ARGUMENT.

1. BECAUSE BURGLARY REQUIRES THE INTENT TO COMMIT A CRIME INSIDE A BUILDING, THE STATE IMPROPERLY ARGUED GARCIA COULD BE CONVICTED OF BURGLARY BY BREAKING AN EXTERIOR WINDOW WHILE THE OUTSIDE OF THE BUILDING, AND THE CONVICTION RESTS ON INSUFFICIENT EVIDENCE

The State argued that Garcia committed burglary by breaking a window outside the building and then entering the building. But burglary requires the intent to commit a crime inside the building, not outside. Because there was no evidence Garcia intended to commit a crime inside the building, and the prosecution urged the jury to convict Garcia based on an erroneous understanding of the legal requirements of burglary, the burglary conviction must be reversed.

a. The State may not seek a verdict based on a misrepresentation of the law. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amend. 14; Wash. Const. Art. I, sections 3, 21, 22. In Washington,

the state constitutional right to a trial by jury "provides greater protection for jury trials than the federal constitution," and mandates that jury verdicts must be narrowly construed. State v. Williams-Walker, 167 Wn.2d 887, 695-96, 225 P.3d 913 (2010); . In a criminal case, the jury must unanimously find the prosecution proved every necessary element of the crime charged. Williams-Walker, 167 Wn.2d at 698; State v. Smith, 159 Wn.2d 778, 783, 155 P.3d 873 (2007).

It is a manifest constitutional error for the prosecution to misstate the governing law. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor's misstatement of the law is misconduct which is a serious irregularity having a grave potential to mislead the jury. Davenport, 100 Wn.2d at 763. The prosecutor's bad faith is not required – when the jury may have relied on an incorrect understanding of the law due to the prosecution's argument to the jury, the court cannot be certain that the jury's verdict rests on a legally valid theory. State v. Allen, 127 Wn.App. 125, 137, 116 P.3d 849 (2005).

In Davenport, the prosecutor argued to the jury the defendant was guilty as an accomplice, although he was not charged as an accomplice and the court did not instruct the jury on accomplice liability. 100 Wn.2d at 760. The reviewing court found the prosecutor's remarks improperly distracting to the jury, dissuading them from properly reviewing the law as instructed by the trial court and encouraging them to find Davenport guilty based on improper legal arguments. Id. at 762.

In Allen, the prosecutor did not accurately explain the essential elements of burglary. 127 Wn.App. at 136. The prosecutor told the jury that the defendant was guilty of burglary if he entered a publicly accessible building and intended to commit a crime therein, but this explanation of the law was wrong. Burglary requires that a perpetrator is unlawfully inside a building, meaning that he is in a place that he is not allowed to go. Id. at 136-37. Although there was some evidence that Allen had unlawfully remained inside a private part of the building, the court did not presume the jury's verdict rested on an accurate understanding of the law. Id. Instead, because the reviewing court could not "be certain that the jury relied solely on" a correct application of the law, it ordered a new trial. Id.

b. The State argued that the crime committed outside the building was the intended crime for burglary. Burglary requires that a person (1) unlawfully enter or unlawfully remain inside a building, and (2) intend to commit a crime against person or property inside the building. State v. Devitt, 152 Wn.App. 907, 911, 218 P.3d 647 (2009). RCW 9A.52.030(1) provides:

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

(emphasis added).

"[T]he settled canons of statutory construction require that meaning be given to the word 'therein.'" State v. Gilbert, 68 Wn.App. 379, 383, 842 P.2d 1029 (1993). In Gilbert, the court interpreted a former first degree burglary statute that included as an element that the perpetrator "assaults any person therein." Id. at 380. The defendant had assaulted a person outside the home, in the course of stealing property from inside the home. Id. The reviewing court refused the prosecution's invitation to view the word "therein" as irrelevant. Id. at 382. Instead, all language must be given effect and the penal statute construed strictly, and thus, the

requirement of a crime therein means that the crime must occur inside the building. Id.

As Gilbert explains, the plain language of the burglary statute dictates that the perpetrator who enters unlawfully must intend to commit a crime "therein." RCW 9A.52.030(1). An unlawful entry is a criminal trespass unless the accused person intends to commit a crime once inside. RCW 9A.52.070(1) (first degree criminal trespass where a person "knowingly enters or remains unlawfully in a building."). Consequently, as a matter of common sense and under the terms of the statute, a crime committed outside the building, to facilitate entry, is not a crime intended to be committed "therein."

The prosecutor told the jury there were two alternative theories for how Garcia committed burglary, either he intended to steal something but decided against it once inside, or he committed malicious mischief outside. RP 400-01. The prosecutor explained that one "way of committing Second Degree Burglary, is by actually doing the malicious mischief, throwing the brick through the window." RP 400. The prosecutor argued that "by throwing a brick through the window," Garcia intended and committed a crime at the gas station sufficient to prove burglary. RP 406.

The prosecutor did not argue that Garcia intended to commit malicious mischief once inside the building. Rather, he claimed, Garcia either intended to steal "or he intended to commit a crime by throwing the brick through the window," and either constituted burglary. RP 401.

This argument was incorrect. Throwing a brick through a window does not constitute a burglary, even when coupled with an unlawful entry. The statute requires the intent to commit a crime against person or property therein, which requires the intent to commit the crime inside the building, following an unlawful entry. RCW 9A.52.030(1).

c. The prosecution's erroneous explanation of the law mislead the jury. When the State rested its case, Garcia moved to dismiss the gas station burglary allegation based on the lack of evidence he intended to commit a crime therein. RP 243-46. The prosecution responded by telling the court that Garcia's intent was a question for the jury but without offering any theory about what crime Garcia may have intended to commit. RP 245. The court ruled that a crime committed as part of the entry process could serve as the crime "therein" and denied Garcia's motion to dismiss. RP 245. This ruling was erroneous, and permitted the

prosecution to mislead the jury about whether Garcia committed second degree burglary.

Here, the prosecutor presented improper argument by encouraging the jury to decide the case based on incorrect statements of the law. Davenport, 100 Wn.2d at 763. The prosecutor "has no right to mislead the jury." (Emphasis in original). Id. (quoting State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955)). Such arguments, made by a quasi-judicial officer invested with the prestige generally accorded to the prosecutor's office, are substantially likely to taint the jury's verdict. Id.; Fleming, 83 Wn.App. at 215. The State urged the jury to convict Garcia of burglary for the crime of throwing a brick through the window, even though that crime occurred outside the building. RP 400-01, 406. By misrepresenting the essential element that Garcia intended to commit a crime against person or property therein, the prosecutor sought a verdict based on an incorrect explanation of the law, which undermines the verdict obtained. See Allen, 127 Wn.App. at 137.

d. There was insufficient evidence that a burglary occurred. The trier of fact is free to make rational inferences from the record, but evidence that Garcia intended to commit any crime

inside the building so weak that it would be unreasonable for any juror to conclude Garcia intended to commit a crime once inside the store. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Garcia had the opportunity to steal or damage property in the store, had that been his intent, yet he left without committing any crimes inside the building. A surveillance videotape showed his actions inside the store and thus, there was no need to speculate about what he might have intended to do. As the videotape shows, Garcia "just walked in [the store] and turned back out." RP 27.

A person acts with "intent" when "acting with the objective or purpose to accomplish a result that constitutes a crime." CP 36 (Instruction 6). If Garcia's purpose was to take something, be it cash, a candy bar, or a Coke, there was nothing to stop him from either doing so or trying to. Yet once inside the store, he did not try to take anything even though no one was present to stop him. There was "nothing out of place" in the store other than the broken window. RP 27. The prosecutor argued that Garcia must have changed his mind once he heard the alarm inside the store and that is why he left without taking anything, but this scenario is unreasonable given the fact that he did not even pick up any items

to indicate an interest in taking them. RP 400. As Garcia explained, he went in and looked around, thinking someone from the store might come, then he left. RP 292-93. The videotape confirms his disinterest in committing a crime inside the store. RP 27.

When he walked away from the store, he still believed he was being pursued by others. RP 293. He knocked on a stranger's door and said, "help, they're trying to kill me." RP 49. The reason he went to the gas station, and to the two homes after, was because he wanted help but he could not find anyone to help him. RP 290, 293.

The jury is permitted to make reasonable inferences from the evidence, but not unreasonable ones. Because there was no reasonable inference that Garcia intended to commit a crime inside the gas station, the burglary conviction is not supported by legally sufficient evidence. Alternatively, the burglary allegation must be reversed and a new trial ordered at which the prosecution may not seek a conviction based on a misstatement of the law.

2. THE COMBINATION OF UNREASONABLE LIMITS PLACED ON GARCIA'S ABILITY TO CHALLENGE THE STATE'S EVIDENCE AND THE PROSECUTION'S RELIANCE ON INAPPLICABLE ALTERNATIVE MEANS DENIED GARCIA A FAIR TRIAL BY JURY

The prosecution charged Garcia with first degree kidnapping, which required that in addition to intentionally abducting Wilkins, Garcia intended to either: use Wilkins as a shield or hostage; facilitate a burglary; or inflict extreme mental distress. The court prohibited Garcia from demonstrating the insufficient evidence of his intent to commit first degree kidnapping by barring him from eliciting his statements to Wilkins, based on a misguided belief that such statements were inadmissible hearsay. The State did not prove Garcia had the requisite intent to commit any of the alternative means of first degree kidnapping, and the court unreasonably restricted Garcia's ability to challenge the State's claim that he intentionally abducted Wilkins.

a. The right to present a defense requires the admission of material statements made during the incident. The right to present a defense is one of the "minimum essentials of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 296 (1973); U.S. Const. amends. 6, 14; Wash.

Const. art. I, §§ 3, 22. Under certain circumstances, it encompasses the right to place before the jury secondary forms of evidence, such as hearsay. Chambers, 410 U.S. at 294. Moreover, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id. at 302.

Before trial, the prosecution insisted that the defense may not elicit Garcia's statements made during the alleged kidnapping, because it would rather take the risk that it could not prove its case than let the jury know of "self-serving," or exculpatory, statements Garcia made to Wilkins. RP 4, 9; CP 27. Garcia objected, because the charges were necessarily based on what Garcia said to the complainant. RP 5-7, 12. The court questioned how the prosecutor would be able to prove its case but declined to issue a broad ruling. RP 12-13.

During the trial, the prosecution objected as soon as Garcia tried to elicit statements in his cross-examination of Wilkins about what he said when he entered her home. RP 122. The judge overruled this objection because Wilkins had mentioned Garcia's request for a ride in her direct examination, but "caution[ed]" defense counsel "to avoid hearsay from here on." RP 122.

Defense counsel explained that statements made in the course of the incident were pertinent to all of the events, including whether Wilkins was afraid and restrained. RP 124. The court ruled that statements relevant to Garcia's state of mind would be inadmissible hearsay, necessarily offered for their truth. RP 124. It ruled that what Garcia said would be hearsay unless he testified. RP 127. The court would let defense counsel ask about general categories, such as whether he threatened Wilkins, but not his specific statements. RP 127, 131. Garcia insisted the statements were important not for their truth, but for their effect on the listener and to explain the context of events during the alleged offense. RP 127-28.

During Garcia's questioning of Wilkins, the court sustained each of the State's objections made when Garcia tried to elicit information about what he said during the incident. See RP 138 (sustained objection to Garcia's statement that he was checking the pantry door), 143 (sustained objection to whether Garcia asked to using bathroom), 145 (objection, without court ruling, to why Wilkins would not leave her home during incident), 164 (sustained objection to whether Garcia said there were people outside with guns); 165 (sustained objection to what Garcia said about

possibility someone else inside home), 165 (sustained objection to what Garcia said about looking though Wilkins' home); 166-67 (sustained objection to whether Garcia thought he had a ride); 171-72 (sustained objection to what Garcia said he was going to do to Wilkins with knife); 177 (sustained objection to whether Garcia made any comments about holding Wilkins for ransom); 177 (objection, without ruling or answer, to whether Garcia said he was going to harm Wilkins).

ER 803(a)(3) permits the admission of a hearsay statement that shows the "declarant's then existing state of mind, emotion, sensation, or physical condition." The state of mind exception allows hearsay statements to show "that the declarant acted in accordance with statements of future intent." State v. Powell, 126 Wn.2d 244, 266, 893 P.2d 615 (1995). Garcia's statements to Wilkins showed his feelings and beliefs existing at the time. ER 803(a)(3). They show whether he acted in accordance with his declared intent, such as whether he threatened to harm Wilkins, tried to use Wilkins as a hostage or shield, or intended to inflict extreme emotional distress during the kidnapping, all of which were elements of kidnapping in the first degree. CP 48. They are additionally pertinent to whether he intended to commit a crime

inside the home, which is an essential element of the charged crime of burglary. CP 44.

Also, Washington has long-endorsed the res gestae theory of admissibility for statements contemporaneous to a charged offense and so connected to it as to illustrate its character. State v. Pugh, 167 Wn.2d 825, 839-40, 225 P.3d 892 (2009). The theory underlying admissibility of statements under the res gestae doctrine is that "'[w]hat is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks." Id. Res gestae evidence is offered to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. Powell, 126 Wn.2d at 263.

Garcia's statements to Wilkins showed his state of mind and his intent, which were necessary aspects of the allegations that he intentionally abducted Wilkins with the intent to use her as a shield or hostage, to facilitate a burglary, or to cause extreme mental distress. CP 7, 48. His statements to Wilkins and their effect on her demonstrated his intent during the incident, but the court both cautioned Garcia against eliciting his statements and sustained almost every objection the State made when defense counsel tried

to elicit what Garcia may have said in the course of the incident. CP 44, 48; RP 122.

Where out-of-court statements should not be considered for their truth, the court may provide a limiting instruction to alleviate the potential for misuse of the evidence. See State v. Hartzell, 156 Wn.App. 918, 937, 237 P.3d 928 (2010) ("trial court *must* give a limiting instruction where evidence is admitted for one purpose but not for another and the party against whom the evidence is admitted asks for a limiting instruction." (emphasis in original); ER 105. Here, the court did not admit relevant statements made during the course of the kidnapping with a limiting instruction, or allow Garcia to elicit statements contemporaneous to the incident critical to completing the story. These restrictions impaired Garcia's ability to contest the specific elements of kidnapping, as further discussed below.

b. The kidnapping allegation rested on unproven alternative means. When the prosecution posits various alternative means by which a jury may convict the accused person of a certain offense and the jury's verdict is silent as to which alternative means its verdict reflects, the evidence must supply sufficient evidence of each alternative. State v. Smith, 159 Wn.2d 778, 783, 155 P.3d

873 (2007); State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). If one of the alternative means presented to the jury is not supported by substantial evidence, the verdict must be vacated unless the reviewing court finds that the verdict could only have been based on the alternative that was supported by substantial evidence. State v. Rivas, 97 Wn.App. 349, 351-52, 984 P.2d 432 (1999), disapproved on other grounds, Smith, 159 Wn.2d at 787. When there is only a general verdict, the reviewing court presumes the error requires reversal. Id. at 353.

To prove kidnapping in the first degree, the prosecution needed to establish Garcia intentionally abducted Wilkins with the intent to serve an additional specified purpose. RCW 9A.40.020(1). The "to convict" instruction for first degree kidnapping offered the jury three alternative purposes for the intentional abduction, requiring the State to prove that Garcia intentionally abducted Wilkins, and he did so with the intent:

> (a) to hold the person as a shield or hostage;
> (b) to facilitate the commission of Burglary in the Second Degree or flight therefrom;
> (c) to inflict extreme mental distress on that person.

CP 48 (Instruction 18). There is insufficient evidence of each alternative of first degree kidnapping.

i. There was no evidence Garcia intended to use Wilkins as a shield or hostage. Using a person as a shield or hostage in the course of a kidnapping is not specifically defined by statute or further explained in Washington case law. As essential elements of a penal statute, they must be strictly construed and narrowly interpreted. See Gilbert, 68 Wn.App. at 382-83.

To find Garcia intended to use Wilkins as a human shield, there would need to be evidence Garcia tried to put Wilkins in the line of fire. See e.g., State v. Canola, 374 A.2d 20, 26 (N.J. 1977) (discussing "shield cases" as those where defendant thrust bystander into line of fire, thereby forcing the person to occupy a place of danger); accord, State v. Stone, 594 P.2d 558 (Ariz. App. 1979) (construing use of person as "shield" in kidnapping to include case where defendant takes officer's gun and hides behind him so that police will not interfere).

While Garcia sought shelter in Wilkins' home, he did not hide behind her. He did not move her to a place where she would be a target. On the contrary, she remained sitting on her sofa throughout the incident while he looked out the windows and doors, sat in a chair, or paced. RP 101, 134, 137, 143. The statute requires using a "person" as a shield, thus indicating that this

means of abduction may not rest on using a person's home as a protective barrier. RCW 9A.40.020(1). Garcia did not thrust Wilkins into a position to endanger her as a human shield. Although Garcia believed people threatening him might be in the vicinity, Wilkins did not hear voices or sounds outside. RP 107, 166. There was no evidence that Garcia's fear of people outside was more than a figment of his imagination and no evidence he intended that Wilkins, and not he, would be the target of the men who might be after him.

Using a person as a hostage in a kidnapping involves holding a person as a pledge that a promise will be kept or terms met by another party. State v. Lyles, 695 S.W.2d 945, 946 (Mo.App. 1985); see also State v. Crump, 484 P.2d 329, 334 (N.M. 1971) (definition of "hostage" for purpose of kidnapping does not include demands made directly on victim); State v. Moore, 340 S.E.2d 401, 406 (N.C. 1986) (adopting definition of hostage for kidnapping from Crump, that victim must be "held to coerce forebearance or performance by a third party, not by the person held.").

Garcia did not try to exchange Wilkins for something of value or use Wilkins as a negotiating pawn. He did not ask anyone

to give him anything in return for Wilkins. The fact that Wilkins may not have felt free to leave indicates she felt restrained, not that she was being held hostage as contemplated to commit first degree kidnapping.

The paucity of the prosecutor's argument in support of this alternative shows its far-fetched nature. In his closing argument, he meekly offered that "[t]he evidence can also support that, frankly, he was using her potentially as a shield or a hostage." RP 392. The facts the prosecutor mustered to show this "potential" basis for first degree kidnapping was that Garcia told Wilkins about "the group of mystery men out there that were looking for him that were hiding outside." Id. He argued that Garcia said, "there are these men outside and they're going to get after me." RP 392.

Tellingly, by pointing to Garcia's statements that he feared men outside were trying to get him, the prosecutor essentially conceded that Garcia was not trying to put Wilkins in harm's way. RP 392. The men were not after Wilkins and Garcia was not trying to exchange Wilkins for anything else. Garcia was seeking shelter in Wilkins' home, which is not the equivalent of using Wilkins as a personal shield or hostage. This means of first degree kidnapping

was not supported by the evidence, even though the prosecutor encouraged the jury to convict him based on it. RP 392.

ii. Garcia was not convicted of burglary related to the kidnapping and did not intend to abduct Wilkins to facilitate a burglary. The to-convict instruction also directed the jury it could convict Garcia of first degree kidnapping by finding he abducted Wilkins with the intent to facilitate a second degree burglary or flight therefrom. CP 48. The instruction did not explain which burglary it should consider Garcia was trying to facilitate. Id.

Garcia was charged with two separate counts of burglary. CP 6-7. Count one charged second degree burglary involving the Valero gas station store, and count two charged first degree burglary alleging he burglarized Wilkins' home. CP 6-7. The jury convicted Garcia of second degree burglary for the Valero gas station. CP 37; CP 44. But the jury found him not guilty of the other burglary charge. CP 59, 60. It acquitted him of both first degree burglary and the lesser offense of second degree burglary. Id.

However, the precise nature of the jury's verdict is complicated by ambiguity in the to-convict instructions. Instruction 7, the to-convict instruction for second degree burglary, explicitly

pertained to the Valero gas station as the building burglarized. CP 37. But Instruction 14, the to-convict instruction for first degree burglary, and Instruction 15, directing the jury to consider the lesser offenses of second degree burglary and criminal trespass, only asked the jury to decide whether Garcia unlawfully entered "a building." CP 44-45 (Instructions 14, 15). Instructions 14 and 15 did not specify which building the jury should consider. CP 44.

In any event, the jury acquitted Garcia of the burglary allegation charged in Instructions 14 and 15, both as a first or second degree burglary. CP 58, 59 (Verdict Forms C, D). Assuming for the purpose of argument that these instructions related to Wilkins' home, they show that the jury did not find Garcia intended to steal property from Wilkins's home or to commit another crime therein, and thus, there was not substantial evidence Garcia intentionally abducted Wilkins for the purpose of facilitating a burglary as required for first degree kidnapping.

The to-convict instruction for kidnapping in the first degree did not explain which burglary the jury should consider that Garcia intended to facilitate. CP 48. In his closing argument, the prosecutor mentioned that Garcia was facilitating his flight from the Valero gas station. RP 391. This argument of the prosecutor was

not a legal instruction binding the jury's consideration of the elements of the offense. CP 30 (Instruction 1: "The law is contained in my instructions to you. You must disregard any remark, statement, or argument thát is not supported by the evidence or the law in my instructions.").

As the Washington Supreme Court has recognized, the court's instructions define the elements of the offenses and facts at issue, not the arguments of counsel. In re Detention of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010). "A jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995).This Court cannot speculate as to the basis of the jury's verdict. Williams-Walker, 168 Wn.2d at 898; see also State v. Kier, 164 Wn.2d 798, 811, 194 P.3d 212 (2008) (when verdict does not specify the underlying act relied on, it is ambiguous and principles of lenity require the ambiguity to be construed in favor of the accused).

Because the jury was not instructed to decide whether Garcia's intent was to further the Valero gas station burglary, and the jury apparently acquitted Garcia of burglarizing Wilkins's home,

the "facilitate a burglary" alternative means of first degree kidnapping was not sufficiently proven.

Additionally, the jury's verdict regarding the Valero gas station rested on its misunderstanding of the requirements of a burglary, as discussed above. If the alleged facilitating of burglary required for kidnapping may have rested on separate acts of burglary, juror unanimity would be required. Kitchen, 110 Wn.2d at 409. The jury did not provide a special verdict form explaining which alternative means it rested its conviction for first degree kidnapping upon. The allegation that Garcia's abduction of Wilkins was intended to facilitate a burglary was not supported by substantial evidence or by a unanimous jury verdict.

iii. Garcia did not intend to inflict extreme mental distress upon Wilkins. The third alternative means for first degree kidnapping, the intent to inflict extreme mental distress, must also be construed narrowly by giving effect to each term. CP 48; RCW 9A.40.020(1). The intentional infliction of "extreme" distress requires an emotional impact, purposefully committed, that is above and beyond the inherently upsetting nature of being the victim of a crime. See State v. Dyson, 74 Wn.App. 237, 247, 872

P.2d 115, rev. denied, 125 Wn.2d 1005 (1994) (legislature limits scope of statute by requiring "extreme" impact and specific intent).

While Wilkins was justifiably surprised and frightened by Garcia's unexpected presence in her home, there is no evidence Garcia intended to cause her extreme distress. Garcia testified to the opposite. He believed he was acting carefully in trying not to upset Wilkins. RP 306. Wilkins agreed that she tried to seem calm as a way to keep Garcia calm, and tried to help him "problem solve." RP 172, 176. He interpreted her calm demeanor and her interest in talking to him about his life and her family as an indication she wanted to aid him, not that he was upsetting her. RP 313-14. She seemed "friendly and understanding." RP 321. When he left, she gave him a necklace that she had been wearing, said "Merry Christmas," and hugged him. RP 109, 141. In a letter written to the sentencing court, Wilkins said she thought Garcia was just as disturbed and upset during the event as she was, but Garcia was unable to fully explore his interactions with Wilkins during the incident due to the court's restrictions on his cross-examination. Supp. CP __, sub. no. 56.

The State did not claim Garcia intended to cause Wilkins extreme mental distress, but instead focused on Wilkins' subtly

hidden feelings of fear during the encounter. It may well have been a "terrible, traumatic experience" for Wilkins, but the statute requires Garcia to have intended to inflict such extreme trauma. RP 391. There is no evidence that Garcia intended to make Wilkins extremely upset or scared. Substantial evidence does not support this alternative means.

c. The lack of evidence together with the unreasonable restrictions on Garcia's ability to challenge the State's evidence denied Garcia a fair trial. First degree kidnapping requires evidence of an intentional abduction together with another aggravating alternative, as discussed above. The lesser included offense of second degree kidnapping requires an intentional abduction. RCW 9A.40.030.[2] Here, the State failed to prove a valid factor elevating the offense to first degree kidnapping, and this Court may not presume the jury would have convicted him of the offense of second degree kidnapping because the court substantially restricted Garcia's ability to challenge the evidence against him.

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[2] "A person is guilty of kidnapping in the second degree if he or she intentionally abducts another person under circumstances not amounting to kidnapping in the first degree." RCW 9A.40.030(1).

Garcia could not explore the means by which he allegedly restrained Wilkins when he could not elicit what he said to Wilkins, and what Wilkins perceived as his words, during their encounter. Although he testified, Wilkins' testimony about the incident was essential, since the jury might discount his explanation of events based on his interest in minimizing his actions. The court's rulings left him unable to elicit Wilkins' explanation of the lack of force or threats in his behavior during the incident. There is no doubt that Garcia's purpose throughout the encounter was to get a ride away from Wilkins' home but the prosecution objected when he tried to elicit and explore his statements about his purpose.

If Garcia had been able to fully explore his conduct during the incident, he would have been able to cast doubt on whether he committed any kidnapping offense. Because the State did not prove the charged offense by sufficient evidence, the first degree kidnapping conviction must be reversed. The State did not charge or ask the jury to consider a lesser offense and thus, the court may not impose a conviction for a lesser offense.

3. THE COURT IMPROPERLY USED UNRELIABLE ALLEGATIONS FROM OTHER SUSPECTS IN DECADE-OLD POLICE REPORTS TO CATEGORIZE GARCIA'S CRIMINAL HISTORY AS CRIMES OF DISHONESTY

a. A prior burglary conviction is admissible as a crime of dishonesty only when the State can prove, by competent evidence, that the underlying crime intended was a crime of dishonesty. Evidence that a testifying witness has been convicted of a crime is admissible at trial for the purpose of attacking the witness's credibility only if the crime "involved dishonesty or false statement." ER 609(a)(2).

Garcia had pled guilty to one count of burglary in the second degree and a related count of conspiracy to commit burglary in 1999, and the State asked to use these convictions to attack Garcia's credibility when he testified. RP 252, 254. Garcia objected because there was no evidence that the burglaries were crimes of dishonesty. RP 252, 254.

Burglary is not a *per se* crime of dishonesty. State v. Watkins, 61 Wn.App. 552, 556, 811 P.2d 953 (1991). Burglary involves the intent to commit other crimes against people or property. Id. Burglary is considered a crime of dishonesty when it

was based on the intent to commit theft inside a building, because theft is a crime of dishonesty. Id.

To determine whether a burglary was based on a crime of theft admissible under ER 609(a)(2), the court may examine the information and judgment and sentence relating to the prior burglary. Id. at 556 n.4. "Only if those documents unambiguously reveal that defendant's criminal intent was to commit theft would the burglary be admissible." Id.

b. The court relied on unreliable hearsay from perpetrators of a burglary in old police reports to determine Garcia's intent for his two convictions. The court documents from Garcia's prior convictions did not unambiguously reveal that Garcia was convicted of burglary based on the intent to commit theft. RP 254. Garcia did not plead guilty to a burglary with the intent to commit theft. RP 255. The information, judgment and sentence, and statement on plea of guilty contained no admission and no finding that Garcia intended to commit theft. RP 255. Defense counsel noted that even in the probable cause statement "there is nothing about" Garcia's intent "to steal things." RP 255. Defense counsel objected to the court looking at any documents outside the record. RP 256.

Faced with the absence of reliable information unambiguously explaining the factual basis of Garcia's guilty plea, the prosecution presented the trial court with allegations contained in a police report from the prior charges. RP 266-67. In that police report, a juvenile who was arrested for a string of burglaries told the police that his plan was to steal property once inside the building and that "Philsy" was involved. RP 267. The prosecutor agreed that Garcia was not connected to the string of burglaries the juvenile discussed, but claimed that this perpetrator's statements to police should be used to ascertain Garcia's intent because the juvenile claimed Garcia was involved. RP 267. No police report contained a statement from Garcia agreeing that his intent was to steal. RP 268-69.

The trial court relied on State v. Schroeder, 67 Wn.App. 110, 834 P.2d 105 (1992), as authority permitting the court to go beyond the face of the judgment to determine whether a burglary was based on the intent to commit theft. RP 266, 270-71. As Garcia told the court, Schroeder did not suggest that the court should review police reports to determine the basis of a conviction. RP 269, 272. In Schroeder, the court looked at trial testimony of the prior conviction which showed the defendant intended to steal

property and was found in possession of goods stolen from the burglarized home. 67 Wn.App. at 120.

Furthermore, Schroeder cautioned against interpreting its analysis too broadly. Id. at 119. The court explained, "[w]e intend our holding to be a narrow one," and warned against "open-ended examination of the entire record of past proceedings . . . ." Id. (quoting in part, State v. Newton, 109 Wn.2d 69, 79-80, 743 P.2d 254 (1987)).

Here, the court went beyond examining the "record" of past proceedings, and instead relied on unconfirmed allegations contained in police reports. In the context of determining the proof of a prior conviction for sentencing, the State must establish the basis of the conviction "beyond mere allegation." State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). In Mendoza, the court emphasized the need for "facts and information," beyond "bare assertions," proving the existence of criminal history. Id. at 929. The bare assertions of a suspect with unknown motives for talking to the police was the sum of the evidence the court relied on to find Garcia's convictions were based on the intent to steal.

In In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005), the court held that factual comparability analysis

for sentencing is limited to facts that were proved to a trier of fact beyond a reasonable doubt or were admitted or stipulated to by the defendant. Additionally, the Lavery Court held that it is "problematic" to weigh allegations raised in a prior prosecution, because the accused may not have had any incentive to contest them. Id. at 257-58. Similarly, Garcia had no incentive to contest the predicate for his involvement in the alleged burglary, because his guilty plea did not require him to specify his intent. The findings inherent in a prior conviction must rest on facts admitted or stipulated at the time of the conviction, as explained in Lavery.

Allegations from another alleged participant in a crime are notoriously unreliable. See Lilly v. Virginia, 527 U.S. 116, 133-34, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) ("The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule"). No reliable evidence or admissions demonstrated the intended crime underlying Garcia's convictions.

In Watkins, this Court held that the documents that a judge may consider when deciding whether a burglary was based on the intent to commit theft are the information or judgment and sentence. 61 Wn.App. at 556 n.4. Only in the face of

"unambiguous" evidence that the defendant intended to commit theft would the court be able to find a burglary be admissible as a crime of dishonesty. Id.

Here, the information and judgment and sentence do not unambiguously reveal that Garcia intended to commit theft. RP 254. The guilty plea statement does not reveal the intent to commit theft. Even if the probable cause certification could be considered by the court as evidence of the basis of Garcia's conviction, it did not speak to Garcia's intent. The court erroneously found Garcia's two convictions for burglary offenses admissible as crimes of dishonesty. RP 273.

c. The improperly admitted evidence attacking Garcia's credibility affected the outcome of the case. The critical issue for the jury in the case was whether it believed Garcia was honestly explaining his actions and motivations over the course of the evening at issue. Garcia testified in order to explain his actions and motivations. The jury did not convict Garcia of all of the charged offenses, indicating it did not wholly endorse the prosecution's version of events.

In his closing argument, the prosecutor emphasized that Garcia's prior crimes of dishonesty must be used to discount his

testimony. RP 403. The prosecutor argued, "one of the things about credibility is criminal history." RP 403. "He's been convicted of two crimes of dishonesty. So you have to use that in deciding how much credibility you give to Ms. Wilkins, you give to Mr. Garcia." RP 403.

The prosecution told the jury that it must use Garcia's history of dishonesty in deciding Garcia's truthfulness. RP 403. The prosecution's ability to impeach Garcia's explanation of what he did and why was significantly enhanced by the fact of his two convictions for "crimes of dishonesty." This evidence should not have been placed before the jury. Its erroneous admission affected the jury's deliberations and impacted the outcome of a close case resting on Garcia's credibility.

4. THE JURY WAS ERRONEOUSLY INSTRUCTED THAT ITS DEADLY WEAPON ENHANCEMENT VERDICT HAD TO BE UNANIMOUS

a. The court must accurately instruct the jury on the unanimity required for an aggravating circumstance. When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169

Wn.2d 133, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003); State v. Ryan, _ Wn.App. _, 2011 WL 1239796 (2011) . In Bashaw, Goldberg, and Ryan, the jurors were told that their answer in a special verdict form addressing an additional aggravating factor must be unanimous for either a "yes" or "no" answer. Bashaw, 169 Wn.2d at 139; Goldberg, 149 Wn.2d at 894; Ryan, 2011 WL 1239796 at *1. The Supreme Court and this Court held that such an instruction is incorrect, and unanimity is required only when the jury answers "yes."

> The rule from Goldberg[3] then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence.

Bashaw, 169 Wn.2d at 146.

As the Ryan Court explained,

> If the jury cannot unanimously agree that the State has done so, the State has necessarily failed in its burden. To require the jury to be unanimous about the negative—to be unanimous that the State has not met its burden—is to leave the jury without a way to

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[3] In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either "yes" or "no." 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

> express a reasonable doubt on the part of some jurors.

2011 WL 1239796 at *2.

The jury instruction given in Bashaw for the special verdict form told the jurors, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at 139. The Bashaw Court held that jurors need not be unanimous in a special finding. Rather, any jury's less than unanimous verdict "is a final determination that the State has not proved that finding beyond a reasonable doubt." Id. at 145.

Similarly to Bashaw, the trial court told Garcia's jury that their special finding must be unanimous to decide the deadly weapon allegation, either in deciding "yes" or "no." CP 55. The court's instruction directing the jury to consider the special verdict form stated in pertinent part,

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 55 (Instruction 23).

The jury instruction in the case at bar presents the identical error identified in Bashaw and discussed in Ryan. The court erroneously told the jury that they could not vote "no" in the special verdict form unless they were unanimous in finding the State had not proven the aggravating factor contained in the special verdict.

b. The clearly incorrect jury instruction requires reversal of the special verdict. The court in Bashaw characterized the problem as an error in "the procedure by which unanimity would be inappropriately achieved." 169 Wn.2d at 147. This instructional error creates a "flawed deliberative process" and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id.

The Court in Bashaw looked to the example of the deliberative process in Goldberg, where several jurors had initially answered "no" to the special verdict, but after the trial judge told them they must be unanimous, they returned with a "yes" finding on the aggravating factor. Id. Where the trial court improperly insisted on a unanimous determination for a "no" finding, this Court "cannot say with any confidence what might have occurred had the jury been properly instructed," and cannot conclude that the error was harmless beyond a reasonable doubt. Id.

As in Bashaw, the jury was incorrectly informed that their special verdict finding of whether Garcia possessed a deadly weapon must be unanimous. CP 55. Garcia disputed his possession of such a weapon at trial, explaining that he briefly handled the knife as protection against the men outside but never using it in a fashion that was threatening toward Wilkins. RP 302, 306. He had the knife for his own safety. RP 306. This Court may not guess the outcome of the case had the jury been correctly instructed, and thus the special finding imposing additional punishment due to the deadly weapon must be stricken. Bashaw, 169 Wn.2d at 147; Ryan, 2011 WL 1239796, at *3; CP 57.

5. THE TRESPASS CONVICTION DOES NOT REPRESENT A FINDING OF A SEPARATE ACT AND VIOLATES DOUBLE JEOPARDY

It violates double jeopardy for a court to impose punishment for multiple convictions for the same crime. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); U.S. Const. amend. 5; Wash. Const. art. I, § 9. Either by clear jury instructions or unambiguous charging practices, the court needs to ensure the jury's verdict rests on unanimous agreement of separate acts necessary for each conviction. State v. Borsheim, 140 Wn.App.

357, 365, 165 P.3d 417 (2007); see also State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009) ("In 'multiple acts' cases, the jury must unanimously agree as to which incident constituted the crime charged.").

Additionally, a jury must unanimously agree on the act that underlies a conviction, and this act must be the same one charged in the information. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); State v. Workman, 66 Wash. 292, 294-95, 119 P.2d 751 (1911). When multiple acts are charged that could independently prove one count, the court should explain to the jury that its verdict must be based on a unanimous finding that a certain act was proven beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. An instruction explaining the requirement of unanimity for the underlying act protects juror unanimity. Id.; see State v. Vander Houwen, 163 Wn.2d 25, 37, 177 P.3d 93 (2008) ("In the absence of a unanimity jury instruction, each juror could have convicted Vander Houwen based on different criminal acts").

The State charged Garcia with two counts of burglary, and the court instructed the jury that trespass was a lesser offense of the two burglary charges. CP 6-7; CP 37-39, 44-45. The court did

not instruct the jury that the burglary charges must rest on different acts.

Instruction 7 directed the jury to consider the burglary of the gas station, and Instruction 14 directed the jury to consider whether Garcia committed first degree burglary of "a building." CP 38, 44. Instruction 15 explained that second degree burglary and criminal trespass are lesser offenses of first degree burglary that could be considered by the jury if it did not find first degree burglary proven beyond a reasonable doubt, but the court did not give separate to-convict instructions for these lesser offenses. CP 45.

The verdict forms referred to count one and count two, but the jury never received the charging document. The instructions did not explain what count one or count two were and the charging document was not placed into evidence.

The jury convicted Garcia of criminal trespass and found him not guilty of first or second degree burglary. CP 58-60. Nowhere did the jury declare that this trespass finding rested on a determination that Garcia unlawfully entered a building other than the Valero gas station.

Absent a clear finding that the State prove Garcia unlawfully entered two different buildings, the conviction of criminal trespass

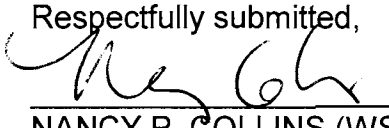
violates double jeopardy. Williams-Walker, 167 Wn.2d at 901-02. The jury's verdict does not unambiguously explain that it found Garcia unlawfully entered Wilkins' home. It reflects only its finding that he entered a building. CP 44-45. This is duplicative of the building described in the first count involving the gas station. See State v. Berg, 147 Wn.App. 923, 936-37, 198 P.3d 529 (2009) (when same crime charged in two counts, failure to include "separate and distinct" language violates doubt jeopardy). Because the jury instructions did not tell the jury it must separately find Garcia unlawfully entered two buildings, the punishments imposed for criminal trespass and second degree burglary violate double jeopardy. Id.

F. CONCLUSION.

For the foregoing reasons, Mr. Garcia respectfully requests this Court reverse his convictions and the improperly imposed deadly weapon enhancement.

DATED this 26th day of May 2011.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65836-1-I
v.	)	
	)	
PHILLIP GARCIA,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MAY, 2011, 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:

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2011 MAY 26 PM 4:16

[X]	RICHARD WEYRICH, DPA ERIK PEDERSEN, DPA SKAGIT COUNTY PROSECUTOR'S OFFICE COURTHOUSE ANNEX 605 S THIRD ST. MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	PHILLIP GARCIA 763209 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MAY, 2011.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711