

65836-1

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No. 65836-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP GARCIA,

Appellant.

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

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
SUPERIOR COURT
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A. ARGUMENT.

1. THE STATE CONCEDES THE PROSECUTOR SOUGHT A BURGLARY CONVICTION BASED ON AN INCORRECT THEORY BUT IMPROPERLY URGES THIS COURT TO IGNORE THAT ERROR

The prosecution does not defend the State's closing argument urging the jury to convict Garcia of burglary based on the intent to commit the crime of breaking a window outside the building. Instead, it agrees that "this portion of the prosecutor's argument was in error," but tries to minimize the effect of the prosecution's misstatement of the law, claiming it was a secondary theory. Resp. Brf. at 22. By encouraging the jury to convict Garcia of burglary based on the intent to break a window while standing outside the building, rather than the intent to commit a crime once inside the building, the prosecutor misrepresented the law and sought a conviction on an improper basis.

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).

Here, the prosecutor told the jury that its burglary verdict could rest on either of two theories: “either by having the intent to steal something when he went in, when that alarm went off, or he intended to commit a crime by throwing the brick through the window.” RP 401. There is no factual dispute that Garcia was outside the building when he threw the brick through the window. The videotape showed him standing outside the building. RP 25. He broke the glass before he entered, not while entering and not while inside. RP 27.

Throwing a brick through a window does not constitute a burglary, even when coupled with an unlawful entry, as the State now acknowledges. The offense is committed only when a person intends to commit a crime against person or property once inside the building, following an unlawful entry. RCW 9A.52.030(1). The prosecutor sought a verdict based on a misrepresentation of the law and the State cannot wish it away by pretending it was not really part of the argument to the jury.

The only counterargument the prosecution offers on appeal is that Garcia did not object. Resp. Brf. at 25. But Garcia had already argued to the court that the burglary could not be predicated on a crime committed outside the building and the court

rejected that argument. RP 243-46. The court ruled that committing a crime the enables you to enter sufficed. RP 244. The court said that the crime committed as the entry process would prove that Garcia intended to commit a crime as required for burglary. RP 245-46. Accordingly, the court had sanctioned the argument that the State now concedes was erroneous and further objection would have been futile because it would not have cured the error given the court's sanctioning of this argument.

Furthermore, the second theory of burglary, based on the notion Garcia intended to commit a crime inside the building, rested on a thin reed of speculation and the State misrepresents those facts on appeal. The prosecution claims that the video showed Garcia "fled when the alarm was tripped." Resp. Brf. at 19. But the gas station's security video had no audio; it was simply frames from various surveillance cameras inside and outside the building. RP 23, 25-26. The cameras are activated by motion. RP 23, 26-27. The film does not indicate what Garcia heard or when the alarm sounded. It also does not depict Garcia fleeing. The gas station owner described the security camera footage showing Garcia as follows: "I see him enter, as we did right there, and turn around

and walk back out. He was nowhere near the register.” RP 27.

This was the only footage that captured Garcia inside the store. Id.

His entry into the building coupled with his exit therefrom does not prove he intended to commit a crime therein. He took nothing and disturbed nothing inside. RP 27. He explained that he was looking for help and in his confused, panicked state, he thought someone might come and help him once he broke a window. His descriptions of his actions are consistent with the security video. RP 27, 290-91. He waited outside and then he realized the folly of that expectation when it was too late to turn back the clock, so he left. RP 292-93. But entering a building by an illegal means, without showing the intent to commit a crime inside, does not amount to a burglary. The conviction must be reversed due to the legally incorrect theory of prosecution and it must be dismissed based on the insufficient evidence.

2. THE KIDNAPPING CLAIM WAS UNPROVEN
AND GARCIA'S DEFENSE HAMPERED BY
THE EXCLUSION OF EVIDENCE ABOUT
THE INCIDENT ITSELF

a. Evidence about the charged incident cannot be excluded by claiming it is "self-serving." The court prohibited Garcia from eliciting his statements to the complaining witness during the alleged kidnapping, both in a pretrial ruling and during the trial, as discussed in Garcia's Opening Brief, at 21-23. What Garcia said while inside Wilkins' home went to the heart of the charged crime, including whether Garcia threatened Juliana Wilkins, whether he intentionally made her feel that she was not free to leave, whether he inflicted extreme emotional distress, and whether he intended to use her as a hostage.

The prosecution's understanding of rules pertaining to "self-serving hearsay" is so broad that it insists the court could have excluded even Garcia's own testimony about what he said to Wilkins during the incident. Resp. Brf. at 33. It asserts that the court had authority to prohibit Garcia from testifying about what he said in his encounter with Wilkins under ER 801(d)(2). Id. at 32-33. Because the court let Garcia testify about what he said to Wilkins, the State claims he was able to "explain what occurred." Id. at 33.

The prosecution's argument would read the right to present a defense out of existence. When a trial judge prohibits an accused person from eliciting relevant evidence, the judge may effectively preclude the defendant from presenting his or her defense. State v Jones, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Although evidence that a defendant seeks to introduce must be minimally relevant to a defense, the threshold for relevant evidence is a low one. Jones, 168 Wn.2d at 680; State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); ER 401. Moreover, where evidence is relevant to a theory of defense, the court may prohibit its admission only where it is of a character that undermines the fairness of the trial. Darden, 145 Wn.2d at 621. The State bears the burden of showing that the evidence is "so prejudicial as to disrupt the fact-finding process at trial." Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). When evidence is of high probative value, "it appears [that] no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." Id. Evidentiary rules cannot be used to exclude "crucial evidence relevant to the central contention of a valid defense." State v. Young, 48 Wn.App. 406, 413, 739 P.2d 1170 (1987).

As Jones demonstrates, the trial court may not prohibit an accused person from presenting the complete story of what happened during the charged crime. In Jones, the court reversed a rape conviction because the defendant was precluded from introducing evidence that the incident occurred during an “all-night drug-induced sex party.” 168 Wn.2d at 721. The trial judge had barred Jones from both cross-examining the complainant as well as him from testifying that the complainant used drugs and engaged in consensual sex with Jones and two others during the incident. Id. The trial judge believed the evidence attacked the complainant’s credibility in violation of the rape shield statute. Id. at 717-18. Because the “sex party evidence” was Jones’ entire defense, the Supreme Court held that it “could not be of higher probative value” and thus, could not be barred by concerns of prejudice. Id. at 724.

Likewise, Garcia’s defense was that he sought refuge and aid from Wilkins, but never intended to make her free that he was holding her against her will. Garcia needed to elicit what he said during the course of the incident in order to demonstrate his intent at the time of the incident and thus effectively present his defense.

The State's argument also reads ER 106 out of existence.¹

Under the rule of completeness,

Where one party has introduced part of a conversation[,] the opposing party is entitled to introduce the balance thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved. This is true though the evidence might have been inadmissible in the first place.

State v. West, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967).

Here, the State introduced Wilkins' testimony that Garcia surprised her in her home and stayed there, while holding a knife, for two hours. But the court refused to let Garcia elicit what he said to Wilkins while he was in her home.

The substance of what Garcia wanted to elicit is not a mystery, as the State's brief implies, because he asked numerous questions and the court sustained his objections. See Opening Brf. at 22-23. These unanswered, proffered, questions illustrate that Garcia wanted to show that he told Wilkins he was afraid, he needed a ride, he made continual efforts to find someone to give

¹ ER 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, ... which ought in fairness to be considered contemporaneously with it.

him a ride, and they had lengthy conversations in which he never threatened her or indicated he might harm her. Id.

The fact that Garcia testified does not cure the error. His self-interest in the outcome would give the jury a reasoned basis to discount his testimony, making Wilkins's testimony about what happened far more pertinent and persuasive. He was unable to meaningfully and effectively present a defense when he could not ask the complaining witness about what he said when he was alleging making her feel that she was being restrained, was purportedly using Wilkins as a shield or hostage, or was showing his intent to inflict extreme emotional distress. He could not rebut the charged crime without asking Wilkins about what he said to her during the crime itself.

b. The alternative means of first degree kidnapping were unproven. The State offered three alternative means of kidnapping in the first degree and the verdict was silent as to which alternative. Therefore, 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). In fact, the evidence does not support any of the alternative means. Because the jury rendered no express finding that Garcia was guilty of a lesser offense and was not “explicitly instructed” to find him guilty of a lesser crime, the cause cannot be remanded for sentencing on second degree kidnapping. State v. Green, 94 Wn.2d 216, 234-35, 616 P.2d 628 (1980).

i. There was no evidence Garcia held Wilkins with the intent to use her as a shield or hostage. The prosecution offers no relevant case law explaining how Garcia demonstrated the intent to use Wilkins as a shield or hostage. It agrees that in this context, “shield” means using a person as a human shield, but it offers a meager contention that the intent to use a person as a shield could be inferred by Garcia’s agitated state and by showing her a knife that he had to fend off any potential assailants. Resp. Bf. at 37-38. This theory is not only entirely speculative, it is implausible and unreasonable.

In closing argument, the prosecutor offered no theory under which Garcia showed an intent to use Wilkins as a shield or hostage, but merely claimed Garcia was using Wilkins’s house to hide. See RP 392. As the State now appears to concede, “shield” requires an intent to use a human shield and “hostage” requires an

intent to negotiate a benefit by using a person, and neither scenario was offered by the State. This alternative means of first degree kidnapping was not proven by competent evidence.

ii. The intent to facilitate a burglary fails as the basis of first degree kidnapping based on Garcia's acquittal of burglary, the lack of express finding by the jury explaining what burglary it considered, and the incorrect legal explanation of burglary by the prosecutor. The State asserts that the jury "would not have" used the alleged burglary of Wilkins' home as the basis of this alternative means, because it found Garcia not guilty of first or second degree burglary relating to Wilkins' home. Resp. Brf. at 38 n.3; CP 56, 59. Thus, the State contends that the jury must have thought Garcia was trying to avoid arrest on the burglary of the gas station by hiding in Wilkins' home and therefore the kidnapping occurred with the intent to facilitate that burglary.

There are numerous problems with this interpretation of the jury's verdict. First, the jury's verdict does not explain that it made such a finding. Garcia was charged with two different burglaries and the to-convict instruction did not explain which burglary the jury should consider Garcia was trying to facilitate in conjunction with kidnapping. CP 48. The jury was never instructed to unanimously

agree upon which burglary. It is impermissibly speculative to guess at the meaning of the jury's verdict. See e.g., Green, 94 Wn.2d at 235 (when it is "impossible to know" the basis of jury's verdict without explicit finding, court refuses to speculate about what jury found).

Second, the jury did not convict Garcia of first or second degree burglary, presumably relating to Wilkins' home,² and rightly so because there was no evidence he intended to commit a crime therein. CP 56, 59. Yet without any instruction or finding by the jury, the court cannot know whether jurors relied on the alleged intent to facilitate a burglary or which potential burglary jurors may have had in mind.

The State did not stake its case on a specific allegation that Garcia intended to facilitate the gas station burglary. The court did not instruct the jury to consider only the Valero gas station allegation. The prosecutor made an incoherent argument about the need to find "facilitating, and that's facilitation," which referenced the gas station but it did not tell the jury that the

unlawful entry into Wilkins' home could not be the burglary underlying the kidnapping allegation. RP 392.

Finally, the jury's finding of an intent to facilitate burglary of the gas station is tainted by the prosecution's misleading arguments about what constitutes burglary in the scenario of a damaged window outside a building coupled with an entry without any crime being committed inside, as discussed *supra*. The jury was given a false impression of what constituted burglary of the gas station. Given the ambiguous jury instructions on which burglary allegation to consider, the jury's failure to convict Garcia of burglary related to Wilkins' home, the lack of information explaining that the jury's verdict rested on a unanimous finding that he intended to facilitate the alleged burglary of the gas station, and the lack of evidence supporting that burglary, this alternative means of first degree kidnapping cannot stand.

iii. The fear experienced by Wilkins does not meet the elements of the intent to inflict extreme emotional distress. The focus of this alternative means is not on how Wilkins

² Because the to-convict instruction for first degree burglary referred only to "a building" and not Wilkins's home, and there was no to-convict instruction for second degree burglary, the jury's understanding of the factual basis of this count is impossible to know, as discussed in Garcia's Opening Brief, at 48-50, and *infra*,

experienced the event, but what Garcia intended by his actions. CP 48; RCW 9A.40.020(1). There is no evidence Garcia intended to terrify Wilkins or cause her extreme emotional distress. He perceived her willingness to engage in conversation as evidence that she understood his plight and wanted to help. RP 306, 313-14, 321. He never believed that he was upsetting her. Id. The prosecutor encouraged the jury to find this prong of kidnapping based on how Wilkins felt, disregarding the essential requirement that Garcia's intent to cause such harm is the necessary inquiry. RP 391. No evidence showed Garcia's intent to inflict such great distress upon Wilkins. This means of first degree kidnapping is unsupported by the record.

The State's failure to prove any of the alternative means of first degree kidnapping requires reversal of the conviction. Green, 94 Wn.2d at 234-35.

at 16.

3. THE IMPROPERLY ADMITTED CRIMES OF
"DISHONESTY" WERE USED BY THE STATE
TO DISCREDIT GARCIA'S TESTIMONY
AFTER THE COURT IMPROPERLY RULED
THIS EVIDENCE WAS ADMISSIBLE

The prosecution never addresses the substantive argument in Garcia's Opening Brief – the court erred by relying on old police reports that repeated a statement from another suspect as the basis to deem Garcia's prior burglary convictions crimes of dishonesty. By its wholesale avoidance of this legal issue, the State appears to concede the error.

Instead it claims "waiver" by Garcia, but it flagrantly misstates the law governing Garcia's ability to preemptively offer testimony after the court ruled that the testimony was admissible over his objection. Garcia admitted his convictions when testifying, but only because he was forced to by the court's ruling admitting that evidence and his need to reduce the risk the jury discounted his testimony further by thinking he was hiding this information from them when the prosecutor elicited it.

Dismayingly, the prosecution misleads the Court on the pertinent law. It first cites a case where the defendant never testified, State v Mezquia, 129 Wn.App. 118, 127-18, 118 P.3d 378

(2005), to show Garcia did not preserve the issue. Garcia testified so this doctrine has no application.

Then it cites cases where the defendant offered the information about prior convictions of his own accord, State v. Hultenschmidt, 87 Wn.2d 212, 215, 550 P.2d 1155 (1976) and State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). But in Hultenschmidt, the defendants admitted their prior convictions while testifying and without previously objecting to their admission. 87 Wn.2d at 213-14. In Renfro, the court had ruled details about a prior conviction inadmissible, but reversed that ruling after the defendant testified about it. 96 Wn.2d at 908-09. These cases are inapposite, and they are contrary to our precedent.

More to the point, in State v. Thang, 145 Wn.2d 630, 648, 41 P.3d 1159 (2002), our Supreme Court recognized,

It has been a long-standing practice for a defendant to mitigate the damaging effect of testimony regarding prior crimes by introducing the conviction during direct evidence, to take the sting out of the evidence.

The court held that a defendant does not waive his objection to the admissibility of prior convictions by preemptively introducing them.

Id. “A defense lawyer who introduces preemptive testimony only after losing a battle to exclude it cannot be said to introduce the

evidence voluntarily.” Id. This objection is not waived and the State’s disingenuous legal analysis should be rejected.

4. THE FLAWED UNANIMITY INSTRUCTION
UNDERMINES THE DEADLY WEAPON
VERDICT

Garcia did not propose the erroneous unanimity instruction and he did not invite the error. He is entitled to raise a manifest error affecting a constitutional right on appeal and that is what he raises. See State v. Ryan, 160 Wn.App. 944, 252 P.3d 895, review granted, 172 Wn.2d 1004 (2011).³ This Court should adhere to its ruling in Ryan.

5. READING PROSPECTIVE JURORS THE
INFORMATION, BEFORE THEY WERE
SELECTED, DOES NOT CURE THE
ERRONEOUS AND CONFUSING JURY
INSTRUCTIONS

In its instructions to the jury, the court told it consider whether Garcia committed burglary of a gas station or of a building, but did not explain what building it was talking about. These instructions did not make the law manifestly apparent to the average juror and did not ensure the jury rested its verdicts on

³ This issue is pending in the Supreme Court, in Ryan and other related cases, and that anticipated ruling will likely control the outcome in this case.

separate offenses. The confusion arose from the critical to-convict instructions, as follows:

(1) Instruction 7 told the jury to consider second degree burglary of the gas station. CP 38. It does not refer to any “count” of the information.

(2) Instruction 14 directed the jury to consider first degree burglary of “a building.” CP 44. It did not specify which building and does not refer to any “count” of the information. The jury found Garcia not guilty of first degree burglary. CP 58.

(3) Instruction 15 said that second degree burglary and criminal trespass are lesser offenses of first degree burglary. CP 45. The court did not give any further instruction regarding the lesser offenses. The jury found Garcia not guilty of second degree burglary but guilty of first degree criminal trespass, presumably for unlawfully entering “a building.” CP 59, 60.

The verdict forms referred to “count 1” and “count 2.” CP 56, 58-60. But the instructions never explained what counts 1 and 2 were.

The State argues this error should be forgiven because the court read the amended information to the prospective jurors at the start of jury selection. 6/7/10RP (amended) 6-8. The process of jury selection occurred after the court read the charging document, thus the prospective jurors did not even know if they would serve on the case at the time they heard the charges. Id. at 8. It is far-fetched to assume each juror recalled that specific information

when construing the instructions during deliberations, and the State offers no legal authority for this interpretation of the scope of the court's instructions to the jury.

While the State urges the court to interpret the verdict to mean criminal trespass verdict referred to Wilkins's home, this scenario is no more plausible than deciding that the verdict related to the entry of the building at the gas station. Garcia argued that he committed a simple trespass of the gas station. RP 415. It is just as likely that the verdict reflects a finding of trespass for the gas station as it does some other building.

Because Garcia argued that he committed trespass and not burglary of any building, his case is nothing like the scenario of State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011). In Mutch, the Supreme Court found the lack of instruction on separate and distinct crimes harmless based on the "rare" circumstances of that multi-count rape case. Id. at 665-66. The holding rests on the fact that the defense did not contest the separate sexual encounters and instead argued each act was consensual. Id. Unlike Mutch, Garcia argued he did not commit burglary but may have committed trespass. RP 415. The lack of instruction on which building he may have unlawfully entered let jurors base their individual verdicts

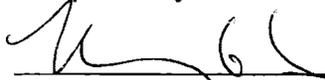
on the same building as the gas station for which the jury found a burglary. Because the jury instructions did not tell the jury it must separately find Garcia unlawfully entered two different buildings, the punishments imposed for criminal trespass and second degree burglary violate double jeopardy.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Garcia respectfully requests this Court reverse the convictions that were not proved to the jury and remand his case for further proceedings.

DATED this 7th day of December 2011.

Respectfully submitted,



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Respondent,)	
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)	
PHILLIP GARCIA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **REPLY 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:

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