

Filed: December 12, 2013

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Respondent on Review,

v.

BRUCE LYNN PIPKIN,

Petitioner on Review.

(CC 200904318; CA A142469; SC S059769)

En Banc

On review from the Court of Appeals.*

Argued and submitted June 13, 2012; resubmitted January 7, 2013.

Susan Fair Drake, Deputy Public Defender, Office of Public Defense Services, Salem, argued the cause and filed the brief for petitioner on review. With her on the brief was Peter Gartlan, Chief Defender.

Jamie K. Contreras, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

KISTLER, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

*On appeal from Lane County Circuit Court, Charles M. Zennache, Judge. 245 Or App 73, 261 P3d 60 (2011).

1 KISTLER, J.

2 Defendant was charged with first-degree burglary, which occurs when a
3 person "enters or remains unlawfully" in a dwelling "with an intent to commit a crime
4 therein." *See* ORS 164.225; ORS 164.215. At trial, defendant argued that the state
5 should be required to elect whether it intended to proceed on the theory that he entered
6 the victim's home unlawfully or on the theory that he remained in her home unlawfully.
7 Alternatively, relying on *State v. Boots*, 308 Or 371, 780 P2d 725 (1989), *cert den*, 510
8 US 1013 (1993), defendant requested an instruction that at least 10 jurors had to agree on
9 one (or both) of those theories. The trial court denied both requests, and the Court of
10 Appeals upheld the trial court's rulings. *State v. Pipkin*, 245 Or App 73, 80, 261 P3d 60
11 (2011). We allowed defendant's petition for review and now affirm the Court of Appeals
12 decision and the trial court's judgment.

13 The indictment in this case alleged that, on or about a specific date,
14 defendant "did unlawfully and knowingly enter or remain" in the victim's home with an
15 intent to commit a crime therein. At trial, the evidence permitted the jury to find that
16 defendant had entered the victim's home unlawfully. It also permitted the jury to find
17 that defendant had entered the victim's home lawfully but had remained there unlawfully
18 after the victim told him to leave. Finally, there was evidence that defendant intended to
19 commit the crime of menacing or harassment when he entered the victim's home and also
20 when he remained there.

21 At the close of the case, defendant asked the trial court to require the state
22 to elect the theory on which it wanted to proceed -- whether he had entered the victim's

1 home unlawfully or whether he had remained there unlawfully. Alternatively, defendant
2 asked the court to instruct the jury that at least 10 of its members had to agree on one (or
3 both) of those theories. The trial court denied both motions. It ruled:

4 "All right. With regard to the phrase 'enter or remain unlawfully,' I'm going
5 to deny the motion to require an election by the state. I'm also going to
6 deny the request for a *Boots* instruction with regard to that. I note that the
7 statute, ORS 164.205(3), defines the phrase 'enter or remain unlawfully' as
8 a single phrase that has its own definition. So it makes no distinction. It is
9 actually one thing. So I don't think there's an election to be made under the
10 law there."

11 Consistently with that ruling, the trial court did not give defendant's requested instruction.
12 Rather, it instructed the jury that, to establish that defendant had committed the crime of
13 first-degree burglary, the state had to prove that defendant "entered or remained
14 unlawfully in the premises described in the charge." The jury found defendant guilty of
15 first-degree burglary, and the trial court entered judgment accordingly.

16 On appeal, the Court of Appeals affirmed the trial court's judgment. It
17 reasoned that, as a matter of legislative intent, entering and remaining unlawfully are two
18 ways of proving a single element of first-degree burglary -- unlawful presence in a
19 dwelling -- and that Article I, section 11, does not require jury concurrence on alternative
20 means of proving a single element. *Pipkin*, 245 Or App at 79-80. We allowed
21 defendant's petition for review to consider the level of factual specificity on which either
22 state statutes or the state constitution requires jury agreement.¹ We have addressed that

¹ In his petition for review, defendant mentions briefly that the trial court should have required the state to elect. His brief on the merits focuses on the jury concurrence issue, and we limit our decision to that issue.

1 issue in *Boots* and three other cases: *State v. King*, 316 Or 437, 852 P2d 190 (1993);
2 *State v. Lotches*, 331 Or 455, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001); and *State*
3 *v. Hale*, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004).² Those four cases
4 address two conceptually distinct situations, and it is helpful to distinguish them.

5 One situation occurs when a statute defines one crime but specifies
6 alternative ways in which that crime can be committed. *Boots* and *King* addressed that
7 situation. In *King*, for example, a statute made it a crime to drive either under the
8 influence of intoxicants or while having a blood alcohol content of .08 or higher, and the
9 question was whether 10 members of the jury had to agree on one of those alternative
10 ways of committing that crime.³ As this court explained in *King*, the answer to that
11 question turns initially on what the legislature intended. 316 Or at 441-42. If the
12 legislature intended that each of those alternatives is a separate statutory element, then
13 jury concurrence is required on each element. *Id.* at 446. If, however, the legislature
14 intended that the alternative ways of committing the crime are different factual ways of
15 proving the same element, the remaining question is whether the constitution prohibits
16 that legislative choice. *See id.* at 447.

² In *State v. Sparks*, 336 Or 298, 316-17, 83 P3d 304 (2004), the court declined to reach as plain error the defendant's unpreserved claim that the jury had to agree unanimously on whether certain predicate crimes occurred in the defendant's bedroom, on a railroad embankment, or at both locations.

³ In criminal cases, at least 10 jurors must agree on the verdict, except for charges of murder, which require unanimous jury agreement. *See* ORS 136.450 (requiring jury agreement in "a jury trial in a criminal action"); Or Const, Art I, § 11 (requiring jury agreement in criminal actions "in circuit court").

1 The other situation arises when the indictment charges a single violation of
2 a crime but the evidence permits the jury to find multiple, separate occurrences of that
3 crime. An indictment, for example, might charge one act of statutory rape, but the
4 evidence may disclose multiple, separate occurrences of statutory rape. *See State v.*
5 *Reyes*, 209 Or 595, 622, 303 P2d 519, 304 P2d 446, 308 P2d 182 (1957) (describing that
6 situation). *Hale* and *Lotches* arose in that context.⁴ Ordinarily, a defendant faced with
7 that problem can ask the state to elect the occurrence on which it wishes to proceed and,
8 in that way, limit the jury's consideration to a single occurrence. *See, e.g., State v. Lee*,
9 202 Or 592, 276 P2d 946 (1954); *State v. Ewing*, 174 Or 487, 496, 149 P2d 765 (1944).
10 Alternatively, *Hale* and *Lotches* hold that a defendant can ask for an instruction requiring
11 jury concurrence on one of the several occurrences that the record discloses.

12 This case presents the first situation. ORS 164.225 specifies that a
13 defendant can commit the crime of first-degree burglary by entering or remaining in a
14 dwelling unlawfully with the intent to commit a crime therein.⁵ In determining whether

⁴ In *Lotches*, the indictment charged the defendant with three counts of aggravated murder, each of which allegedly had been committed in the course of and in furtherance of three separate predicate crimes. 331 Or at 462-63. The *Boots* issue arose because, for each count, the evidence permitted the jury to find multiple occurrences of each predicate crime. *Id.* at 465-69. Similarly, in *Hale*, the indictment charged the defendant with five counts of aggravated murder based on the claims that the defendant had committed the murder to conceal the crime of third-degree sexual abuse and to conceal the perpetrator of that crime. 335 Or at 624-25. The *Boots* issue arose in *Hale* because, for each count, the evidence permitted the jury to find multiple, separate occurrences of the predicate crime of third-degree sexual abuse. *Id.* at 629.

⁵ In this case, defendant did not enter or remain unlawfully in the victim's home on multiple, separate occasions. If he had, this case would also present the situation discussed in *Hale* and *Lotches*.

1 10 jurors must agree on one of those statutory alternatives, we look initially to *Boots* and
2 *King*, the two decisions from this court that addressed a similar issue. Because the parties
3 read *Boots* and *King* differently, we begin by discussing what those cases held. We then
4 apply their holdings to the issue that defendant raises on review.

5 *Boots* was the first decision from this court to consider jury concurrence.
6 See 308 Or at 376 (so stating). To convict the defendant in *Boots* of aggravated murder,
7 the jury had to find that he had committed murder accompanied by at least one of 17
8 aggravating circumstances. The indictment in *Boots* alleged two aggravating
9 circumstances -- that the defendant had committed murder (1) personally and
10 intentionally in the course of and in furtherance of a robbery and (2) to conceal the
11 identities of the perpetrators of a robbery. *Id.* at 374. Proof of either aggravating
12 circumstance was sufficient to elevate the crime of murder to aggravated murder. The
13 trial court instructed the jury in *Boots* that all the jurors need not agree on the same
14 aggravating circumstance. It was sufficient, the instruction provided, if the jurors found
15 that one or the other aggravating circumstance was present.

16 This court reversed. It began from the proposition that, in an aggravated
17 murder case, all the jurors have to agree, at a minimum, on each legislatively defined
18 element of the crime. *Id.* at 377.⁶ That proposition accordingly led to the question

⁶ The court did not identify the basis for that proposition but instead appeared to view it as self-evident. See 308 Or at 377. As explained below, we think the proposition finds its basis in Article I, section 11. We also note that a majority of the Court in *Schad v. Arizona*, 501 US 624, 111 S Ct 2491, 115 L Ed 2d 555 (1991), viewed it as axiomatic that jurors have to agree on each legislatively defined element of a crime. See 501 US at 636 (plurality); *id.* at 654 (White, J., dissenting). The plurality and the

1 whether the legislature intended that each of the 17 aggravating factors is a separate
2 element of the crime of aggravated murder, on which all the jurors must agree, or
3 whether the legislature intended to require proof of a single element -- a generic
4 "aggravating circumstance" -- that could be proved in 17 ways. The state took the latter
5 position in *Boots* and, relying on cases from other states, argued that there was no
6 constitutional infirmity in the legislature's specifying different factual ways of proving a
7 single statutory element.

8 As we read *Boots*, the court concluded that, as a matter of legislative intent,
9 each of the 17 aggravating circumstances was a separate element. Specifically, the court
10 focused on the disparate and unrelated nature of those aggravating circumstances. 308 Or
11 at 373. It then reasoned that the cases on which the state relied were distinguishable
12 either because "the [underlying] statutes [in those cases] differ[ed]" or because those
13 cases "involve[d] issues different from the present case and are not in point." *Id.* at 377-
14 79 and nn 5, 6.⁷ Finally, the court quoted a passage from *United States v. Gipson*, 553
15 F2d 453 (5th Cir 1977), in which the Fifth Circuit had held that alternative statutory
16 means of committing a particular federal crime were too disparate to satisfy the Sixth

dissent in *Schad* disagreed whether the alternative ways of committing the crime in that case were independent elements. *See id.* at 636 (plurality) (state law identified two alternative means of proving a single element); *id.* at 655 (White, J., dissenting) (each alternative means was a separate element).

⁷ Some of the cases on which the state relied involved alternatives that were not as disparate as the 17 aggravating circumstances in ORS 163.095. *See Boots*, 308 Or at 377 n 6. Others involved situations in which one alternative necessarily included the other. *Id.* at 378-79 and n 6.

1 Amendment jury unanimity requirement. *Id.* at 380-81. This court explained that "[t]he
2 *Gipson* opinion comes closer to the present case than do cases like [a Michigan case on
3 which the state relied that considered] statutes defining who besides the primary actor is a
4 principal." *Id.* at 381.

5 Having reviewed those considerations, this court held, "Nothing in ORS
6 163.095 [defining the crime of aggravated murder] or in ORS 136.450 [requiring jury
7 unanimity in murder cases] requires or supports an instruction [permitting jurors to rely
8 on a mix of aggravating circumstances] that, as *Gipson* notes, creates serious
9 constitutional doubts." *Id.* As we interpret that holding, *Boots* reasoned that, as a matter
10 of legislative intent, each aggravating circumstance is a separate element and, as such,
11 requires jury unanimity. The constitution explicitly factored into the court's holding only
12 to the extent that the court interpreted the aggravated murder statute to avoid
13 "constitutional doubts." And, because *Gipson* was applying the Sixth Amendment to the
14 United States Constitution, the reference to "constitutional doubts" in *Boots* appears to
15 refer to federal constitutional doubts, not state constitutional ones. The difference matters
16 because a majority of the United States Supreme Court later disagreed with the rationale
17 in *Gipson*. See *Schad v. Arizona*, 501 US 624, 634-37, 111 S Ct 2491 115 L Ed 2d 555
18 (1991) (plurality) ("We are not persuaded that the *Gipson* approach really answers the
19 question[.]); *id.* at 650-51 (Scalia, J., concurring in part and concurring in the judgment)
20 (looking solely to history to determine what due process requires).

21 Four years later in *King*, this court interpreted *Boots* in the same way that
22 we do today. The court explained in *King* that the "basic rationale of [*Boots*] is that each

1 of the 17 special circumstances or 'aggravating factors' listed in ORS 163.095 is an
2 element of a separate and distinct crime." 316 Or at 441. *King* also recognized, as *Boots*
3 had, that "[e]ach element of each crime must be proven to each juror beyond a reasonable
4 doubt." *Id.* It followed from those two propositions that *Boots* turned on the conclusion
5 that, in specifying alternative means of committing aggravated murder, the legislature
6 had intended to identify separate elements, each of which required jury unanimity.

7 Having interpreted *Boots* that way, the court began its own analysis in *King*
8 by determining the legislature's intent in enacting ORS 813.010, which prohibits driving
9 under the influence of intoxicants (DUII). A person violates that statute if the person
10 drives a vehicle while the person (1) has a blood alcohol content of .08 or higher or
11 (2) "[i]s under the influence of intoxicating liquor." *See King*, 316 Or at 439 n 1 (quoting
12 the DUII statute). As in *Boots*, the question in *King* was whether 10 members of the jury
13 had to agree on one of those alternatives to find the defendant guilty of DUII or whether
14 the jurors could rely on a combination of those alternatives to find a defendant guilty.

15 After analyzing the text, context, and legislative history of the DUII statute,
16 the court concluded in *King* that the legislature had intended to provide two means of
17 proving the same element -- that the person drove while "under the influence of
18 intoxicants." *Id.* at 445-46. One means of proof turned on whether the person was
19 perceptibly impaired; the other turned on the person's blood alcohol content. *Id.* Neither
20 was a separate element.

21 Having concluded that the legislature had intended to specify alternative
22 means of proving a single element of the crime of DUII, the court in *King* turned to

1 whether the DUII statute, so construed, violated the Due Process Clause. *See id.* at 446-
2 47.⁸ In resolving that federal issue, the court found the following passage from the
3 plurality opinion in *Schad* persuasive:

4 "We have never suggested that in returning general verdicts in such cases
5 the jurors should be required to agree upon a single means of commission,
6 any more than the indictments were required to specify one alone. In these
7 cases, as in litigation generally, different jurors may be persuaded by
8 different pieces of evidence, even when they agree upon the bottom line.
9 Plainly there is no general requirement that the jury reach agreement on the
10 preliminary factual issues which underlie the verdict."

11 *Id.* at 447 (quoting the plurality opinion in *Schad*, 501 US at 631-32) (internal quotation
12 marks omitted).

13 As we read *Boots* and *King*, they reaffirm a principle that this court has
14 long recognized. When faced with a claim that the state or federal constitution requires
15 that jurors agree on one of several ways of committing a crime, a court initially should
16 determine the legislature's intent in enacting the underlying criminal statute. If, as in
17 *Boots*, the legislature intended that each alternative means of committing the crime is a
18 separate element, then *Boots* teaches that jury concurrence follows as a result of that
19 legislative determination. Alternatively, if, as in *King*, the legislature intended to provide
20 two ways of proving a single element, then the underlying statute does not require jury
21 concurrence, and the question that remains is whether the legislature's choice violates

⁸ The defendant in *King* had argued that permitting the jury to rely on some combination of the two ways of proving impairment violated Article I, section 11. This court did not discuss that state constitutional argument. Rather, after concluding that the legislature had intended to provide two alternative means of proving a single element, the court turned to the defendant's federal constitutional argument and discussed only that constitutional claim. *See* 316 Or at 446-47.

1 either the state or federal constitution.

2 Following *Boots* and *King*, we begin by examining the legislature's intent
3 in providing that a person commits first-degree burglary if "the person enters or remains
4 unlawfully" in a dwelling with the intent to commit a crime therein. *See* ORS 164.225;
5 ORS 164.215.⁹ ORS 164.205(3) defines the phrase "enter or remain unlawfully" for the
6 purposes of the burglary statutes. That definitional statute provides, in part:

7 "(3) 'Enter or remain unlawfully' means:

8 "(a) To enter or remain in or upon premises when the premises, at
9 the time of such entry or remaining, are not open to the public or when the
10 entrant is not otherwise licensed or privileged to do so[.]"

11 ORS 164.205(3)(a).¹⁰

12 The text of ORS 164.205(3) makes clear that a person can enter private
13 property lawfully but remain there unlawfully if, "at the time of such * * * remaining,"
14 the person no longer has a "licens[e] or privileg[e]" to be there. Put differently, a person
15 who remains unlawfully need not have entered unlawfully. Conversely, a person can
16 enter private property unlawfully. Almost every person who enters private property
17 unlawfully will also remain there unlawfully. To be sure, there may be the odd case in
18 which a person enters private property unlawfully but then receives a license or privilege

⁹ ORS 164.215 provides that a person commits the crime of second-degree burglary "if the person enters or remains unlawfully in a building with intent to commit a crime therein." ORS 164.225 provides that a person commits the crime of first-degree burglary if, among other things, the person violates ORS 164.215 and the building is a dwelling.

¹⁰ ORS 164.205(3) defines "enter or remain unlawfully" as it applies to different types of property. Because this case concerns a home, we quote only the part of that definition that applies to private premises.

1 to remain there. But that would appear to be the exception rather than the rule.

2 In arguing that the legislature intended that entering and remaining
3 unlawfully are separate elements, defendant contends that the legislature used "or" to
4 designate two exclusive alternatives. As we recently explained, however, the legislature
5 may use "or" in either an exclusive or an inclusive sense. *See Burke v. DLCD*, 352 Or
6 428, 435-36, 290 P3d 790 (2012) (describing the exclusive and inclusive uses of "or").
7 Used in an inclusive sense, the word "or" "mean[s] one or the other, *or both*." *Id.*
8 (emphasis in original).¹¹ We infer from the context in which the legislature used "or" in
9 ORS 164.205(3) that it used that word in its inclusive sense; that is, because unlawfully
10 entering on private premises will almost always entail unlawfully remaining there as
11 well, a person can commit burglary by entering unlawfully or by remaining unlawfully or
12 by entering and remaining unlawfully. Put differently, the text of ORS 164.205(3)
13 implies that entering and remaining unlawfully are two alternative and sometimes
14 complementary ways of proving a defendant's unlawful presence in a dwelling that, when
15 accompanied by an intent to commit a crime therein, will constitute first-degree burglary.

16 That is how this court has interpreted the legislative history underlying the
17 definition of "enter or remain unlawfully." *See State v. White*, 341 Or 624, 639-40, 147
18 P3d 313 (2006) (interpreting the legislative history). This court explained in *White* that
19 the legislature expanded the crime of burglary to include not only persons who enter
20 property unlawfully with an intent to commit a crime therein but also persons who enter

¹¹ As *Burke* observed, asking someone whether she wants "cream or sugar" with her coffee does not exclude the possibility of having both. 352 Or at 436.

1 property lawfully but who remain there unlawfully, if they have the requisite criminal
2 intent. *Id.* at 639 (quoting Commentary to the Criminal Law Revision Commission
3 Proposed Oregon Criminal Code, Final Draft and Report § 135 (July 1970)). The court
4 inferred from the legislative history that the legislature did not intend that "a defendant
5 who commits burglary by entering a [dwelling] unlawfully commits an additional,
6 separate violation of the burglary statute by remaining in the dwelling thereafter." *Id.*
7 Rather, the act of remaining unlawfully in a dwelling after unlawfully entering is simply
8 a continuation of the act that gave rise to the crime of first-degree burglary in the first
9 place.¹²

10 Given the text and legislative history of the burglary statute, we agree with
11 the Court of Appeals that the legislature did not intend that entering and remaining
12 unlawfully are separate elements, each of which requires the agreement of 10 jurors in
13 order to find a defendant guilty of first-degree burglary. Rather, entering and remaining
14 unlawfully are interchangeable and often overlapping findings from which the jury can
15 conclude that the defendant's presence in a dwelling was unlawful. As a matter of
16 legislative intent, the trial court correctly declined to instruct the jurors that they had to
17 agree whether defendant unlawfully entered or instead unlawfully remained.

18 The question that remains is whether ORS 164.225, as we have interpreted

¹² The question in *White* was whether the defendant had committed two crimes by entering and remaining unlawfully in a dwelling. Although this case presents a related but separate question, the court's interpretation of the legislative history in *White* bears on our resolution of the issue presented here.

1 it, runs afoul of Article I, section 11, of the Oregon Constitution.¹³ On that issue,
2 defendant argues:

3 "[E]ven if this court decides that 'enters or remains unlawfully' constitutes
4 the single element of unlawful presence, a jury concurrence instruction is
5 still required. Under *Boots*, *Lotches*, and *Hale*, the jury must agree on the
6 facts essential to prove that element."

7 (Emphasis omitted.) Defendant's argument is problematic for two reasons.

8 First, the cases on which defendant relies do not address the issue he raises.
9 Defendant reads *Boots* as resting on Article I, section 11. We read *Boots* as resting
10 primarily on its interpretation of ORS 163.095. *Boots* referred to Article I, section 11,
11 only once. At the beginning of the opinion, the court noted that, because aggravated
12 murder is a capital offense, "[w]e must therefore decide this case in light of the command
13 not only of ORS 136.450 but also of Article I, section 11, of the Oregon Constitution that
14 capital ('first degree') murder requires a unanimous verdict." *Boots*, 308 Or at 374.¹⁴
15 Having said that, the court never returned to Article I, section 11. It never quoted,
16 discussed, or analyzed that provision (or ORS 136.450 for that matter) in the remainder

¹³ Defendant has not raised a federal constitutional claim in this court.

¹⁴ Article I, section 11, provides, in part: "[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict."

When the court wrote *Boots*, ORS 136.450 provided:

"Except as otherwise provided, the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors except in a verdict for murder which shall be unanimous."

ORS 136.450 (1987). That statute has been amended since then but not in ways that bear on its meaning in this context.

1 of its decision. Rather, it based its decision primarily on its interpretation of the
2 aggravated murder statute.

3 To be sure, *Boots* hinted at constitutional doubts that could arise if it
4 interpreted the aggravated murder statute differently. But the constitutional doubts to
5 which *Boots* referred came from *Gipson*, a 1977 Fifth Circuit decision interpreting the
6 Sixth Amendment that the United States Supreme Court later disavowed. In our view,
7 *Gipson* provides a poor basis from which to derive an independent analysis of the Oregon
8 Constitution. Similarly, *Hale* and *Lotches* do little to advance defendant's state
9 constitutional claim. Not only do those cases address a different issue (whether jury
10 concurrence is required when the record discloses multiple separate occurrences of the
11 charged crime), but both *Hale* and *Lotches* simply cited *Boots* without engaging in any
12 further analysis of Article I, section 11. In our view, none of the cases on which
13 defendant bases his Article I, section 11, argument provides support for it.¹⁵

14 Second, in the absence of controlling case law, an analysis of what Article
15 I, section 11, requires in this context must begin with an examination of that provision's
16 text, context, and legislative history. *See State v. Reinke*, 354 Or 98, 106, 309 P3d 1059
17 (2013), *adh'd to as modified on recons*, ___ Or ___, ___ P3d ___ (Dec 12, 2013). On
18 that point, we observe that, as initially adopted, Article I, section 11, did not expressly
19 require that juries be unanimous. Rather, it provided only that, "[i]n all criminal
20 prosecutions, the accused shall have the right to public trial by an impartial jury * * *."

¹⁵ Defendant does not base his Article I, section 11, argument on *King*. As noted, that decision does not address Article I, section 11.

1 Or Const, Art I, § 11 (1857). To be sure, this court assumed early on that jurors in
2 criminal cases had to be unanimous. *See State v. Ivanhoe*, 35 Or 150, 151-53, 57 P 317
3 (1899) (making that assumption in the course of discussing a jury instruction). However,
4 the court did not identify whether its assumption rested solely on the common law or the
5 proposition that the right to a jury recognized in Article I, section 11, incorporated the
6 common law. *See id.*; *cf. Apodaca v. Oregon*, 406 US 404, 408 n 3, 92 S Ct 1628, 32 L
7 Ed 2d 184 (1972) (plurality) (discussing common law and state constitutional sources for
8 jury unanimity).

9 In 1934, the people approved a legislatively referred amendment to
10 Article I, section 11, that for the first time expressly addressed jury concurrence and jury
11 unanimity. That amendment added the following provision to Article I, section 11: "[I]n
12 the circuit court ten members of the jury may render a verdict of guilty or not guilty, save
13 and except a verdict of guilty of first degree murder, which shall be found only by a
14 unanimous verdict." *See Or Laws 1935*, p 5. We consider the same sources in
15 interpreting the 1934 amendment that we consider in interpreting a statute. *See Reinke*,
16 354 Or at 106; *State v. Harrell/Wilson*, 353 Or 247, 254-55, 297 P3d 461 (2013). We
17 look to its text, context, and legislative history, "should [the legislative history] appear
18 useful to our analysis." *See State v. Algeo*, 354 Or 236, 246, 311 P3d 865 (2013)
19 (explaining the methodology for interpreting a referred constitutional amendment).

20 The text of the 1934 amendment requires that at least 10 members of the
21 jury concur in "a verdict of guilty or not guilty." At first blush, that text might suggest
22 that the only thing on which jurors must agree is a defendant's guilt or innocence.

1 However, we do not interpret text in isolation; we also consider the historical context
2 against which that text was enacted. *See Reinke*, 354 Or at 107 (explaining that context
3 includes "the preexisting common law and the statutory framework within which the law
4 was enacted"). In this case, that context provides guidance in two respects. First, a jury's
5 verdict does not simply reflect the jury's impressionistic sense of guilt or innocence.
6 Rather, a verdict is the product of the jurors' application of the court's instructions to the
7 evidence presented at trial. In a criminal case, the court's instructions tell the jury each
8 element that the state must prove in order for the jury to return a verdict of guilty. It
9 follows from that context that the requirement in Article I, section 11, that at least 10
10 jurors must concur in "a verdict of guilty or not guilty" does not mean that those jurors
11 have to agree only on an outcome. Rather, it reflects the proposition that this court
12 posited in *Boots* and reiterated in *King* -- to return a verdict of guilty, the jurors have to
13 agree that the state has proved each legislatively defined element of a crime. *See King*,
14 316 Or at 441 (interpreting *Boots* as holding that "[e]ach element of each crime must be
15 proven to each juror beyond a reasonable doubt"); *Boots*, 308 Or at 377 (stating that
16 proposition).

17 The context bears on the text's meaning in another way. Defendant
18 contends that Article I, section 11, requires that 10 jurors must agree not only on each
19 legislatively defined element of a crime but also on the underlying "facts essential to
20 prove that element." However, the cases that preceded the 1934 amendment to Article I,
21 section 11, cut against that position. As the plurality explained in *Schad*, criminal cases
22 from 1899 to 1932 "reflect a long-established rule of the criminal law that an indictment

1 need not specify which overt act, among several named, was the means by which a crime
2 was committed." 501 US at 631. Additionally, those cases "never suggested that in
3 returning general verdicts in such cases the jurors should be required to agree upon a
4 single means of commission, any more than the indictments were required to specify one
5 alone." *Id.* It followed from those cases, the plurality concluded in *Schad*, that due
6 process does not necessarily require jury unanimity when the legislature has identified
7 alternative means of proving a single element.¹⁶ *Id.*

8 Oregon cases before 1934 point in the same direction. *See State v. Laundry*,
9 103 Or 443, 466, 204 P 958, 206 P 290 (1922) (explaining that, "where a single offense
10 may be committed by several means[,] it may be charged in a single count to have been
11 so committed, if the ways or means are not repugnant"). This court explained as early as
12 1876 that, "[w]hen [a] statute makes it a crime to do this or that, mentioning several
13 things disjunctively, the indictment may, as a general rule, embrace the whole in a single
14 count * * *." *State v. Carr*, 6 Or 133, 134-35 (1876). In Oregon, as in the rest of the
15 country, the jury could return a general verdict on a single count even when the
16 indictment specified alternative means of committing the crime charged in that count.
17 Oregon Code, title XII, ch IX, § 941 (1930); *see* Joel Prentiss Bishop, 1 *New Criminal*
18 *Procedure* § 436 (1895) ("[T]he indictment on [statutes that provide for multiple ways of

¹⁶ The opinion concurring in the judgment did not disagree with either the plurality's description of history or the conclusion it drew from it. *See Schad*, 501 US at 649-50 (Scalia, J., concurring in part and concurring in the judgment). However, the concurring opinion would have relied solely on history to resolve the defendant's due process claim. *Id.*

1 committing a single crime] may allege, in a single count, that the defendant did as many
2 of the forbidden things as the pleader chooses, * * * and it will be established at the trial
3 by proof of any of them.").

4 In *Carr*, for example, the indictment alleged that the defendant had violated
5 a criminal statute that prohibited "deal[ing]," "play[ing]," or "carry[ing] on" a game of
6 faro. 6 Or at 134; *see* General Laws of Oregon, Crim Code, ch IX, title II, § 708, p 443
7 (Deady & Lane 1843-1872) (prohibiting that conduct). The defendant argued that the
8 indictment impermissibly charged more than one offense because dealing and playing
9 were distinct acts. 6 Or at 134. The court disagreed, reasoning:

10 "True, the offense is committed by dealing or playing, but we apprehend
11 that dealing and playing and carrying on a 'game of faro' all at the same
12 time and at one sitting, and between the same parties, would constitute but
13 one offense; and such an indictment may be supported by showing that the
14 defendant has done one of these things."

15 *Id.* at 134-35. As we understand the decision in *Carr*, the question whether the defendant
16 had dealt or played a game of faro was immaterial to the question whether he participated
17 in the game, at least when both acts occurred "at one sitting." The jurors could return a
18 general verdict without regard to whether the jury based its verdict on one act or the other
19 or some combination of both.

20 We finally consider the legislative history of the 1934 amendment to
21 Article I, section 11. In our view, the legislative history is generally neutral on the issue
22 this case presents. The argument in the Voters' Pamphlet in support of the 1934
23 amendment told the voters that "[t]he proposed constitutional amendment is to prevent
24 one or two jurors from controlling the verdict or causing a disagreement." Official

1 Voters' Pamphlet, Special Election, May 18, 1934, 7. The people who argued in favor of
2 the amendment did so primarily as a matter of economy. They reasoned that requiring
3 jury unanimity in criminal cases had led to unnecessary economic and social costs in the
4 form of retrials, congested trial dockets, and compromise verdicts reached to avoid the
5 necessity of a retrial. *Id.* For that reason, the 1934 amendment provided that only 10
6 members of the jury had to concur in the verdict in most criminal cases.

7 That history does not shed any light on the issue that this case presents.
8 The proponents of the 1934 amendment did not seek to limit or expand the issues on
9 which jurors must be unanimous; rather, they sought to avoid the unnecessary economic
10 and social costs that juror unanimity can entail by reducing the number of jurors who
11 must concur. To the extent that the legislative history has any bearing on the issue this
12 case presents, it counsels against requiring jury concurrence on too fine a point.

13 Considering the text, context, and history of the 1934 amendment, we
14 conclude that they cut against extending the requirements of jury concurrence and
15 unanimity beyond the legislatively defined elements of a crime. That is not to say that
16 Article I, section 11, imposes no limit on the legislature's ability to identify alternative
17 means of proving the same element. *Cf. Laundry*, 103 Or 466-75 (noting limits on
18 including multiple means of committing an act in a single count). We need not, however,
19 define those limits to decide this case. As explained above, even though entering and
20 remaining unlawfully can be separate, discrete acts, they often complement each other so
21 that entering unlawfully can shade imperceptibly into remaining unlawfully. These
22 alternative ways of proving unlawful presence in a dwelling are not so repugnant that

1 they could not have been joined in a single count. *See id.* at 466; *Carr*, 6 Or at 134-35.
2 Nor are they the sort of disparate, unrelated acts that raised serious constitutional doubts
3 in *Boots*. Whatever the outer limits of the legislature's authority to specify alternative
4 means of proving the same element may be, the burglary statute falls well within that
5 authority.

6 The decision of Court of Appeals and the judgment of the circuit court are
7 affirmed.