

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP BARRARA GARCIA, JR.,

Appellant.

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No. 65836-1-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: May 29, 2012

Appelwick, J. — Garcia appeals from his conviction for second degree burglary, first degree kidnapping with a deadly weapon enhancement, and first degree criminal trespass. He argues there was insufficient evidence to support his burglary and his kidnapping convictions, that the prosecutor misstated the legal requirements of a burglary conviction, that his prior convictions were improperly admitted, and that his

conviction on the lesser included offense of criminal trespass violated double jeopardy. He contends the trial court gave an improper unanimity instruction in the deadly weapon special verdict form. We vacate the deadly weapon enhancement and remand for resentencing. Any other error was harmless, and we otherwise affirm.

FACTS

In the early morning of December 24, 2009, Phillip Garcia was driving and became concerned that he was being followed. He pulled his car onto some railroad tracks where it got stuck. He abandoned it and made his way on foot to a nearby gas station. Garcia testified he had fallen into a ditch while fleeing, and was wet, nervous, and scared.

The gas station convenience store was closed, and its doors were locked. After banging on the door numerous times, he picked up a cinder block and used it to shatter the glass door. A surveillance video captured his actions there. After breaking the door, he walked inside. Then, upon hearing the alarm, he turned and fled. He testified he had outstanding warrants and realized he did not want to encounter police.

Garcia next went to a nearby home, where he knocked on the door. When the homeowner came to the entrance, Garcia asked for help. The homeowner called 911, but did not open the door. Rather than wait, Garcia left and ran to a nearby trailer park.

At the trailer park, he came upon a residence with a television set on. He stated he found the sliding glass door slightly ajar. Garcia went inside. Juliana Wilkins was asleep on the couch in the living room, in front of the television. Garcia approached her and touched her leg, waking her at 3:55 a.m. She testified she did not know him and was terrified. She also stated that Garcia seemed jumpy and agitated, acting

unpredictably.

Garcia told Wilkins he needed a ride out of the area. She said she could not give him one, but that her husband would be back eventually and perhaps he could do it. Garcia got up and down from a chair in the living room repeatedly to look out the windows and doors. He also picked up a knife from Wilkins' kitchen, which he had in the side pocket of his jeans. He took it out of his pocket and displayed it to Wilkins at one point. She testified that at that point she felt terrified and was afraid she would be killed.

Wilkins tried to remain calm throughout, so as to help keep Garcia calm. She offered him water and cigarettes. Garcia used Wilkins' cell phone and land line to place phone calls, in an attempt to get a ride out of the area. Wilkins told him to call the police, but he did not. At one point, when Wilkins thought Garcia was leaving, she got up and gave him a scapular—a necklace with religious significance. Garcia remained in Wilkins' home for approximately two hours.

Garcia was eventually able to reach his friend Pablo Andrade on the phone. Andrade agreed to pick Garcia up from Wilkins' home. At one point, Wilkins gave him directions to her house. When Andrade arrived and Garcia began to leave, he offered to give Wilkins back her necklace. She told him to keep it. Wilkins said, "Merry Christmas" and gave Garcia a hug. She then called her sister, her husband, and the police.

The State charged Garcia with second degree burglary related to the events at the gas station, and first degree kidnapping and first degree burglary related to the events at Wilkins's house. Garcia was convicted by a jury of the second degree

burglary at the gas station and of first degree kidnapping with a deadly weapon enhancement. The jury found him not guilty of the count of burglary arising from his actions at Wilkins's residence, but found him guilty of the lesser offense of first degree criminal trespass. Garcia received a 173 month standard range sentence, including a 24 months enhancement for the deadly weapon.

DISCUSSION

I. Sufficiency of the Evidence: Burglary

Garcia argues there was insufficient evidence to support the second degree burglary conviction that arose from his actions at the gas station. In order to prove second degree burglary, the State was required to show that Garcia unlawfully entered or unlawfully remained in the gas station store and that he intended to commit a crime against a person or property in the building. Former RCW 9A.52.030(1) (1989), amended by Laws of 2011, ch. 336, § 370 (effective July 22, 2011). The intent required for burglary is intent to commit any crime inside the burglarized premises. State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

When reviewing a party's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

Garcia does not dispute that he unlawfully entered the building. He is on videotape using a cinder block to break the glass in the front door of the convenience store, walking in, and then fleeing. He argues that he had no intention to commit a crime while inside, but intended only to draw attention to himself, out of fear of his

pursuers. He emphasizes that he entered, did not take anything, and walked back out, suggesting that if he had the intent to commit a theft, he would have done so upon gaining entry. But, his testimony was that after he entered the store and tripped the audible alarm, he panicked and ran. Under these facts, viewed in the light most favorable to the State, the jury could have inferred that Garcia entered the store with the intent to commit a theft and was simply dissuaded from doing so by the alarm. State v. Grayson is on point. 48 Wn. App. 667, 739 P.2d 1206 (1987). There, a defendant similarly raised an insufficiency of the evidence argument, based on the fact that after his forceful break-in and upon being confronted by the homeowner, he fled without committing any additional crime inside. Id. at 668-69. The court affirmed Grayson's conviction, stating:

There was sufficient evidence for the jury to rationally infer Mr. Grayson entered the house with the intent to commit a theft therein, given he: (1) knocked on Mr. Beanblossom's door on the morning of the crime, (2) was aware the house was occupied by a person he did not know, (3) forced open the kitchen door, and (4) fled immediately upon being discovered.

Id. at 671. In Garcia's case, just as in Grayson, intent to commit a crime may be inferred from all the facts and circumstances surrounding the break-in. Despite Garcia's assertion to the contrary, the jury could rationally infer that he intended to commit a crime once inside, but chose not to act on that intent once he heard the alarm and became afraid of being discovered. We hold that substantial evidence supports the conviction.

II. Prosecutor's Misstatement of the Legal Elements of Burglary

In a related argument, Garcia contends the prosecutor committed prejudicial error by misrepresenting the law, in stating to the jury that the intention element of

second degree burglary could be satisfied by the act of throwing the brick through the glass door.

The prosecutor's allegedly erroneous statements were:

He intended to commit a crime as he went in there, which is [an]other way of committing Second Degree Burglary, is by actually doing the malicious mischief, throwing the brick through the window. . . .

. . . .

The conclusion you draw from that is he committed that Burglary Second by either 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.

The State concedes it was error to suggest burglary could be completed by intending "to commit a crime by throwing the brick through the window." Burglary required some additional intent to commit a crime within the building. But, the State argues that the prosecutor's error was brief and that it was harmless beyond a reasonable doubt. Those statements were a part of the State's broader central theory that Garcia intended to commit a theft while inside the store. The prosecutor frequently emphasized that Garcia broke in to steal something: "He didn't break in there to be safe. He broke in there to steal something, and that audible alarm spooked him, and he left. He intended to commit a crime when he went in there."

The defendant bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). "Prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Failure to raise an objection at trial constitutes

a waiver of the claimed error unless the remark is so flagrant and ill-intentioned that it resulted in prejudice that could not have been remedied by a curative instruction to the jury. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). We review the comments “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

Here, Garcia did not raise an objection to the prosecutor’s comments at trial. While the comments were a misstatement of the law, they were insubstantial against the backdrop of the prosecutor’s general theory that Garcia intended to commit theft while inside the store. The jury received instructions that correctly stated the elements of second degree burglary, and it was also instructed by the court to “disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.” And, there is no evidence that the jury relied on an incorrect understanding of the law, where the comments were not supported by the jury instructions. The prosecutor’s statement of the law was erroneous, but there is no evidence to suggest that the error was flagrant or ill-intentioned. We hold that the misstatement did not result in prejudice to Garcia’s case, and was thus harmless error.

III. Exclusion of Wilkins’ Testimony as Hearsay

Garcia argues the trial court erroneously impaired his ability to challenge the State’s kidnapping charge by ruling that he could not ask Wilkins about statements he had made to her while inside her house. He argues on appeal that there is an applicable hearsay exception that makes his statements, as recounted by Wilkins, admissible.

ER 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Hearsay is generally inadmissible, unless there is an applicable exception. ER 802. Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay. State v. Collins, 76 Wn. App. 496, 499, 886 P.2d 243 (1995).

This court reviews a trial court’s decision to admit or exclude evidence at trial under an abuse of discretion standard. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Abuse of discretion will be found only on a clear showing that the trial court’s exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or made for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, concerned that Garcia would be allowed to establish his claims about the event without taking the stand to testify himself, the State filed a motion in limine to exclude Wilkins’s testimony about statements he had made to her. The trial court made a provisional ruling that Wilkins’s testimony about those statements would constitute hearsay, but did not make a complete ruling, stating it would deal with such testimony objection by objection. During Garcia’s cross-examination of Wilkins, the trial court sustained some of the State’s objections, but not all of them. For example, as Garcia’s counsel was asking Wilkins about when Garcia awoke her, he asked, “[D]id he say anything to you?” The State objected and the trial court sustained the objection. The trial court sustained several other objections raised by the State, including: to a

question about whether Garcia had asked her if he could use her bathroom; to Wilkins's testimony that Garcia "said he was going to go check the door by the pantry"; and to questions about whether Garcia said he was going to use the knife on Wilkins or hold her for ransom. The trial court also found that the content of a phone call Garcia made to Wilkins an hour after leaving her house was inadmissible.

On the other hand, Wilkins was allowed to testify that Garcia asked for help, and that he told her he was afraid someone was outside trying to kill him. The State originally objected to this, but withdrew the objection. Over the State's objection, the trial court also admitted Wilkins' testimony that Garcia had asked her for a ride from the start. And, Garcia was able to elicit testimony from Wilkins that she was afraid to go outside after he had left, not because she was afraid he was still there but because she was afraid that others were outside. The trial court recognized that some of this evidence was not hearsay.

When the matter of the State's sustained hearsay objections came up the following day, the trial court explained its reasoning, suggesting it believed Garcia was attempting to elicit those statements to prove the truth of the matter asserted:

I told you at sidebar that you could ask general questions, like were any threats made

I did not want specific words stated. The prosecution didn't want specific words stated by him coming in through her testimony because those are hearsay, and in many cases, self-serving hearsay [at] that, although, perhaps offered for a different reason, for example, his state of mind, the case law that I read said that if - - the only real basis for offering those is to prove that they're true, then it's really not coming in for state of mind but for actually advocating a position that he was taking.

For example, that someone was chasing him. . . . When they're really only being offered to prove the truth of the matter asserted therein, they're

not really being offered from a logical sense to show his state of mind.

....

So any statements offered by another witness to say what someone else said are hearsay, and they're simply not allowed under our Court Rules, except for very narrow exceptions. But certain hearsay statements did come in. That didn't open the door to all hearsay statements.

Garcia now argues ER 803(a)(3) permits the admission of his hearsay statements. Under that rule, hearsay is admissible if it is “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).” ER 803(a)(3). He suggests his statements to Wilkins should be admissible, because they showed his feelings and beliefs. But, he never raised this argument below, either when discussing the State’s motion in limine or at the moment the trial court sustained the State’s objections. His failure to contest the trial court’s exclusion of hearsay evidence constitutes a waiver of this argument on appeal. See Thomas, 150 Wn.2d at 859. Further, Garcia has not made a record about what Wilkins would have testified to, absent the sustained objections. Where no such record exists, an appellate court cannot evaluate whether those statements would have had any impact on the case. “The general rule is also that in order to obtain appellate review of a trial court action excluding evidence, there must be an offer of proof made.” State v. Vargas, 25 Wn. App. 809, 816-17, 610 P.2d 1 (1980). Here, the trial court did allow certain hearsay statements to come in. And, Garcia ended up taking the stand himself, where he was able to testify about the statements he made to Wilkins during that period. We hold that the trial court did not abuse its discretion in sustaining the State’s hearsay objections.¹

IV. Sufficiency of the Evidence: Kidnapping

Garcia next argues there was insufficient evidence to support his conviction for kidnapping in the first degree. As addressed above, when reviewing a party's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, and ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Engel, 166 Wn.2d at 576.

The jury instruction provided, in pertinent part:

To convict the defendant of the crime of Kidnapping in the First Degree, each of the following three elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 24, 2009, the defendant intentionally abducted Juliana Wilkins,
- (2) That the defendant abducted that person with intent
 - (a) to hold the person as a shield or hostage, or
 - (b) to facilitate the commission of Burglary in the Second Degree or flight thereafter, or
 - (c) to inflict extreme mental distress on that person
- (3) That any of these acts occurred in the State of Washington.

See RCW 9A.40.020. Garcia does not dispute the first element, that he intentionally abducted Wilkins. But, he argues the State failed to prove the three alternative means under the second element. Because the State did not specify which of these means it was relying on in its theory of the case, and because the jury's verdict was similarly

¹ Garcia also suggests his statements should have been admissible under the *res gestae* theory of admissibility for statements contemporaneous to a charged offense. He relies on State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009). But, “[r]es gestae statements ‘raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design.’” Id. at 837-38 (quoting, Heg v. Mullen, 115 Wash. 252, 256, 197 P. 516 (1921)). Garcia never argued, at either trial or here on appeal, that his statements should have been admitted as excited utterances, nor are they likely to qualify for that category.

silent, the State's evidence must be sufficient to support each alternative. See State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). In reviewing alternative means cases, the court must determine whether a rational trier of fact *could* have found each means of committing the crime proved beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988).

A. Hold the Person as a Shield or Hostage

The language in the jury instruction, "to hold the person as a shield or hostage," derives from the first degree kidnapping statute, RCW 9A.40.020. The statute provides no further definition of shield or hostage. Neither party found Washington cases interpreting those terms, though both cite to cases from other states suggesting the statutory requirement is satisfied where a defendant puts a bystander into a place of danger or a line of fire. State v. Canola, 73 N.J. 206, 374 A.2d 20, 26 (1977); State v. Stone, 122 Ariz. App. 304, 594 P.2d 558 (1979); Bassie v. State, 726 N.E.2d 242, 243-44 (Ind. 2000); State v. Hankerson, 34 Kan. App. 2d 629, 635, 122 P.3d 408, 413 (2005). Absent our own case authority, we look to the plain meaning of the words to interpret the statute.

To determine the plain meaning of an undefined term in the statute, we may look to the dictionary. In re Det. of Danforth, 173 Wn.2d 59, 67, 264 P.3d 783 (2011). *Webster's Third New International Dictionary of the English Language* 2094 (2002) defines shield, in part, as "2 : a structure, device, or part that serves as a protective cover or barrier." (Boldface omitted.) And, it defines "hostage" as "a *obs* : the state of a person given or kept as a pledge pending the fulfillment of an agreement, demand, or treaty . . . b : a person in such a state . . . [or] c : a pledge, security, or guarantee

usu[ally] of good faith or intentions.” Id. at 1094 (boldface omitted).

The State emphasizes that Garcia did not need to actually use Wilkins in this manner, but only needed to harbor intent to do so. Here, Garcia believed he was being pursued by assailants and feared apprehension by police. He armed himself with a knife, and displayed it to Wilkins. And, he acted agitated throughout. His testimony about fleeing the gas station when the alarm went off also reflects his desire to avoid arrest and supports an inference that he would not want to release Wilkins for fear that she could then notify police. His abduction of Wilkins thus shielded him from apprehension. Drawing all inferences in favor of the State, it was reasonable for a trier of fact to conclude Garcia had the intent to use Wilkins as a shield or hostage when he detained her. He could reasonably be said to have put Wilkins into a place of danger, as part of his own attempt to evade pursuers and protect himself from capture. The evidence refuting such alleged intent came from Garcia’s testimony, but the jury was free to weigh his testimony as it saw fit, or to disregard aspects of it if it found it not to be credible. See Faust v. Albertson, 167 Wn.2d 531, 538, 222 P.3d 1208 (2009).

B. Facilitate the Burglary or Flight Thereafter

The jury found Garcia guilty of the first count of burglary for his actions at the gas station. The evidence was that Garcia fled from the convenience store after hearing the alarm, and that his stated purpose in entering Wilkins’s residence was at least in part to get a ride away from the area. Garcia also admitted to taking off his clothes so that he would be harder to find. This evidence supports a finding that Garcia detained Wilkins to facilitate his flight after the burglary at the gas station.²

² Garcia argues the jury instructions were not clear because there were two

C. Inflict Extreme Mental Distress

Wilkins described being terrified by Garcia's presence and his actions in her house that night. She was awoken suddenly by him in the middle of the night, with him standing over her as she slept on the couch. He displayed a knife. And, Wilkins testified that Garcia was extremely agitated throughout. She was afraid she might be killed. Under these facts, Wilkins suffered extreme mental distress from Garcia's actions. Garcia correctly asserts that this element swings not on whether he actually inflicted such mental distress, but on whether he *intended* to do so. And, in his own testimony, he asserts he had no intention of hurting her or scaring her, but was only interested in getting away. But, the jury was entitled to infer his intent from the evidence presented. Reviewing the evidence in the light most favorable to the State, a rational fact finder could reasonably have concluded from his conduct that Garcia intended to inflict mental distress upon Wilkins upon abducting her.

Thus the State provided sufficient evidence to support each of the three alternative means.

V. Admission of Garcia's Prior Conviction as a Crime of Dishonesty

Garcia argues the trial court erred by admitting his prior convictions of second degree burglary and conspiracy to commit burglary. They are only admissible if they are crimes of dishonesty—in other words, if Garcia intended to commit theft as a part of those burglary convictions. ER 609(a)(2). The State sought to prove this intent to

distinct counts of burglary charged, and it was unspecified which burglary he was facilitating or fleeing from based on the instruction. That argument is further addressed below, and is unpersuasive; the jury found Garcia guilty of the first burglary arising from his actions at the gas station, and not guilty of the second burglary count, arising from his actions at Wilkins' house.

commit theft by bringing police reports from the prior cases. According to one report, a juvenile codefendant told police about his own intent to steal belongings from houses, and stated that he, Garcia, and a third person were working together as a team.

Garcia pleaded guilty to the earlier counts of burglary and conspiracy to commit burglary in those prior convictions. However, it is undisputed that the information, the probable cause statement, the judgment and sentence, and the statement on plea of guilty all contained no admission and no finding that Garcia intended to commit theft. The trial court reasoned that State v. Schroeder justified consideration of the police report. 67 Wn. App. 110, 834 P.2d 105 (1992). Indeed, Schroeder stands for the proposition that trial courts may look beyond the elements of burglary and go into the record and the underlying facts, for the sole purpose of identifying the underlying crime the burglar intended to commit. Id. at 118. Thus, the trial court relied on the police reports. It recognized that it was “reaching” a little bit in its application of Schroeder, and sympathized with Garcia’s objection, stating:

[T]he court is going far outside the actual documents contained in the prior conviction court file, but I’m looking at associated police reports that match up with the documents in the Court file. And based on those documents, the actual police reports, there is a basis to find that the intent, at least as stated by a co-conspirator, was to enter the residence and steal. That intent by the co-conspirator is attributed to Mr. Garcia’s intent

And with that examination beyond the elements, the Court is finding that these burglaries were, in fact, crimes of dishonesty. So I want to make it very clear how far I’m reaching in case you need to preserve that.

But, the trial court’s ability to look at the record and underlying facts does not authorize reliance on information that is inadmissible in evidence.

Here, the statement by Garcia's coconspirator to police was an out of court statement made by a third party and offered for the truth of the matter asserted. It was clearly hearsay. ER 801(c). It was not admissible to establish Garcia's intent. Garcia also points to the inherent unreliability of this allegation, because it comes from a fellow participant in the prior crime. See Lilly v. Virginia, 527 U.S. 116, 133-34, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999) ("[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule.") Schroeder allows a trial court to look to the record and underlying facts with a burglary conviction, but it does not allow a court to rely on inadmissible hearsay evidence.

The trial court's error in admitting those prior convictions is nonetheless harmless. An evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. State v. Howard, 127 Wn. App. 862, 871, 113 P.3d 511 (2005). Because the error here resulted from violation of an evidentiary rule, not a constitutional mandate, we do not apply the more stringent "harmless error beyond a reasonable doubt" standard.³ Id. Instead, we apply "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Id. (internal quotation marks omitted) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

While the trial court admitted the prior convictions, it sanitized them, limiting the State's ability to impeach Garcia about those convictions and excluding all details about the actual charges or underlying crimes. The State was only allowed to reference the fact that Garcia had two prior felonies involving dishonesty. When

³ Garcia does not raise a Constitutional argument on appeal.

Garcia was on the stand during direct examination, his counsel asked him, “Mr. Garcia, don’t you have two prior felony convictions for dishonesty?” Garcia responded, “Yes, I do.” This exchange made no mention of the fact that the prior crimes were related to burglary—the same crime that was charged in this case.

As Garcia argues on appeal, the risk that arose from the trial court’s erroneous admission of the prior convictions was that his credibility would be damaged in the eyes of the jury. Indeed, during closing argument, the State suggested the jury should consider those two prior “felonies of dishonesty” in weighing credibility. But, the jury’s verdict reflects that it was not persuaded Garcia lacked all credibility.

This is evidenced most strongly by the jury’s acquittal of Garcia on the second burglary charge. Garcia was charged with two separate counts of burglary: one arising from his actions at the gas station and one from his actions at Wilkins’ home. For both counts, the State was required to show that Garcia unlawfully entered the building in question and that he intended to commit a subsequent crime against a person or property therein. In both counts, it is undisputed that Garcia unlawfully entered the premises. The evidence of his actions at the gas station plainly reflects that Garcia did not commit theft or any additional crime while inside, from which his intent might be inferred. By contrast, the undisputed evidence from his actions at Wilkins’ house is that he did in fact commit theft as argued by the State, stealing a fresh shirt and Wilkins’ cell phone when he left her house. Nevertheless, the jury found him to be guilty of burglary at the gas station, and found him not guilty of burglary at Wilkins’ house. For both counts, Garcia’s defense hinged on the credibility of his own testimony—he asserted that he did not intend to commit theft at either location. His

testimony thus formed the sole basis for the jury's acquittal on the second burglary count. Where the break-in and the actual theft at Wilkins' house were undisputed, the only way for the jury to find him not guilty of burglary was for the jury to believe his own assertion, about his lack of intent to commit theft. The acquittal reflects the jury's reliance on Garcia's testimony as credible.

Garcia cannot demonstrate that the references at trial to his prior convictions negatively impacted the jury's evaluation of his credibility such that the outcome of the trial would have been different without those references. We hold that any error did not materially affect the outcome of the trial, and thus was harmless.

VI. Special Verdict

Garcia argues in the alternative that even if his conviction is affirmed, the deadly weapon enhancement should be vacated, because the special verdict form contained an erroneous unanimity instruction under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). While unanimity is required to find the presence of a special finding, it is not required to find the absence of such a special finding. Id. at 147. In State v. Ryan, a panel of this court applied Bashaw, and found that a special verdict instruction that was essentially identical to the one given in Garcia's case was erroneous. 160 Wn. App. 944, 947, 252 P.3d 895, review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011).

In both Garcia's case and in Ryan, that instruction read, in relevant 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.'"

Ryan, 160 Wn. App. at 947. The State concedes that this instruction was erroneous,

but argues that the error was waived by Garcia's failure to raise an objection to it at trial. Whether such an error may be raised for the first time on appeal is an issue that is pending before the Washington Supreme Court and one that has yielded different results at the Court of Appeals level. We adhere to the holding of Ryan, that such an instructional error is one of constitutional magnitude, which Garcia is entitled to raise for the first time on appeal. 160 Wn. App. at 948-49. But see State v. Nunez, 160 Wn. App. 150, 163, 248 P.3d 103, review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011); State v. Morgan, 163 Wn. App. 341, 344, 261 P.3d 167 (2011) (holding that a failure to object to such a Bashaw error resulted in waiver because it did not involve manifest constitutional error). As in Ryan, we vacate the deadly weapon enhancement, and remand.

VII. Lesser Charged Offense of Criminal Trespass

Garcia was charged with two counts of burglary: one for his actions at the gas station, and one for his actions at Wilkins's residence. The jury found him guilty of the first count, but found him not guilty of the second, finding instead that he committed the lesser included offense of criminal trespass. Garcia argues it is ambiguous whether the criminal trespass conviction was for the first or second burglary charge, and he contends this ambiguity violates double jeopardy. If the jury found him guilty of criminal trespass for his actions at the gas station, even after finding him guilty of burglary for those same acts, Garcia correctly asserts that would violate double jeopardy. But, there is no evidence demonstrating that that happened here, and we reject Garcia's argument. The jury was clearly instructed about each burglary count individually. For the first count, events from the gas station, verdict form A was for burglary and verdict

form B was for the lesser charge of criminal trespass. The forms plainly indicated that form B should be used only if the jury found him not guilty on form A—in other words, criminal trespass at the gas station should only be considered if the jury did not convict Garcia of Burglary at the gas station.

Forms C and D had the same parallel structure for the second and separate burglary count deriving from the events at Wilkins's house. Thus, the lesser offenses of criminal trespass were each clearly linked to their respective burglary counts and the jury was properly instructed. Jurors are presumed to follow the instructions. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). The guilty verdict for criminal trespass was plainly related to the second count of burglary, and was properly considered by the jury only after it had found Garcia not guilty of burglary on those facts and that count.

VIII. Statement of Additional Grounds

In his statement of additional grounds, Garcia argues the trial court's hearsay ruling denied him his constitutional right to cross-examine Wilkins about statements he made to her. He also argues the prosecutor misstated the legal elements of burglary and improperly suggested they could be satisfied by his breaking the convenience store door. These arguments are the same as those raised by counsel, and they have been addressed above. In addition, Garcia contends the misstatement of law constitutes prosecutorial misconduct. To prevail on a claim of prosecutorial misconduct, Garcia must establish the conduct was both improper and prejudicial. State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011). Because the misstatement of the law on burglary was harmless and did not prejudice Garcia's case,

his claim of prosecutorial misconduct fails.

We vacate the deadly weapon enhancement and remand for resentencing. Any other error was harmless, and we otherwise affirm.

Appelwick, J.

WE CONCUR:

Jau, J.

Grosse, J.