71532-1

No. 71532-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JORGE LIZARRAGA,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **The trial court violated Mr. Lizarraga's rights under the Sixth and Fourteenth Amendments by prohibiting him from examining Detective Gee about a witness's report that a different person killed the victim.**

As explained in the opening brief, the issue in this case was the identity of the shooter. Only one witness stated that Mr. Lizarraga was the perpetrator, and other witnesses' descriptions of the killer varied wildly. One witness identified Hugo Vaca Valencia as the murderer, but that witness was deported. The trial court violated Mr. Lizarraga's constitutional rights to due process, to call witnesses in his behalf, and to present a defense by prohibiting him from examining Detective Gee about this witness's identification of another person as the perpetrator. Br. of Appellant at 6-22 (citing, inter alia, United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1981); People v. Valencia, 218 Cal.App.3d 808, 267 Cal.Rptr. 257 (1990); United States v. Leal-Del Carmen, 697 F.3d 964 (9th Cir. 2012)).

The State appears to concede, as it must, that the witness's identification of another person as the killer was material. Br. of Respondent at 19. But it avers that no constitutional violation occurred because "there was neither bad faith nor any act by the sovereign State of

Washington" that caused this concededly "critical witness" to be lost. Br. of Respondent at 19; RP (10/3/13) 20. The State is wrong.

As already explained in the opening brief, "bad faith" in this context does not necessarily mean ill will. Rather, it is intertwined with materiality: "There is no violation where the executive has made a 'good-faith determination' that the alien-witness possesses no evidence that might exculpate the defendant." Leal-Del Carmen, 697 F.3d at 970 (quoting Valenzuela-Bernal, 458 U.S. at 872-73). Here, there is a violation because the prosecution agreed that the alien-witness possessed exculpatory evidence, yet the witness was deported. See also Valencia, 218 Cal.App.3d at 821 ("The presence or absence of bad faith … must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.") (quoting Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 336-337 n.1, 102 L.Ed.2d 281 (1988)); Leal-Del Carmen, 697 F.3d at 970 ("When the government doesn't know what a witness will say, it doesn't act in bad faith in deporting him.... The question of bad faith thus turns on what the government knew at the time it deported the witness.").

Furthermore, the fact that deportation proceedings are initiated by the federal government does not absolve the State of its duty to preserve known material exculpatory evidence. After all, Valencia was a state case,

yet the appellate court affirmed the dismissal of a firearm charge where a witness who had made material, exculpatory statements was deported prior to trial. Valencia, 218 Cal.App.3d at 827. Here, there is no question that Jonathan Cervantes made material, exculpatory statements when he identified Hugo Vaca Valencia as the killer, and there is no question that Cervantes was deported prior to trial without notice to the defense. Accordingly, either the murder charge should have been dismissed or Mr. Lizarraga should have been permitted to question Detective Gee about the exculpatory statements. See Leal-Del Carmen, 697 F.3d at 969 (mentioning these alternative remedies). Because this did not occur, a new trial should be granted on count one. Br. of Appellant at 6-22.

2. The conviction on count one violated Mr. Lizarraga's right to a unanimous jury guaranteed by article I, section 21 of the Washington Constitution.

As explained in the opening brief, the conviction on count one violated Mr. Lizarraga's state constitutional right to a unanimous jury verdict. Mr. Lizarraga was charged with intentional murder and felony murder in the alternative. There was no special verdict form, and the jury was explicitly instructed that it did not have to be unanimous as to whether Mr. Lizarraga committed intentional murder or felony murder. The verdict accordingly violated Mr. Lizarraga's rights under article I, section

21 of the Washington Constitution, requiring a new trial on count one. Br. of Appellant at 22-32.

The State sets up a straw man in response. It claims that because the United States Supreme Court has rejected a similar argument, this Court must do the same. Br. of Respondent at 1, 24-26 (citing Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 111 L.Ed.2d 555 (1991)). But the U.S. Supreme Court has never addressed a Washington State constitutional issue, and has no authority to do so. Indeed, the Washington Supreme Court has repeatedly rejected the State's requests to follow federal law on unanimity, because the Washington Constitution demands more. See State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994).

In Ortega-Martinez, the Court declined the State's invitation to follow Griffin v. United States, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). The U.S. Supreme Court in Griffin adopted the rule the State proposes here: that a general guilty verdict satisfies the Constitution, notwithstanding an absence of unanimity on an underlying means supported by sufficient evidence. Ortega-Martinez, 124 Wn.2d at 708. But as our state supreme court explained, that holding was based on the federal Fifth Amendment. Id. "Since Griffin addressed the requirements imposed by the federal constitution, it does not erode the protections

afforded by our state constitution under State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). Ortega-Martinez, 124 Wn.2d at 708 (emphasis added).

Just two years ago, the Court again rejected the State's argument that the federal standard should apply. State v. Owens, 180 Wn. 2d 90, 96 n.2, 323 P.3d 1030 (2014). The Court reiterated:

> [T]he right to a unanimous jury verdict in criminal trials in Washington is rooted in article I, section 21 of our state constitution and not the federal constitution. Thus, a modification of our jury unanimity doctrine in reviewing an alternative means challenge would be inconsistent with the state constitution, as well as many of our cases from at least the past 30 years. Thus, we reject the State's argument.

Id.

The actual question presented by this case is whether the rights to sufficiency of the evidence and jury unanimity under the Washington Constitution should be independently enforced. As Mr. Lizarraga acknowledged in his opening brief, current caselaw conflates these rights, resulting in a rule under which the absence of express unanimity as to the means proved will require reversal only where there is also insufficient evidence to satisfy due process as to one of the means. Ortega-Martinez, 124 Wn.2d at 707-08. This conflation is the product of a premise that appears to be universally recognized as invalid: the premise that if sufficient evidence supports both means, courts can infer that the jury rested its decision on a unanimous finding as to the means. Br. of

Appellant at 27-29. Because this premise is illogical, and because our state constitution guarantees both due process and jury unanimity, the absence of unanimity should result in reversal. See Br. of Appellant at 29-32 (discussing approaches of other jurisdictions with similar guarantees of jury unanimity).

3. The "for which a reason exists" language should be omitted from the reasonable doubt instruction, in order to protect defendants' Fifth and Fourteenth Amendment rights.

As explained in the opening brief, the trial court should have granted defense counsel's motion to omit the clause "for which a reason exists" from the jury instruction defining reasonable doubt. The instruction undermines the presumption of innocence and invites improper burden-shifting. This Court should take the opportunity to disapprove of the problematic language. Br. of Appellant at 33-37 (citing CP 253; RP (12/11/13) 135-37; State v. Emery, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012); State v. Johnson, 158 Wn. App. 677, 684, 243 P.3d 936 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996)).

The State responds that our Supreme Court has approved the instruction given, and therefore it cannot be reconsidered. Br. of Respondent at 31-32. However, the primary case on which the State relies

supports Mr. Lizarraga's argument. See id. (discussing State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007)). In Bennett, the Court did precisely what Mr. Lizarraga asks this Court to do: it disapproved of an instruction that had been given for years, that had been endorsed by all three divisions of this Court, and that was similar to instructions the U.S. Supreme Court had upheld. See id. at 306-18. The reason the Court disapproved of the instruction is that "[t]he presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." Id. at 316. The Court found the "language problematic" because "the instruction emphasizes what the State need not prove instead of describing the State's burden of proof." Id. at 317.

The same could be said of the instruction given in Mr. Lizarraga's case. Indeed, as explained in the opening brief, prosecutors have repeatedly used the problematic language for precisely the purpose forbidden by Bennett: they emphasized what the State need not prove instead of describing the State's burden of proof. The prosecutors went even further and essentially told juries that the defendants must prove there is a reason to acquit – and that juries must "fill in the blank" with that reason before finding a defendant not guilty. Contrary to the State's claim, this did not just happen in "a" case; it happened in countless cases,

causing Division Two of this Court to issue numerous published opinions condemning the practice. See, e.g., Emery, 174 Wn.2d at 759-60; State v. Sakellis, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011); Johnson, 158 Wn. App. at 684; State v. Venegas, 155 Wn. App. 507, 523–24, 228 P.3d 813 (2010); Anderson, 153 Wn. App. at 431. And it happened because Pierce County prosecutors read the instructional clause at issue here to permit such an argument. See Johnson, 158 Wn. App. at 682; Anderson, 153 Wn. App. at 424.

If the prosecutors in this plethora of cases genuinely believed the instruction meant jurors had to explain a reason for acquittal, then how is the average juror to know that this is not what the instruction means? Either the entire Pierce County Prosecutor's Office was intentionally mischaracterizing the instruction, or one must assume that jurors would have the same genuine misunderstanding about this instruction that the prosecutors had. Pierce County has always argued it was simply explaining the part of the instruction stating a reasonable doubt is "a doubt for which a reason exists." This Court should presume that as officers of the court, the Pierce County prosecutors are telling the truth. In light of this presumption, it necessarily follows that jurors will make the same burden-shifting mistake. King County utterly fails to address this issue.

This Court should address it, and should hold that the offending clause must be omitted from the instruction.

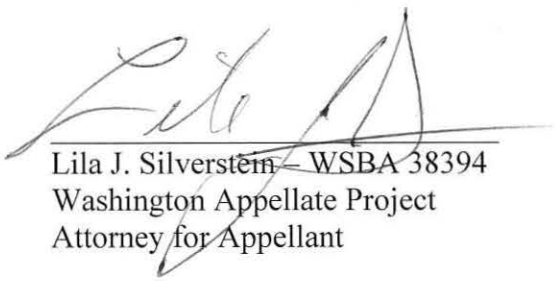
4. **The trial court erred by admitting unreliable fingerprint and ballistics "matching" evidence that is not generally accepted in the relevant scientific community.**

For this issue, Mr. Lizarraga relies on his opening brief at pages 37-50.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Lizarraga asks this Court to reverse his convictions and remand for a new trial.

Respectfully submitted this 30th day of March, 2015.



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DIVISION ONE

STATE OF WASHINGTON, Respondent, v. JORGE LIZARRAGA, Appellant.	)))))))))	NO. 71532-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2015, 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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[X] JORGE LIZARRAGA 327976 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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