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Nov 10, 2015
Court of Appeals
Division I
State of Washington

COA No. 72331-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DENNIS ARMSTRONG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Jim Rogers

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

 1. THE FACTS OF THE POLICE CONDUCT
 EXEMPLIFY THE “BAD FAITH” STANDARD
 THAT REQUIRES REVERSAL IN CASES OF
 POTENTIALLY EXCULPATORY EVIDENCE. 1

 2. WHEN THE PROSECUTOR TELLS THE JURORS
 THAT 6 OF THEM CAN CONVICT BASED ON ONE
 ALTERNATIVE MEANS, AND THE OTHER 6 CAN
 VOTE GUILTY BASED ON THE OTHER
 MEANS, THE APPELLATE DOCTRINE OF
 “SUFFICIENT EVIDENCE ON BOTH MEANS”
 CANNOT SERVE AS A SUBSTITUTE FOR THE
 DEFENDANT’S STATE CONSTITUTIONAL
 RIGHT TO BE CONVICTED BY A
 UNANIMOUS JURY OF 12 AT TRIAL. 7

 a. The existing case law does *not always* permit “sufficiency of the
 evidence on both alternative means” to be utilized on review as a substitute
 assurance of jury unanimity. 7

 b. If the existing law states that sufficiency of the evidence on appeal
 always removes any constitutional requirement of jury unanimity at trial,
 that rule is incorrect, and harmful. 11

B. CONCLUSION 14

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 14. 4

Const. art. I, § 21 7

WASHINGTON CASES

State v. Devin, 158 Wn.2d 157, 142 P.3d 599 (2006) 13

State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002), cert. denied,
127 S.Ct. 440 (2006) 9

Seattle v. Filson, 98 Wn.2d 66, 653 P.2d 608 (1982), overruled on other
grounds in In the Matter of Eng, 113 Wn.2d 178, 776 P.2d 1336
(1989). 10

State v. Groth, 163 Wn. App. 548, 261 P.3d 183 (2011). 1

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) 11

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994) . . . 8,11

State v. Owens, 180 Wn. 2d 90, 323 P.3d 1030 (2014). 8

State v. Stalker, 152 Wn. App. 805, 219 P.3d 722, 723 (2009). 13

State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980) 11

State v. Wittenbarger, 124 Wn .2d 467, 880 P.2d 517 (1994) 4

State v. Workman, 66 Wash. 292, 119 P. 751 (1911). 11

UNITED STATES COURT OF APPEALS CASES

United States v. Cooper, 983 F.2d 928 (9th Cir. 1993) 5

United States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979). 4

United States v. Zaragoza-Moreira, 780 F.3d 971 (9th Cir. 2015) 3

CASES FROM OTHER STATE JURISDICTIONS

People v. Alvarez, 229 Cal. App. 4th 761, 176 Cal. Rptr. 3d 890, 901 (2014), review denied, (Nov. 25, 2014) 3

UNITED STATES SUPREME COURT CASES

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). 4,5

A. REPLY ARGUMENT

(1). THE FACTS OF THE POLICE CONDUCT EXEMPLIFY THE “BAD FAITH” STANDARD THAT REQUIRES REVERSAL IN CASES OF POTENTIALLY EXCULPATORY EVIDENCE.

The Respondent’s recitations of Due Process law in its briefing ultimately serve to make clear that the “bad faith” standard is indeed met by the facts in this case. The Respondent does not misstate the law, but the appellant urges this Court to conclude that the State’s characterization of the facts as not meeting that governing legal standard is not legally persuasive.

First, where the police allow potentially exculpatory evidence to be destroyed, the defendant must show that the police acted in “bad faith” in order to secure reversal. The Respondent states that the presence of “bad faith” on the part of the police must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. Brief of Respondent, at p. 9 (citing State v. Groth, 163 Wn. App. 548, 558, 261 P.3d 183 (2011)).

Mr. Armstrong agrees. At the scene, the police officers repeatedly made clear to Mr. Armstrong their assertion that the videotape from the AM/PM store would show what had or had not occurred in the alleged incident. Specifically, the police used their

pronouncements of the truth value of the videotape, and their declarations that they had gotten, or would get that videotape, to threaten Mr. Armstrong to tell them what happened. But then, they never collected the tape -- thus allowing that truth value to be recorded over. 7/29/14RP at 69-72, 78-84, 79-80; 7/30/14RP at 30-32.

Among the statements the officers made to Mr. Armstrong, which can be heard clearly in Exhibit 3, were these:

“We got the whole incident on video”
“We got you on video”
“Either you tell us what happened, or we pull the video and it goes to court”
“tell the truth, like I say, we got the whole thing on video”
“If you tell me a lie and I go look at the video, I’m going to take it personally”
We’re going to get a video, we’re going to get the video”

State’s Exhibit 3, track 7674@20140420232558.

Thus, the police claimed *specific* knowledge of the security videotape for this day, and *this* incident, and its probity. And, consistent with the officers’ claims, the store clerk later made clear that the Seattle police knew about the videotaping system, and had viewed and obtained security videotapes from this particular store’s cameras numerous times *in the past*. 7/29/14RP at 33, 69; 7/30/14RP at 50-53.

Obviously, videotapes of the crime scene are potentially exculpatory. See, e.g., United States v. Zaragoza-Moreira, 780 F.3d 971, 978-79 (9th Cir. 2015) (video of scene of alleged border/drugs violation); People v. Alvarez, 229 Cal. App. 4th 761, 774-75, 176 Cal. Rptr. 3d 890, 901 (2014), review denied, (Nov. 25, 2014) (video of parking lot at time of robbery was potentially exculpatory).

Mr. Armstrong protested his innocence when the police approached him outside the store. When the police officers' threats were successful in getting Mr. Armstrong to make statements, the officers, subsequently, never collected the videotape like they falsely said they had done, or said they would do and never did.

For these reasons and for all the reasons argued in the Opening Brief, this Court ought to reject the Respondent's arguments that:

- (a) the police had no awareness of a possible security videotape, and that
- (b) "Armstrong cannot demonstrate that the officers had any reason to believe that any existing video surveillance would be exculpatory," and that
- (c) "Armstrong cannot establish that the [police] failure to collect it was motivated by improper intentions."

See Brief of Respondent, at pp. 8-10.

Compared against the facts and the law, these contentions are untenable. In its brief, the Respondent has no answer to Mr.

Armstrong's arguments that under Wittenbarger the motivation of law enforcement is pertinent to the question of bad faith. State v. Wittenbarger, 124 Wn .2d 467, 475-77, 880 P.2d 517 (1994). Here, the police lied, with the motivation to secure inculcation or confession, and then did not collect the evidence they announced they had obtained or would secure. The officers' motivation, and their conduct by omission or commission in full accord with the fabricated nature of their statements and false promises, surely *exemplifies* the "connivance" that is one manner of making out bad faith under the 14th Amendment United States v. Loud Hawk, 628 F.2d 1139, 1146 (9th Cir. 1979).

The Respondent notes that the police claim of getting, or planning to get the videotape was untrue – i.e., a "ruse." See Brief of Respondent, at p. 10. There may have been nothing wrong with that, per se, at that moment, for example for Fifth Amendment questioning purposes. But at some useful point in time, for purposes of Fourteenth Amendment Due Process under Youngblood, Wittenbarger, Loud Hawk, and Cooper, they needed to do what they said they would do – or if not, tell Mr. Armstrong about the ruse before he sat and waited months for a trial at which he reasonably thought that our system of

justice and fair play would mean that the tape would be available for the trial, like the police told him it would be. See AOB at pp. 13-22.

It is crucial to re-emphasize that the police officers' conduct had the effect of making a person in Mr. Armstrong's position believe that there was no need for the defense to collect the videotape evidence itself. This is a central aspect of what "bad faith" means. Whether the bad faith emanated most principally from one officer's false claim, another officer's false promise, or even another officer's departure from the police department's historical evidence collection practice, bad faith is shown overall when the lies told and the false promises made by the police deter a person from collecting evidence that is later destroyed. See United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993) (bad faith shown where police responded to defense request for laboratory equipment evidence by falsely saying they had it, when they didn't have it, and it was later destroyed); Arizona v. Youngblood, 488 U.S. 51, 56, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) (bad faith analysis focuses on police knowledge of the potential evidence and actions taken, or inaction, that allow it to be lost). Of course, one cannot prove what the eviscerated potentially exculpatory evidence would have depicted, or which witness or witnesses it would have shown to be in

error or lacking truth. But Mr. Armstrong need not do so – the Due Process test for reversal in cases of eviscerated “potentially exculpatory evidence” takes this catch-22 into account, by requiring reversal upon a showing of bad faith. The facts in this case establish a *direct causative relationship* between the officers’ lies and the evidentiary destruction that later occurred. Bad faith, when paired with potentially exculpatory evidence in this causative manner, requires reversal. The case presents no mere technical constabular error, but instead shows the outcome to be so undeserving of any confidence in its reliability that Mr. Armstrong believes that this Court can feel rightfully unhesitant to firmly order the remedy that the law requires.

The Respondent offers nothing in response to the appellant’s arguments under Cooper and Loud Hawk. By the time Mr. Armstrong, in the course of complaining about his trial lawyer, finally convinced the trial court to address his distress about the lack of attention being paid to the question of the videotape, the tape of course had been long ago destroyed by AM/PM in the normal course. The trial court even held – incorrectly -- that there never had been any such videotape in the first place. 7/30/14RP at 9. Unfortunately, Mr. Armstrong was ignorant to the fact that his hope that he or his attorney would be able to

defend the case with the best possible evidence that one can muster in a criminal case – videotape of the scene – had been a futile, pointless hope *for months*. His deep sense of injustice at this situation is well-founded. This Court should find that the police, in bad faith, allowed the destruction of the potentially exculpatory evidence of the videotape, and should reverse Mr. Armstrong’s conviction and dismiss the charge.

(2). WHEN THE PROSECUTOR TELLS THE JURORS THAT 6 OF THEM CAN CONVICT BASED ON ONE ALTERNATIVE MEANS, AND THE OTHER 6 CAN VOTE GUILTY BASED ON THE OTHER MEANS, THE APPELLATE DOCTRINE OF “SUFFICIENT EVIDENCE ON BOTH MEANS” CANNOT SERVE AS A SUBSTITUTE FOR THE DEFENDANT’S STATE CONSTITUTIONAL RIGHT TO BE CONVICTED BY A UNANIMOUS JURY OF 12 AT TRIAL.

a. The existing case law does not *always* permit “sufficiency of the evidence on both alternative means” to be utilized on review as a substitute assurance of jury unanimity. The defendant is entitled to a jury of 12 that issues an expressly unanimous verdict of guilt to the crime. Wash. Const. art 1, § 21. When the issue of jury unanimity arises in alternative means cases, it has to do with the fact that the different multiple statutory means vary significantly enough that they are effectively different crimes for unanimity purposes – they cannot be described merely as examples of factual “ways” of

committing a single crime. State v. Owens, 180 Wn. 2d 90, 99, 323 P.3d 1030 (2014).

Appellate cases have used phrasing that in some cases seems to excuse the absence of a unanimity instruction at trial, by holding that the error does not require reversal if the appellate court holds that there was sufficient evidence on both means. See AOB, at pp. 5-12. Importantly, this doctrine or test is specifically used by the appellate courts as a substitute method of determining that the jury was unanimous -- as is required.

If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means.

(Emphasis added.) State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

The Respondent dismisses assignment of error no. 1 in the present case by pointing to the existence of sufficient evidence on both alternative means of commission of the felony level no-contact order violation (the existence of two priors; or the violation being an *assault*).

But Mr. Armstrong's case is different, because the prosecutor in closing argument procured conviction by expressly urging the jury that

it could be non-unanimous and issue a verdict of guilty. Sufficiency cannot be used to “infer” existence of the required unanimity in this case where the State *expressly* urged non-unanimity. Here, the prosecution utilized its assertion that unanimity is not a requirement, as a way of securing a guilty verdict from a jury that the prosecutor believed might not contain a full 12 jurors that were persuaded of guilt as to either means. 7/31/14RP at 18. This directly contravenes the core requirement of unanimity.

The “sufficiency on both means” analysis on appeal may do an adequate job of ensuring that, for appellate affirmance, the jury’s verdict must represent agreement of the 12 jurors on a means, with that means supported by legally sufficient evidence. See State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002), cert. denied, 127 S.Ct. 440 (2006) (evidence meets sufficiency standard required for conviction on a crime where it is enough to allow a rational jury to find the elements proved beyond a reasonable doubt).

However, Mr. Armstrong argues that the Washington case law on Wash. Const. art. 1, § 21 indicates that unanimity must have to do with more than merely ensuring that a jury did not rest its verdict on a means as to which the evidence was insufficient.

The unanimity cases indicate that ‘unanimous’ is defined as a jury verdict of 12 agreeing jurors. The cases indicate that the appellate conclusion that there was sufficient evidence on both means operates as a substitute basis for an appellate court to presume the required unanimity, simply because the evidence must always be sufficient to support a criminal conviction. State v. Ortega-Martinez, *supra*, 124 Wn.2d at 707.

But here, it would be incompatible with the record to hold that there is a viable ‘substitute’ indicator of unanimity in Mr. Armstrong’s case, because, in closing argument, the prosecutor told the jurors that they could convict the defendant based on 6 jurors believing Mr. Armstrong was guilty of the “assault” means of committing the felony-level no-contact order violation, and the other 6 jurors could base felony guilt on the existence of two prior convictions. 7/31/14RP at 17-18. But manifestly, 6 is not 12, and the guaranty is 12:

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. 1, § 21. This right includes the right to an expressly unanimous verdict. Const. art. 1, § 21 states: “The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases . . .” Allowing juries of less than 12 in courts not of record, creates a right to 12-member juries in courts of record. Seattle v. Filson, 98 Wn.2d 66, 70, 653 P.2d 608

(1982), overruled on other grounds in *In the Matter of Eng*, 113 Wn.2d 178, 776 P.2d 1336 (1989).

Additionally, by allowing verdicts of nine or more only in civil cases, the final clause implicitly recognizes unanimous verdicts are required in criminal cases. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see also *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v. Workman*, 66 Wash. 292, 295, 119 P. 751 (1911).

State v. Ortega-Martinez, 124 Wn. 2d 702, 707, 881 P.2d 231, 234

(1994). This case is marked by an express *absence* of unanimity that can find no curative substitute in the presence of sufficient evidence on both means. Wash. Const. art. I, § 21.

b. If the existing law states that sufficiency of the evidence on appeal always removes any constitutional requirement of jury unanimity at trial, that rule is incorrect, and harmful. Importantly, this case is not a challenge to the jury instruction that the prosecutor relied on to tell the jury that all 12 jurors need not agree on a means; rather, it is a challenge to the manifest constitutional error of the absence of the express assurances of jury unanimity that the defendant is entitled to under Wash. Const. art. 1, § 21. RAP 2.5(a)(3); see AOB, at p. 1 (Parts A and B).

However, the prosecutor's closing argument to that effect demonstrates the absurdity of idea that the jury doesn't have to be

unanimous in the trial court if there is “sufficient evidence” later found by the appellate court. Mr. Armstrong believes that a proper reading of all of the case law regarding Wash. Const. art. 1, § 21 indicates that the “sufficient evidence on both means” test is properly applied only as an appellate court doctrine that will be held to *substitute* for the required jury unanimity at trial.

Mr. Armstrong further believes that the root concept of jury unanimity under the state constitution requires that this Court dismiss, as inartfully phrased outliers, any cases which appear to state that jury unanimity is never required at any stage if the evidence is later reviewed to be legally sufficient on both means. For one thing, evidentiary “sufficiency” is a legal test that only this Court can assess. While it is true that juries do answer the question of whether they are persuaded of guilt beyond a reasonable doubt, it is nonsensical to tell juries that they need not be unanimous if the criteria of sufficiency – a legal question of art that juries are neither equipped nor authorized to answer --is satisfied.

However, Mr. Armstrong also argues that **if** the existing law says that jury-verdict unanimity of agreement at trial is ‘not required,’ at all, in cases where the evidence is later held sufficient on both means

on appeal, then any such rule or precedent must be rejected as both incorrect, and harmful. See State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006); State v. Stalker, 152 Wn. App. 805, 808, 219 P.3d 722, 723 (2009).

For all the reasons discussed in Part 2.a, supra, if it is the rule that juries need not be unanimous at the trial level if the appellate court determines at the review level that the evidence was legally sufficient, that rule is *incorrect* because it is completely incompatible with the core concept of unanimity guaranteed by Wash. Const. art. 1, section 21. As to the “harmful” criteria, in closing argument, the State told Mr. Armstrong’s 12 jurors:

But the kind of secondary paragraph that says, that speaks about unanimity, so whether or not you have to be unanimous -- that's a hard word to say -- it's essentially instructing you that if **six** of you believe that: Hey look, we don't know if you've been twice previously convicted but we believe you assaulted her and **six** of you say: We think he's been twice previously convicted but we don't know if he assaulted her but we do believe he violated the no-contact order by going to her residence that that's guilty. So you don't have to be unanimous as to which of the alternative means were present[.].

(Emphasis added.) 7/31/14RP at 18 (State's closing argument). If it is the rule that sufficiency on appeal allows non-unanimity at trial, the rule is *harmful* because it allows what occurred below -- the State

secured a guilty verdict in a case in which the prosecution feared that its witnesses might not be believable or compelling enough on either means to persuade the full complement of 12 jurors to find Mr. Armstrong guilty.

In this case, as shown by the entire record, the jury's verdict carried express indicators of non-unanimity. This is the exact opposite of what Mr. Armstrong is entitled to under Article 1, section 21. The judgment entered upon the verdict must be vacated.

B. CONCLUSION

Based on the foregoing and on the Opening Brief, this Court should reverse Dennis Armstrong's conviction and sentence.

Respectfully submitted this 9 day of November, 2015.

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DENNIS ARMSTRONG,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF NOVEMBER, 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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