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Division II  
State of Washington  
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No. 52585-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

LARRY AYO PETERS,

Appellant.

---

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

---

BRIEF OF APPELLANT

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## A. INTRODUCTION

Mary Tipton falsely accused her former boyfriend, Larry Peters, of pulling her into a motel room, keeping her there all evening, and raping her. However, the DNA evidence excluded Mr. Peters as a sexual assault suspect, and indicated that there were at least four separate male DNA contributors instead. Mr. Peters was acquitted of rape in the first degree, but convicted of kidnapping and related counts, with deadly weapons enhancements.

After Mr. Peters was detained by police, he experienced heart trouble and was interrogated in his hospital bed by Fife Police Detective Jeffrey Nolta. The State did not reveal to Mr. Peters that at the same time, Nolta was under investigation for official misconduct by the Fife Police Department. Shortly before he testified in Mr. Peters's trial, Nolta was found to be in violation of departmental policies for, among others things, unauthorized listening to jail phone calls, including attorney-prisoner phone calls. The State did not disclose this until two months after Mr. Peters's trial. Nevertheless, the trial court denied Mr. Peters's motion to dismiss under Brady v. Maryland.<sup>1</sup>

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<sup>1</sup> 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

B. ASSIGNMENTS OF ERROR

1. The State's failure to disclose favorable material evidence before trial denied Larry Peters his rights to due process, to present a defense, and to a fair trial.

2. The trial court violated Mr. Peters's Sixth and Fourteenth amendment rights when it failed to disclose material impeachment evidence.

3. Mr. Peters did not receive his constitutional right to a unanimous jury verdict as to the deadly weapon enhancement.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecution must inform the accused of favorable evidence known to law enforcement that is either exculpatory or impeaching. Approximately three weeks before trial, a primary detective in the State's case was found to be in violation of police department policies related to the misuse of access to telecommunication lines, including listening to privileged attorney-client phone calls. The State did not provide this information to the defense. Did the State's failure to disclose material impeachment evidence prejudice Mr. Peters's right to a fair trial and undermine confidence in the outcome of the case?

2. When evidence of multiple criminal acts is introduced to support a conviction, the court must give a unanimity instruction unless the prosecution elects a single act upon which to proceed. Here, the State introduced evidence alleging Mr. Peters used a number of different weapons, including a taser and a machete, but failed to elect the weapon associated with the deadly weapon enhancement. Did the court's failure to give a unanimity instruction violate Mr. Peters's right to a unanimous verdict as to the enhancements?

D. STATEMENT OF THE CASE

1. Mary Tipton's Unsubstantiated Rape Allegation

Larry Peters and Mary Tipton dated for a few months in late 2016. 3/12/18 RP 102-03.<sup>2</sup> Ms. Tipton claimed that in the afternoon of January 11, 2017, she received a text message from a number she did not recognize. Id. at 105. Ms. Tipton said the person texting identified herself as her friend "Leah Schafer," who invited Ms. Tipton to come and meet her at the Motel 6 in Fife. Id. at 105-08. Ms. Tipton later said the person who texted her was her friend, Jen. Id. at 105-06. The friend invited Ms. Tipton to come to the Motel 6 room to take a shower and clean up, an invitation which Ms. Tipton accepted. Id.

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<sup>2</sup> The verbatim report of proceedings is not consecutively paginated, and is referenced by both date and page number.

When Ms. Tipton arrived at the Motel 6 around 10:00 p.m., she walked to the specific room and found the door open. Id. at 109. She claimed she was immediately grabbed by a person wearing all black clothing, including a mask over part of his face. Id. at 113. Ms. Tipton stated the man held a taser to the side of her neck, and then to her abdomen. Id. at 114-16. She said that it took her awhile to realize this man was her former boyfriend, Mr. Peters. Id. at 119. Mr. Peters took off his mask and allegedly told Ms. Tipton that he “just wanted to make love to [her] one last time.” Id.

Ms. Tipton testified at trial that she took off her clothing and had sex with Mr. Peters approximately seven times that night. Id. at 134. She stayed with Mr. Peters in bed all night, and they went out for breakfast together in the morning. Id. at 143. Since Ms. Tipton was the only person with a car, she drove to their breakfast outing. Id. at 143-46. She drove them both to McDonalds and then to the local 7-11, where Mr. Peters went inside to buy Ms. Tipton a Big Gulp and to use the ATM. Id.; 3/13/18 RP 448. At no time, either at the McDonalds, nor while she waited at the 7-11, did Ms. Tipton attempt to leave Mr. Peters by driving away. 3/12/18 RP 148.

During the evening, Ms. Tipton encountered others who could have assisted her if she was held against her will. For example, Patricia

Grigsby knocked on the door of the motel room on the morning after the alleged sexual encounter. 3/12/18 RP 140. Ms. Grigsby introduced herself to Ms. Tipton, and then she and Mr. Peters stepped out of the room to have a conversation outside. Id. Ms. Tipton did not ask her for assistance, nor did she try to leave the room. Id. at 142. Ms. Tipton also encountered her friend Jim at the 7-11, but did not leave with him either. Id. at 145-46.

After they returned from breakfast, Mr. Peters wanted to change motel rooms. Id. at 146. While Mr. Peters was moving their belongings to a different room, Ms. Tipton decided to leave him. Id. at 149-50. She drove to the nearby Emerald Queen Casino, where she called 911 and reported that she had been kidnapped and raped. 3/13/18 RP 428-30. Ms. Tipton was interviewed by officers from the Fife Police Department, and was transported to St. Francis Hospital, where she was given a sexual assault examination. Id. at 430-34.

## 2. Mr. Peters is Arrested and Charged

Ms. Tipton told officers she had sex with Mr. Peters seven times because he threatened her with an array of weapons. Id. at 462-44. Ms. Tipton described a machete, zip-ties modified into handcuffs, two tasers, and a trash can that he filled with water (she claimed he planned to “waterlog” her, apparently meaning waterboarding). Id. Ms. Tipton

claimed Mr. Peters said the encounter would end in a “murder-suicide.”  
Id. at 465.

Fife police officers located Mr. Peters at the Motel 6, where he was registered in his new room. 3/13/18 RP 485-87. He cooperated with officers and was taken into custody. Id. at 489. After obtaining a search warrant, officers seized a number of weapons from the room, all of which were located in a red bin by the bathroom. 3/8/18 RP 416.

Mr. Peters began to have heart palpitations in the police vehicle and soon became unresponsive. Id. at 495-500. He was transported to Tacoma General Hospital. Id. Detective Jeff Nolta, one of the lead detectives on the case, interrogated Mr. Peters in his hospital bed, along with Sergeant Thomas Thompson. 3/12/18 RP 21-22. Detective Nolta specifically asked Mr. Peters about whether he had sex with Ms. Tipton, and suggested she would be having a “rape examination” conducted. Id. at 75. Nolta’s interrogation of Mr. Peters elicited a number of inculpatory statements, which were introduced at trial against Mr. Peters. Id. at 25-26, 75-80. Detective Nolta also performed the forensic analysis of Mr. Peters’s cell phone, which resulted in the

admission of a number of text messages alleged to be conversations between Mr. Peters and Ms. Tipton. Id. at 42-45.<sup>3</sup>

Mr. Peters was charged with kidnapping in the first degree, rape in the first degree, felony harassment, assault in the second degree, and violation of a court order. CP 46-50.<sup>4</sup>

### 3. The Jury Acquits Mr. Peters of Rape

At trial, Jennifer Hayden from the State Patrol Crime Lab testified she tested the evidence from the sexual assault examination in this case. 3/14/18 RP 543. She stated Mr. Peters was excluded as a significant contributor to the DNA profile obtained in the case. Id. at 555-57. Ms. Hayden also testified she identified at least four contributors, in addition to Ms. Tipton, from the swabs she tested.<sup>5</sup> Id. at 550-52.

In addition, although Ms. Tipton claimed she had not been in touch with Mr. Peters on the day of her allegation, when confronted with phone records, she acknowledged she had actually been texting

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<sup>3</sup> According to Detective Nolta's forensic analysis of the cell phone, Ms. Tipton texted Mr. Peters at 12:28 p.m. on the day after this alleged incident, saying, "I just had to get away." 3/12/18 RP 51. Mr. Peters allegedly texted Ms. Tipton at 12:43 p.m., "Can I please have some of the stuff? I want to at least die high." Id.

<sup>4</sup> Ms. Tipton had a Lakewood District Court no-contact order. CP 48.

<sup>5</sup> When asked, Ms. Tipton said she "did not recall" having sex with any other partners that night. 3/8/18 RP 150.

Mr. Peters 30 minutes before she arrived at his motel room. 3/13/18 RP 440-42 (“Looks like I did text him”).

Ms. Tipton claimed Mr. Peters had taken her cell phone and removed the battery so she could not seek help. 3/12/18 RP 117. However, when she called 911 from the casino, Ms. Tipton called from her own phone. 3/13/18 RP 445.

The jury acquitted Mr. Peters of rape in the first degree. CP 196. The jury convicted him of kidnapping in the first degree, felony harassment, and assault in the second degree. CP 192, 200, 203.<sup>6</sup> The jury also rendered special verdicts finding Mr. Peters was armed with a deadly weapon during the incident. CP 195, 202, 206. The jury did not specify, and was not asked to agree upon, what deadly weapon was used. CP 170, 187-89. The jury was unable to reach a unanimous verdict as to whether Mr. Peters assaulted Ms. Tipton with a deadly weapon. CP 204.

#### 4. Prosecution Fails to Disclose Police Misconduct

Approximately two months following Mr. Peters’s trial, the State informed defense counsel that Detective Nolta, one of the primary detectives in this prosecution, had been under investigation at the time of Mr. Peters’s trial. 8/24/18 RP 779-80. Nolta was the subject of a

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<sup>6</sup> Mr. Peters was also convicted of violation of a court order, but this count was dismissed and vacated following trial. CP 207; 8/24/18 RP 783.

Fife Police Department internal investigation, and on February 20, 2018 – three weeks before Mr. Peters’s trial – was found to be in violation of Department policies, due to his misconduct. CP 226 (citing Investigation Report of Fife Police Captain Aaron Gardner).

Detective Nolta was a lead detective in the prosecution of Mr. Peters, responsible for the interrogation of Mr. Peters in his hospital bed at Tacoma General Hospital, as well as the forensic analysis of Mr. Peters’s cell phone. 3/12/18 RP 23-25, 30-56. The investigation of Detective Nolta stemmed from his improper use of the Pierce County Securus phone system. CP 234. The specific complaint was lodged by the Pierce County Sheriff’s Department on January 10, 2018, after Nolta accessed and attempted to listen to a jail phone call between a suspect and his lawyer’s office. CP 234. Although the Fife Police Department sustained both policy violations against Nolta on February 20<sup>th</sup>, the State did not notify Mr. Peters of this finding. CP 243. Both Nolta and his commanding officer who signed the disciplinary Investigation Report, Captain Aaron Gardner, testified at Mr. Peters’s trial the following month. 3/12/18 RP 18-60; 3/13/18 RP 484-89.

Due to the State’s failure to disclose Nolta’s disciplinary violations, Mr. Peters moved for dismissal under Brady v. Maryland. CP 225-44. The motion was denied. 8/24/18 RP 795-96.

E. ARGUMENT

**1. The State's failure to disclose material impeachment evidence concerning the detective who interrogated Mr. Peters denied Mr. Peters a fair trial and undermines confidence in the verdict.**

Detective Jeff Nolta was the first officer to interrogate Mr. Peters when he was handcuffed to a hospital bed at Tacoma General Hospital, shortly after his arrest and his subsequent treatment for chest pains. 3/12/18 RP 20-25. Nolta was also responsible for conducting the forensic analysis of Mr. Peters's phone. *Id.* at 30-56. Nolta introduced incriminating statements against Mr. Peters through both of these official duties. 3/12/18 RP 25-26, 42-45, 75-80.

At the same time Nolta was working on the Peters case and preparing to testify at trial, he was under investigation for misconduct by the Fife Police Department. CP 234. In fact, a few weeks before Mr. Peters's trial, Nolta faced a departmental hearing and was found to have committed two counts of misconduct. CP 234-44 (Investigation Report of Fife Police Captain Aaron Gardner). The State failed to notify the defense of this misconduct until two months following Mr. Peters's trial. RP 779-80. The State's failure to disclose material impeachment evidence denied Mr. Peters his right to a fair trial, as it would have changed the outcome.

- a. The State must disclose material evidence, known to them, that is favorable to the accused, whether it is exculpatory or impeaching.

“[O]ne essential element of fairness” in a criminal case “is the prosecution’s obligation to turn over exculpatory evidence.” Milke v. Ryan, 711 F.3d 998, 1002 (9th Cir. 2013); see Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). There are three components of a Brady violation. The evidence must be favorable to the accused, either as exculpatory or impeachment evidence; the State must have failed to disclose the evidence, “either willfully or inadvertently;” and “prejudice must have ensued.” Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

The requirement that the government disclose material favorable evidence to a criminal defendant is required by the due process clauses of the State and Federal Constitutions as well as the constitutional guarantee of meaningful opportunity to present a defense. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22.

The prosecution’s duty to disclose evidence favorable to an accused arises even when there has been no request by the accused. In re Pers. Restraint of Stenson, 174 Wn.2d 474, 486, 276 P.3d 286

(2012). “The scope of the duty to disclose evidence includes the individual prosecutor’s ‘duty to learn of any favorable evidence known to others acting on the government’s behalf.’” Id. (citing Strickler, 527 U.S. at 281; Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

b. The requirement to disclose favorable evidence includes impeachment evidence.

“Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness ” United States v. Jackson, 345 F.3d 59, 70 (2d Cir. 2003); see Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); see e.g., United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) (“Brady/ Giglio information includes ‘material ... that bears on the credibility of a significant witness in the case.’ ”) (omission in original) (quoting United States v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir.1992)); Stenson, 174 Wn.2d at 486.

Here, the State claimed the evidence was not material because, among other reasons, Detective Nolta was not the sole officer to interrogate Mr. Peters at the hospital. CP 252. The State argued that the Investigation Report finding Nolta guilty of violating Fife Police Department policy was not “related in any way” to Mr. Peters’s case,

and Nolta's misconduct only involved his misinterpretation of departmental policy. CP 246, 251.

First, the value of impeachment evidence is not mitigated by the fact that other impeachment evidence exists. United States v. Price, 566 F.3d 900, 914 (9th Cir. 2009); cf. Benn v. Lambert, 283 F.3d 1040, 1056 (9th Cir. 2002) (holding that Brady material is especially likely to be prejudicial if it "would have provided the defense with a new and different ground of impeachment"). Evidence is material when it might have been used to impeach a government witness, including "any inference therein which bears on credibility." Price, 566 F.3d at 912, 913 n.14.

Moreover, the other officer in the room during Mr. Peters's interrogation, Sergeant Thompson, was also part of the internal investigation of Nolta. CP 236-42 (Thompson interrogated Nolta as to his misuse of phone system, including listening to privileged attorney-client calls). Sergeant Thompson and Captain Gardner, both of whom testified at Mr. Peters's trial, were an integral part of the Nolta investigation.

The question is whether all of the impeachment material, taken together, would have affected the jury's assessment of the case. State v. Gregory, 158 Wn.2d 759, 800, 147 P.3d 1201 (2006).

c. The failure to disclose the impeachment evidence reasonably affected the outcome of the trial.

Whether the prosecution's failure to disclose the evidence prejudiced Mr. Peterson is reviewed de novo. Stenson, 174 Wn.2d at 491. Sufficient prejudice exists where there is a reasonable probability of a different result. Kyles, 514 U.S. at 434. A "reasonable probability" of a different result is shown when the government's failure to disclose favorable impeachment evidence "undermines confidence in the outcome of the trial." Id. (quoting Bagley, 473 U.S. at 678).

In cases in which the witness is central to the prosecution's case, the defendant's conviction indicates that in all likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility. Therefore, the suppressed impeachment evidence, assuming it meets the test for disclosure, takes on an even greater importance.

Benn, 283 F.3d at 1055.

The United States Supreme Court has emphasized the critical role of cross-examination at trial. "It is not up to us to decide, ex ante, what evidence is trustworthy and what is not." Williams v. Illinois, 567 U.S. 50, 138, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) (Kagan, J., dissenting); see Melendez-Diaz, 557 U.S. at 317–318; see also Bullcoming v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). "[T]he Confrontation Clause prescribes its own

‘procedure for determining the reliability of testimony in criminal trials.’” Id. (quoting Crawford v. Washington, 541 U.S. 36, 67, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

The importance of meaningful cross-examination to the jury’s weighing of evidence underscores the critical nature of presenting jurors with reasons to question the evidence.

If “there is a reasonable probability that the withheld evidence would have altered at least one juror’s assessment” of the evidence presented at trial, the outcome would have been different and the Brady violation requires a new trial. Price, 566 F.3d at 914.

In Gregory, for example, the defense objected to the court’s refusal to provide impeachment evidence contained in a witness’s sealed file from a dependency proceeding. 158 Wn.2d at 798. The file included inconsistent statements from the witness regarding her use of drugs and whether she was court-ordered to attend drug treatment. Id. The prosecution argued that the defense had numerous other available means to attack the complainant’s credibility. Id.

In evaluating the materiality of evidence relevant to the credibility of a witness, the Gregory Court noted that the question was not whether there were other means of challenging the witnesses’ credibility, but rather, whether all of the impeachment material, taken

together, would have affected the jury's assessment of the case. Id. at 800. If so, the nondisclosure is prejudicial and requires reversal.

Here, the nondisclosed material affected the jury's assessment of the case. Had Mr. Peters been timely provided with the Investigation Report regarding Detective Nolta's misconduct, which was known to the State for three weeks before trial, Mr. Peters would have proceeded differently in a number of ways, including re-interviewing the Fife police officers, changing his voir dire and opening statement, and altering his cross examination of three different witnesses, at least.

In fact, the trial court agreed with Mr. Peters that knowledge of Detective Nolta's misconduct was imputed to the prosecutor's office, "and at the very least, could have been obtained and ... or should have been known about prior to the time of [Mr. Peters's] trial." 8/24/18 RP 796.

The delayed disclosure of Nolta's misconduct deprived the jury of a reasonable basis to question the State's case, undermining confidence in the outcome of the trial. It is reasonably probable that the State's failure to disclose this impeachment evidence affected the outcome of the trial. This Court should reverse.

**2. The deadly weapons enhancements violated article I, section 21, because the jury was not required to render a unanimous verdict as to the deadly weapon.**

According to the State's evidence, Mr. Peters had a taser, a machete, and other weapons in the room. 3/12/18 RP 113, 121-22. To prove the deadly weapon enhancement, the State was required to prove Mr. Peters was either armed with the machete, or had used the taser in a manner that could easily and readily produce death. Here, the jury's verdict was not unanimous as to the weapon used by Mr. Peters.

a. Article I, section 21 guarantees an accused person the right to a unanimous verdict.

Article I, section 21 guarantees the right to a unanimous jury verdict. Const. Art. I, § 21; State v. Elmore, 155 Wn.2d 758, 771 n.4, 123 P.3d (2005). Before conviction, jurors must unanimously agree that a defendant committed the charged criminal act. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If the State presents evidence of multiple acts, then either the State must elect a single act or the court must instruct the jury to agree on a specific criminal act. Id. at 511.

In the absence of an election, failure to provide a unanimity instruction is presumed prejudicial.<sup>7</sup> Id. at 512. Without proper election or instruction, each juror's guilty vote might be based on facts that his or her fellow jurors do not believe were established. Id. Failure to provide a unanimity instruction requires reversal – or here, vacation of the sentencing enhancements – unless the error is harmless beyond a reasonable doubt. Id. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts (or enhancements). See id.

b. The absence of a unanimity instruction pertaining to the deadly weapon special verdicts requires reversal of the sentencing enhancements, because the State relied on both the taser and the machete, either of which the jury could have relied on for its verdict.

The State presented evidence that Mr. Peters had a taser, and that he also held a machete in the air while threatening Ms. Tipton. 3/12/18 RP 113-15, 121-22. Several weapons were recovered from the motel room they shared, including those mentioned above. 3/8/18 RP 416.

The State did not adequately elect in its closing argument which weapon was allegedly used by Mr. Peters in each count, and accordingly, which weapon the jury should rely upon when deliberating. The State failed

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<sup>7</sup> The omission of a unanimity instruction, accordingly, is a manifest error affecting a constitutional right, and as such, can be raised for the first time on appeal. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009).

to elect one weapon as the basis for Count I (kidnapping), Count II (rape), or Count IV (assault).<sup>8</sup> To the degree the prosecutor did elect in closing, the argument regarding the deadly weapon special verdicts was equivocal and confusing. 3/19/18 RP 683, 687, 696.

For example, the prosecutor explained to the jury in closing argument that it should rely on the machete to find the deadly weapon enhancement. 3/19/18 RP 683. He then suggested they could also find the enhancement using the taser, but concluded by “asking” them to rely upon the machete:

The Special Verdict Form is with regard to the machete, so whether the machete was readily accessible, okay. Perhaps also the taser, but I think more – you’re on firmer ground, I would submit and ask you to rely on the machete, okay.

3/19/18 RP 683.

The prosecutor made a similar argument regarding election of the taser or machete regarding the rape count. 3/19/18 RP 687.

Likewise, the prosecutor informed the jury they could find Mr. Peters was armed with the taser, but not armed with the machete. 3/19/18 RP 696. This failure to elect seems to have resulted in the jurors’ assault verdict, whereby they were not unanimous as to whether Mr. Peters committed the assault with a deadly weapon, but still found the special verdict as to deadly weapon. CP 203, 204, 206.

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<sup>8</sup> The State did elect the machete for Count III (harassment), and the jury acquitted of Count II (rape).

The State's failure to elect is problematic, because the court failed to give a unanimity instruction to the deadly weapon enhancements.<sup>9</sup> The State's closing argument was equivocal, and regardless, the jury was instructed that the lawyers' arguments are not evidence. CP 154. The lack of election, together with a lack of a unanimity instruction applied to the enhancements, violated Mr. Peters's right to a unanimous jury, and gives rise to a presumption of prejudice. Coleman, 159 Wn.2d at 511-12.

This error is further problematic, because while a machete is a per se deadly weapon under RCW 9A.04.110(6), a taser is not. For the jury to find that the taser was the deadly weapon, it would require proof the taser was "used" in a manner "likely to produce or may easily and readily produce death." RCW 9.94A.825. There was a decided lack of evidence presented at trial of such potential lethality. 3/8/18 RP 382; 3/14/18 RP 625-28.

In the absence of a proper election or unanimity instruction, a divided jury might have voted to find the deadly weapon special verdicts. Some jurors may have focused on the taser, while others may have focused on the machete exclusively. The possibility that Mr. Peters was convicted by a divided jury violates his Article I, section 21

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<sup>9</sup> The court gave a general unanimity instruction which did not address this issue. CP 184, 187.

right to a unanimous jury. The sentencing enhancements must be vacated. See Coleman, 159 Wn.2d at 511. At any retrial, the State must elect a single weapon as the basis for the enhancement, or the court must give a unanimity instruction.

F. CONCLUSION

For the reasons stated above, Mr. Peters respectfully asks this Court to reverse his convictions and remand this matter for a new trial. In the alternative, this Court should vacate the deadly weapon enhancements.

DATED this 20th day of June, 2019.

Respectfully submitted,

s/ Jan Trasen

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JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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|                      |   |                |
|----------------------|---|----------------|
| STATE OF WASHINGTON, | ) |                |
|                      | ) |                |
| Respondent,          | ) |                |
|                      | ) |                |
| v.                   | ) | NO. 52585-2-II |
|                      | ) |                |
| LARRY PETERS,        | ) |                |
|                      | ) |                |
| Appellant.           | ) |                |

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF JUNE, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - **DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] LARRY PETERS<br>734729<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13 <sup>TH</sup> AVE<br>WALLA WALLA, WA 99362                                   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                |

**SIGNED IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF JUNE, 2019.**



X \_\_\_\_\_

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# WASHINGTON APPELLATE PROJECT

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**Superior Court Case Number:** 17-1-00167-0

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