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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Nos. 335151 & 335160

In the Court of Appeals of the State of Washington

Division III

State of Washington,

Respondent,

v.

Cindy Lou Mc Means

and

Ricky K. Watlamet,

Appellants.

REPLY BRIEF OF APPELLANTS

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Table of Contents

Table of Authorities.....	ii
Statement of Facts.....	1
Argument.....	5
Vindictive Prosecution.....	5
Exercise of Religious Beliefs.....	8
Conclusion.....	13
Certificate of Service.....	14

Table of Authorities

Cases:

Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).....10
First Covenant Church v. Seattle, 120 Wn. 2d 203 (1992)..... 10
Frank v. Alaska, 604 P. 2d 1068 (1979)..... 12
Sofie v. Fibreboard Corp., 112 Wn. 2d 636 (1989)..... 11
State v. Balzer, 91 Wn. App. 44 (Div. II 1998)..... 9
State v. Chambers, 81 Wn. 2d 929 (1973)..... 5n
State v. McFarland, 127 Wn. 2d 322 (1995)..... 5
State v. Worl, 129 Wn. 2d 416 (1996)..... 11
State v. Vanderhouwen, 163 Wn. 2d 25 (2008)..... 5

Statutes:

RCW 69.50..... 9
RCW 77.110.030..... 5

Washington State Constitution:

Article 1, §11.....9, 10, 12n
Article 1, §21.....11

United States Constitution:

Am. I.....10

Other:

WPIC 1.02.....	11
WPIC 10.50.....	12
RPC 3.8.....	7

Statement of Facts

First, certain misstatements, and improper statements, in respondent's Statement of Facts must be addressed and corrected. Page 3 of Respondent's Brief states that on March 24, 2013 "the officers drove out to the area of [Cindy Mc Means'] property with her and found (among other things) dead elk gut piles on the property." This evidence was suppressed (docket entry no. 84, May 8, 2015). The State did not cross-appeal the suppression of this evidence. Consequently, it is inappropriate to attempt to taint the facts of this appeal by implying that this information is part of the record in this appeal.

The State also brushes up against the line on Candor Toward the Tribunal by referring *only* to the dates of March 23 and 24, 2013 and implying that, on that date when appellant Watlamet harvested elk on appellant Mc Means' property, he did not plan to hunt or shoot elk (Respondent's Brief, pp. 3, 17, 20). The State then uses this misrepresentation to argue that on the date of the alleged offense Watlamet "was not planning to hunt *that day* and only decided to hunt once he was there" and therefore he "did not set out to obtain the elk as part of a religious duty (*id.*, p. 20) (emphasis added). What the Verbatim Record of Proceedings *actually* discloses is that on an unknown date in March, appellant Watlamet was called telephonically by Mc Means' son

in law about a problem of elk on her property and that he was not *then* asked, nor was there any discussion of shooting elk (RP, pg. 6) (May 28, 2015). The un rebutted testimony was that *following* the call it took him another several days to get out to the property and “look around” (RP, pg. 7). It was on this date that he wasn’t primarily there to hunt. However, prior to his *next* visit to appellant Mc Means property he was informed of the death of a tribal elder and requested to provide a couple elk for the funeral (RP, pg. 10, May 28, 2015) (Testimony of Ricky Watlamet). Consequently, he informed Mc Means that he desired to keep the meat from some of the animals he would be attempting to remove from her property. *Id.* All of which demonstrates, contrary to respondent’s argument, that on the date of the alleged offense Watlamet *was* planning on killing some of the elk on the Mc Means property to provide meat for a Tribal funeral.

The State further attempts to denigrate the sincerity of Watlamet’s religious beliefs by misstating the testimony of Gerald Lewis, stating that “he talked about how hunters leave an offering behind when they hunt” and stating that “there was no testimony that Mr. Watlamet deliberately did that.” The actual testimony was that tribal members hunting for a ceremony *generally* “leave something behind such as casings.” The

record shows that among evidence that was *not* suppressed was the game agents' discovery of two shell casings at the offense site (docket entry no. 84, Findings of Fact & Conclusions of Law, May 8, 2015).

In its Statement of Facts the State highlights the candid testimony of Gerald Lewis that the elk to be provided for a funeral did not have to come from this property but could have come from anywhere (RP, May 28, 2015, p.31, May 28, 2015) (cross-examination of Gerald Lewis), and Watlamet's testimony that he *could* have obtained elk from the Yakama Reservation (RP, p. 22, May 28, 2015) (cross-examination of Ricky Watlamet).¹ Such an argument, which plainly implies that Indians should confine their activities to the reservation, should be relegated to its proper resting place as a remnant of a less enlightened era when persons of certain races were the subjects of exclusionary zoning confining "their kind" to discrete areas.

Apart from the State's so-called facts, throughout its brief, the State attempts to make arguments which were not made at trial. Specifically, appealing to this court that Watlamet had "the ability to hunt out of season on open and unclaimed land" and that "Yakama tribal

¹ The State's ignorance of the negative connotations to tribal people of saying one is "off the reservation" is, unfortunately, understandable. Even the Oxford English Dictionary merely describes the term as deviating from what is expected or customary. The origins of the phrase, however, trace back to the Nineteenth Century and was used in the literal sense to describe Native Americans as "shiftless, untameable, and a rampant intractable enemy to civilization" (New York Times, October 27, 1886).

members have the right to kill animals on open and unclaimed land in the ceded treaty area. Defendants did not raise any defense that Watlamet was exercising Indian treaty hunting rights. The sole defenses raised by the appellants were: (1) a Washington state constitutional right to protect Mc Means property from depredating animals as enunciated in State v. Vanderhouwen, 163 Wn. 2d 25 (2008); and (2) that application of the hunting season regulations to Watlamet under the facts of the case burdened his exercise of religious beliefs protected by Article 1, §11 of the Washington State Constitution. The defense made a strategic decision that the local jury might not be receptive to an Indian treaty defense.² Such matters not raised at trial may not be raised by the State for the first time on appeal.³ State v. McFarland, 127 Wn. 2d 322 (1995).

Argument

Vindictive Prosecution

² A mere 31 years ago the People of the State of Washington overwhelmingly declared their opposition to such Indian tribal treaty defenses. RCW 77.10.030.

³ Respondent's frequent references to "private property" similarly have no bearing on this case and are merely efforts to fool the court into believing that appellants did raise a treaty defense, setting that up as a straw man, and then arguing that the conduct ran afoul of State v. Chambers, 891 Wash. 2d 929 (1973). Such a defense was not raised at trial and is not properly the subject of this appeal, and Chambers cannot be read so broadly to prohibit hunting on all privately owned property. Unlike Chambers, which involved land visibly occupied with structures upon it, posted against trespassing, and no government lands in the vicinity, it is uncontroverted that appellant was invited onto the property, was a pasture and was adjacent to government land. The trier of fact was not presented such a defense and this court of appeals should decline to entertain it.

Respondent states that “the prosecutor made a plea offer on December 3, 2013”, and “told” Mr. Fiander that if the offer were not accepted and they proceeded to file motions that he would be dismissing the case in district court and filing in Superior Court. This is incorrect. Rather, prosecutor Swartz specifically stated that he did *not* include that in this case:

MR. SWARTZ: It's boiler plate couple sentences on the bottom there. The offer we make. I didn't include it specifically for this case. It's every case that even, Mr. Fiander in District Court hasn't seen this same offer.

Additionally, on December 3rd, the prosecutor did *not* say if they proceeded to file motions he would file in Superior Court. Rather, on December 10th, after a motion had *already* been filed, he sent electronic correspondence stating that “just an FYI--The elected wants this moved *straight* to Superior Court for felonies if you file any motions.” At no time did the defense “reject” a plea offer.⁴ In fact, the State admits that, subsequent to the defendants’ exercise of their procedural right—and defense counsel’s duty—to file a motion defending against the charges which ran afoul of “the elected’s” wishes, the original charges *were* dismissed straight away on December 20th.⁵

⁴ As to the state hanging its hat on the phrase “welcome to the big leagues”, that is a flimsy branch to infer a rejection from. Rather, it was a collegial exchange between lawyers, one of whom did not regularly appear in Superior Court.

⁵ The State’s footnote 1 implying that the State graciously, once coercive felony charges carrying the threat of imprisonment and loss of civil rights were filed, “re-offered” a plea

As to respondent's argument section, the State is correct that prosecutors are vested with substantial discretion. However, because of the special role which prosecutors hold in our system of justice (RPC 3.8), that discretion is not to be abused. When a prosecutor *increases* the charge from a gross misdemeanor to a felony merely because the defendant exercises a procedural right, the filing of a motion—because “the elected” wants that done, that is vindictive and runs afoul of principles of due process.

The respondent states that “otherwise the entire plea bargain system would break down” (Respondent's Brief, p. 11). However, what it fails to mention is that when the state has all the evidence it needs to have filed a felony in the first place but elects not to and then, informs the defense that if it files *any* motion the elected would move it to superior court, it denies the defendant of the ability to raise any defense and the potential for civil disabilities accompanying a felony charge is guaranteed to have a chilling effect on the ability and obligation of counsel to zealously represent his or her client.

Moreover, the superior court's rationale for denial of appellants' motion to dismiss appears internally inconsistent. As the court stated in denying the motion:

agreement is bad form according to the Negotiations Privilege and should be stricken.

[T]hat's what the argument is here. Is that the state has been attempting to prevent these four defendants from exercising their legal rights. That's the argument. Is the state by the method that they chose to communicate with counsel, deprived these four defendants of their rights. Now had these four defendants succumbed to that pressure and pled guilty, I think they they'd be able to complain and bring some sort of action.

RP, Motion Hearing, May 30, 2014[4], pp. 36-37. It is as confusing and difficult to understand the logic of this rationale as it is to understand the trial court's rambling discourse during the hearing regarding a previous Child and Family Services Case it had presided over (RP, Motion Hearing, May 30, 2014, p. 36). If it is violative of due process for the State to coerce the defendants into pleading guilty under threat of prosecution for felonies not originally charged, it should be just as violative for the state to punish defendants for merely attempting to put on a *defense* to the original charges.⁶

For the foregoing reasons, as to this issue, the decision of the superior court on the motion it had before it should be reversed, its order vacated, and the information dismissed.

Exercise of Religious Beliefs

⁶ One frustrating aspect of this case has been that, although appellant Mc Means' direct examination at the May 30, 2014 motions hearing commenced at 11:25 a.m., the JAVS audio recording apparently was not activated until 11:41 a.m. resulting in only a partial transcript of her testimony.

While arguing that defendant Watlamet could not demonstrate that his exercise of religious beliefs were burdened, respondent admits that evidence, testimony and exhibits were presented that it was against State Hunting Regulations to hunt elk at that time and place without a special master hunter designation (Respondent's Brief, p. 4) (see also Trial Exhibit 6, 2012-13 Washington Department of Fish and Wildlife Big Game Hunting Seasons and Rules) and that defendant Watlamet did not have a state hunting license or master hunter designation (RP, May 28, 2015, testimony of R. Watlamet). *See* Respondent's Brief, p. 4 ("there was also testimony that [Watlamet] did not have a state hunting license or master hunter designation"). Additionally, respondent admits that "the game statute at issue here, which is facially neutral, controls how the State's wildlife resource may be harvested" (Respondent's Brief, p. 13).

A facially neutral statute may *itself* constitute a burden upon the exercise of religious beliefs if it prohibits the conduct engaged in. State v. Balzer, 91, Wn. App. 44 (1998).⁷ In that type of case, a defendant need not demonstrate other burdens if there is a statute which itself prohibits the

⁷ In Balzer, the defense raised was that the application of RCW 69.50, which criminalized marijuana possession to him unconstitutionally burdened his free exercise of religion guaranteed by Article I, Section 11 of the Washington State Constitution. At trial, Balzer testified as to his religious beliefs. The trial judge found that his religious beliefs were sincere and central to his religion. Since RCW 69.50 criminalized the defendant's conduct, the defendant was not required to make a separate showing that the exercise of his religion was burdened. The conduct was unlawful, and therefore burdened, by the statute.

conduct—in this case hunting without possessing a special master hunter designation.

The municipal ordinance prohibiting any person from sacrificing animals for ritual purposes within city limits in Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993), was also facially neutral. That ordinance, which similarly provided an exception from the prohibition for those acting in accordance with state law, could not, consistent with the First Amendment of the United States Constitution, be applied to the plaintiffs. In Lukumi Babalu Aye, being *potentially* subjected to the proscription of the ordinance was sufficient to constitute a burden upon the exercise of religion. In this case, appellant Watlamet was *actually* subjected to prosecution under the statute. Article 1, Section 11 of the Washington State Constitution has been held to provide greater protection to the exercise of religious beliefs than the First Amendment of the United States Constitution. First Covenant Church v. Seattle, 120 Wn. 2d 203, *passim* (1992).

It further appears that the Court placed obligations of proof upon the defense that may not be required under Washington case law holding that, in order to raise a defense of free exercise of religion the defendant need merely to prove that he or she was exercising sincerely held religious beliefs and that a statute or regulation prohibited the conduct engaged in.

The trial court in this case explicitly stated that “I don’t have any doubt that Mr. Watlamet has these beliefs and is sincere in them” (RP, May 29, 2015, pg. 7). What further obviates in favor of the court having issued instructions regarding the defense is that the superior court previously entered a finding and conclusion that the matter required presentation of facts for consideration by the jury. Having so ruled, that was the law of the case. *See generally, State v. Worl*, 129 Wn. 2d 416 (1996). For the superior court to rule that “this court finds defendant’s free exercise of religion motion to be a factual question to be determined by the jury” (CP 104) and allow the evidence to be presented to the jury and then effectively deny the jury an opportunity to consider the defense is perhaps as confusing as the court’s prior reasoning that, if the defendants had pled guilty under threat of felony prosecution their rights would be violated, but forcing them to refrain from filing motions—effectively denying them assistance of counsel—under threat of felony prosecution would not.

In Washington courts, the judge rules upon the admissibility of evidence but it is the province of the *jury* to determine its weight and sufficiency. *See, e.g.,* WPIC 1.02. The framers of the Washington State Constitution provided that the right of trial by jury shall remain “inviolable.” Art. 1, §21.⁸ In this cause, the appellants never waived their

⁸ The framers’ use of the word “inviolable” suggests nothing less than an unwavering guarantee. “The essence of the right’s scope” is the jury’s province, duty, and ability to make factual determinations. *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 645 (1989).

right to trial by jury. By taking it upon itself to allow the evidence of defendant Watlamet's religious beliefs, find that they were sincere, and then determine for itself whether application of the State hunting seasons and regulations burdened their exercise, the trial court essentially subjected appellants to a bench trial on this defense which was never consented to.

This Court of Appeals is not asked to establish new law nor to incorporate *in toto* the decision of the Alaska Supreme Court in Frank v. Alaska, 604 P. 2d 1068 (1979).⁹ Rather, the panel is merely asked to rule that the superior court erred when it declined to instruct the jury on the defense raised by appellant and, on this issue, dismiss or remand the case for a new trial.

Finally, the State's argument that the foregoing issue regarding issuance of the requested jury instruction was waived as to appellant Mc Means (Respondent's Brief, p. 12) should be rejected. Ms. Mc Means, an elderly widowed landowner, was merely accused as an accomplice in the case (Court's Instruction to the Jury, No. 6 [WPIC 10.51]). She killed no

⁹ In terms of protecting the exercise of religious beliefs, the Alaska State Constitution language which the Alaska Supreme Court found sufficient to support a religious defense merely states that "no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." In contrast, Article 1, Section 11 of the Washington State Constitution provides even stronger language, that "absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion[.]

animals and merely asked her son in law to seek out someone to assist in the removal of depredateing elk damaging her property. As such, if the case is remanded based upon error in denying the requested jury instruction such that appellant Watlamet's conduct is determined to have been a lawful exercise of religious beliefs, appellant Mc Means cannot be convicted of having aided, abetted or assisted in the commission of a *crime*. Therefore, this issue is not "waived" as to her.

Conclusion

For the foregoing reasons, the decisions of the trial court should be *reversed*.

DATED this 5th day of January, 2016.

Respectfully submitted,

TOWTNUK LAW OFFICES, LTD
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By:



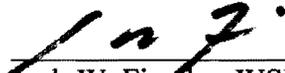
Jack W. Fiander, WSBA #13116

Counsel for Appellants
Cindy Lou Mc Means
and Ricky K. Watlamet

Certificate of Service

A copy of the foregoing was served upon counsel for respondent on the date above by placing same in the mail with first class postage prepaid addressed to:

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Candace Hooper
Kittitas County Prosecutor
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