

Nos. 335151 & 335160

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In the Court of Appeals of the State of Washington
Division III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

State of Washington,
Respondent,

v.

Cindy Lou Mc Means
and
Ricky K. Watlamet,
Appellants.

BRIEF OF APPELLANTS

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Statement of the Case

Appellant Cindy Mc Means had longstanding concerns over the depredation of her land by foraging elk. Her frustration came to fruition when in March 2013 she instructed her son in law to contact his cowboy friend Ricky Watlamet (RP, May 28, 2015, 5) to assist her in protecting her property (Id., RP 6, Testimony of Ricky Watlamet). Appellant Watlamet was unable to immediately assist as he was attending a rodeo (RP 7).

On March 21, 2013 Appellant Watlamet, a Yakama Indian, was informed of the death of a Tribal elder and was requested to provide meat for the funeral (RP, May 28, 2015, 10-11). On March 22, 2013 he, accompanied by his son, harvested three elk from the Mc Means property, one of which he testified was already wounded.

Eight months later, on November 13, 2013 which was, coincidentally, the same date which Ms. Mc Means wrote a letter to the editor of the local newspaper critical of the Washington State Department of Fish and Wildlife, gross misdemeanor charges of Unlawful Hunting in the Second Degree were filed against both appellants in the Lower Kittitas County District Court (CP 101-104) (Findings of Fact Nos. 4, 5).

On December 10, 2013 the deputy prosecutor assigned to the district court case informed defense counsel by way of a “heads-up” that

“the elected”—an obvious reference to the elected county prosecutor—would file felony charges if the defense filed any motions in the district court (Id., Finding No. 7). Unfortunately, defense counsel on the same date had electronically served a copy of a motion to dismiss he had placed in the mail to the district court. The State promptly dismissed the gross misdemeanor criminal complaints.

No further action was taken by the State until an article critical of the Washington State Department of Fish and Wildlife appeared in a local newspaper on March 23, 2014. On March 27, 2014, the prosecution filed felony charges of Unlawful Hunting in the First Degree against Watlamet and Mc Means in Kittitas County Superior Court. The Information, or charging document, is virtually identical to the criminal complaint which had been filed in the district court. The Discovery provided to defense counsel in the Superior Court prosecution was identical to that previously provided in the district court prosecution. There was no new additional evidence.

Approximately a year prior to trial, appellant Watlamet filed various pretrial motions, including *inter alia* a motion to dismiss the felony information based upon vindictive prosecution grounds (CP 2-7) and a motion to dismiss based upon the free exercise of religion (CP 48-81). On May 30, 2014 the trial court denied the former and, as to the

latter, concluded that the motion involved questions of fact to be determined by the jury. Following trial, at which the court allowed the testimony of witnesses, including the defendant, regarding his religious beliefs and practices and of law enforcement officers that the hunting season was closed at the time of defendant's conduct, the court declined to issue an instruction on defendant's defense based upon the free exercise of religion as secured by Article 1, § 11 of the Washington State Constitution.

Assignments of Error

1. The Trial Court erred in denying appellants' motion to dismiss based upon vindictive or wrongful prosecution in that there was no new information or evidence meriting the increased charges and the filing of more serious charges were prompted by the appellants' exercise of a procedural right.
2. The Trial Court violated appellant's right to trial by jury by determining the sufficiency of evidence or burden of proof on appellant's defense, thereby usurping the function of the jury, and erred in declining to issue appellant's proposed jury instruction number 11 regarding conduct based upon the exercise of sincere religious beliefs which is protected by Article 1, Section 11 of the Washington State Constitution.

Summary of Argument

1. Where there is no reasonable explanation for the filing of increased charges other than as punishment for a defendant's exercise of a procedural right, vindictive prosecution has occurred.

2. Although a trial judge may rule upon the admissibility of evidence, determination of the weight and sufficiency of evidence is to be determined by the jury. The trial court denied the defendant's right to have the jury determine whether he met his burden of proof on his defense when the judge took it upon himself to determine it. In the absence of a knowing, voluntary and intelligent waiver, "the right of trial by jury shall remain inviolate." Wash. State Const., Art. 1, § 21.

Argument

Vindictive Prosecution

A prosecuting attorney represents the people and presumptively is required to act with impartiality in the interest of justice. State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). As a quasi-judicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant. Id.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 267 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

A vindictive prosecution occurs when the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006) (*quoting* United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). Such a prosecution violates a defendant's due process rights. *See* Korum, 157 Wn.2d at 627. The filing of felony (Unlawful

Hunting in the First Degree) charges in this case was premised upon the defendants' filing of motions in their defense. The filing of defense motions is a right guaranteed by the due process clause of the Fourteenth Amendment and Article 1, section 3 of the Washington State Constitution.

The filing of a motion in a court of limited jurisdiction in this state is also characterized as a right in the Washington State Court Rules. As stated in CRrLJ 8.2, "rules 3.5 and 3.6 and CRLJ 7(b) shall govern motions in criminal cases." CRrLJ 3.5 and 3.6 are contained in Title 3 of the Criminal Rules for Courts of Limited Jurisdiction. *That* title, or chapter, is entitled "Rights of Defendants." The only reasonable reading which fulfills the intent of the rules is that a defendant accused of a crime has a right to file a motion in his or her case. That is especially true when this is read *in pari materia* with the Rules of Professional conduct applicable to defense counsel which require that:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf.

RPC 1.3. As such, this present prosecution was precipitated by the defendant's assertion of a right protected by the state and federal

constitutions and by the court rules which, in this state, have the force and effect of a statute. Endorsing the ruling of the trial court would have a chilling and discouraging effect upon the ability of those in the legal profession with a duty to zealously represent persons accused of crimes facing incarceration if the State may threaten criminal defendants with increased charges, that the State elected in the first instance to not file, if he or she files “any” motion. Such conduct by the State—described as “odious” (RP, May 29, 2015) by the trial court—cannot be squared with the right of the citizens of this state to due process embodied in Article 1, Section 3, of the Washington State Constitution.

As is clearly stated in the correspondence of the original assigned deputy prosecutor:

Just an FYI—the elected wants this moved straight to Superior Court for felonies if you file any motions.

(CP 2-14) (emphasis added) (Appendix A-1). As to what occurred, the Superior Court specifically entered the following findings of fact:

6) On December 10, 2013, defense counsel Jack Fiander, on behalf of Ricky and Jonathan Watlamet, filed motions to dismiss in Lower District Court.

7) On December 10, 2013, defense counsel Jack Fiander received an email from Deputy Prosecutor Tony Swartz. The email notified Fiander that the Lower District Court plea

offer would be revoked, and additionally the cases would be dismissed and re-filed in Kittitas County Superior Court, upon filing of any motions. On the same day, Mr. Fiander responded via email with "Welcome to the big leagues."

8) The Lower District Court case was dismissed on December 20, 2013. Defendants were not able to argue any motions in Lower District Court given the dismissal.

9) On March 28, 2014, defendants were charged with one count of Big Game I, a class C felony, in Kittitas County Superior Court.

(CP 101-104) (Appendix A-2).

A prosecutor may not vindictively file a more serious crime in intentional retaliation for a defendant's lawful exercise of a procedural right. State v. Korum, 120 Wn. App. 686, 709, 86 P.3d 166 (2004) (citations omitted), *affd in part, revd in part*, 157 Wn.2d 614 (2006). This is consistent with the special role which prosecutors representing the State hold in our system of justice:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice[.]

See, Comment, following RPC 3.8 (Special Responsibilities of a Prosecutor). A prosecutorial action is vindictive if it is designed to

penalize a defendant for exercising protected rights. Korum, *supra*, 157 Wn.2d at 627. "A presumption of vindictiveness arises when a defendant can prove that 'all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.'" Korum, 157 Wn.2d at 627 (*quoting United States v. Meyer*, 258 U.S. App. D.C. 263, 810 F.2d 1242, 1246 (1987)). The facts of this case are strikingly similar to those in Korum. As stated by the Court of Appeals:

The record shows that the State was not only aware of possible additional charges at the time of Korum's guilty plea, but it also expressly threatened to file an amended 32-count information with 16 additional charges if Korum did not plead guilty and opted instead to go to trial. Moreover, the State faxed a copy of its threatened 32-count information to Korum, offering to dismiss the other existing charges and to refrain from filing new charges if Korum pleaded guilty to 1 count of first degree kidnapping and 1 count of second degree unlawful firearm possession.

120 Wash. App. At 709. We acknowledge and respect the "broad ambit to prosecutorial discretion, most of which is not subject to judicial control." Under the Sentencing Reform Act of 1981 (SRA), our legislature has given prosecutors great latitude in determining what charges to file against a defendant. State v. Lewis , 115 Wn.2d 294, 299, 797 P.2d 1141 (1990).

Nonetheless, the legislature did not leave the prosecutors' discretion unbridled. On the contrary, the legislature limited prosecutors' charging discretion as follows:

(1) The prosecutor should file charges which *adequately* describe the nature of defendant's conduct. *Other offenses may be charged only if they are necessary* to ensure that the charges:

(a) Will significantly enhance the strength of the state's case at trial;
or

(b) Will result in restitution to all victims.

(2) *The prosecutor should not overcharge to obtain a guilty plea* .
Overcharging includes:

(a) Charging a higher degree;

(b) *Charging additional counts* .

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. *Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged* .

Former RCW 9.94A.440 (2) (1996), *recodified as* RCW 9.94.411 (2), sub-captioned "Decision to prosecute" (emphasis added). In addition to these legislative limitations, there are constitutional constraints on a prosecutor's exercise of discretion in charging crimes:

[A] prosecutor's discretion to re-indict a defendant is constrained by the due process clause. . . . [O]nce a prosecutor exercises his discretion to bring certain charges against a defendant, neither he

nor his successor may, without explanation, *increase the number of or severity of those charges* in circumstances which suggest that the increase is *retaliation for the defendant's assertion of statutory or constitutional rights* .

Hardwick v. Doolittle , 558 F.2d 292, 301 (5th Cir. 1977) (emphasis added), *cert. denied* , 434 U.S. 1049 (1978).

After the decision in North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court extended the “vindictiveness” concept to include *prosecutorial* vindictiveness in Blackledge v. Perry, 417 U.S. 21 (1974). In that case, the defendant was convicted on a misdemeanor assault charge and appealed, meaning that, under state law, the conviction was annulled and defendant was granted a *de novo* trial in superior court. *Id.* at 22. Before the superior court trial began, the prosecutor obtained an indictment based on the same conduct but charging a *felony* offense. *Id.* The Supreme Court held that for the prosecution to indict on the felony charge constituted an impermissible penalty on the defendant for exercising his legal right to appeal. *Id.* at 28-29. The Court stated that a person convicted of an offense was entitled to pursue his appellate remedies without fear of the prosecution’s retaliation by substituting a more serious charge for the original one. *Id.* at 28. *See also* State v. Tsosie, 171 Ariz. 683, 832 P.2d 700 (App. 1992), in which the Court of

Appeals for that state held that re-indictment on more serious charges, following the defendant's successful invocation of his right to speedy trial, raised a *presumption* of vindictive prosecution.

In this case, appellants' concerns were eloquently expressed by Ms.

Mc Means' trial counsel:

[T]he offer in this case, I agree with Mr. Fiander is not a settlement negotiation, it is a unilateral one page preprinted form that says this is what they are charged with, plead guilty, don't fight it. And we're sworn to put up every defense that's appropriate under the statute and to do it aggressively. It's improper and it's followed by an E-mail that says if you file a single motion consistent with your oath, a felony charge arises. This one is bad.

(RP, May 29, 2015, 35). The Superior Court's ruling on the issue of whether the felony prosecution should proceed was as follows:

I think it can. And the reason is these issues are being litigated. And because of counsel bringing up these issues, air and light have been pointed out to the odious practice that the—that the state can use. And I say can "use," because I don't think there's a lot of authority by the Supreme Court or the Court of Appeals telling prosecutors not to threaten people with the loss of their rights, because hopefully that's what a guilty plea will do, it's a loss of rights, you give up rights.

(RP 37-38, May 29, 2015). A fundamental problem with the trial court's

reasoning is that, when a defendant in a criminal case enters a guilty plea, those rights are given up, or lost, *knowingly* and *voluntarily*. However, in this case, the defendants had no knowledge that the motion their counsel had filed in their defense as a matter of procedural right would result in increasing their charges to a felony level. It is clear from the record that this instruction came down from the highest elected official in the prosecutor's office and was communicated after their motion had already been filed (RP 24, May 30, 2014; CP 101-104).

Free Exercise of Religion

It is undisputable that, in its Findings of Fact and Conclusions of Law (CP 101) entered by the Superior Court following the May 30, 2014 evidentiary hearing the Court held that:

This Court finds defendant's free exercise of religion motion to be a factual question to be determined by the jury. As such, the court neither grants nor denies defendants' motion to dismiss for free exercise of religion.

Notwithstanding the trial court's ruling at the *pretrial* stage that defendant Watlamet's First Amendment and Washington State Constitution defense involved "a factual question to be determined by the jury", the Court, at trial, *denied* the trier of fact the opportunity to consider this defense. In doing so, the trial court usurped the province of the jury. At trial, appellant testified that, on the date of the alleged offense, he:

[H]ad gotten a call earlier that day that a family friend, that one of his family members had passed away. And that they were planning several dinners and that he was going to need a couple animals was his request.

(RP, May 28, 2015, p. 10). The reason the appellant was called was that, within the Yakama tribal longhouse religious structure, he was denominated a Designated Hunter:

Each longhouse has a membership, of that

membership there are food gatherers and hunters and cooks appointed from that parish. Much like any other church. Of the seven longhouses I am a designated hunter for all seven. Of the Shaker churches, of which I do not belong, I am also a designated hunter.

(RP, May 28, 2015, p. 16). The sincerity of appellant's religious practice was also borne out by the testimony of Yakama Washat religious leader Gerald Lewis:

[T]he last 45 years I have been in this religion. But just recently within the last 10 years I've become the more or less the religious leader of our longhouse when my father-in-law had passed away.

Id., p. 26 (Testimony of Gerald Lewis). Witness was asked whether the Yakama tribal longhouses he was associated with had designated hunters:

Q: Is it common to have a person designated to provide meat for a funeral?

A: Yes.

Q: Is this young man sitting here one of your designated hunters?

A: Yes.

Id., (RP p. 29).

In denying appellant's proffered jury instruction (Appedix A-4), the Court stated

as follows:

I don't have any doubt that Mr. Watlamet has these beliefs and is sincere in them. But that's not the point. The point is the state hasn't done anything to infringe his religious exercise in this case under these circumstances, so I won't give that instruction.

Whether or not the State action infringed upon the appellant's religious practice, again, should not have been taken from the jury. Even a facially neutral, even-handedly enforced statute that does not *directly* burden free exercise may, nonetheless, violate article 1, section 11, if it indirectly burdens the exercise of religion. Sumner, at 7-8; Boiling, at 385-86; First Covenant II, 120 Wash. 2d at 226. In this case, the appellant was charged by Information with having hunted for, took, or possessed three or more big game animals within the same course of events and violating "any DFW department rule regarding seasons, bag or possession limits, closed areas including game reserves, closed times, or any other rule governing the hunting, taking, or possession of big game." Specifically, it appears from Jury Instruction numbers 13, 14 and 15 (Appendix A-3) that the State's theory was that the Modern Firearm hunting season for Elk at the situs of the offense (Game Management Units 328 and 329) closed on November 4, 2012. The appellant harvested the elk on March 22, 2013. Consequently, had the jury been issued the requested instruction, they could have concluded

that the mere application of the season requirement was *de facto* an indirect burden upon a hunt by appellant for a *bona fide* religious purpose, because he, as designated hunter, is required to provide fresh meat for funeral feasts, and the death of Tribal elders and longhouse members cannot be timed to coincide with state seasons and regulations. By failing to give the requested instruction, or one similar to it, after having previously ruled that the defense involved questions of fact for the jury and after allowing extensive testimony to the jury regarding it, the court effectively denied the jury the right and power to bring in a verdict of acquittal—effectually denying the defendant the right of trial by jury. State v. Christiansen, 161 Wash. 530 (1931). Article 1, § 21 of the Washington State Constitution provides that “the right of trial by jury shall remain inviolate.” The Washington State Supreme Court made clear over one hundred years ago that “the courts have no right to trench upon the province of the jury upon questions of fact.” Jensen v. Shaw Show Case Co., 76 Wash. 419 (1913).

One decision this panel can look to is State v. Balzer, 91 Wn. App. 44 (Div. II, 1998). 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 by statute. As the Court of Appeals stated:

Given Balzer's beliefs as sincere and central to his religious practices, it is clear that restriction of his marijuana use burdens exercise of his religious practices; RCW 69.50.401 criminalizes possession and distribution of the drug even if for religious purposes.

Thus, if a *statute* makes a defendant's conduct criminal even if the practice engaged in is the exercise of a sincerely held religious belief which is a central tenet of the person's religion, the exercise is burdened. One need not present further evidence that his or her religious practice is burdened. Even application of an otherwise facially neutral, even-handedly enforced statute may, nonetheless, violate article 1, section 11. The essential parallel between Balzer and this case is that appellant Watlamet's conduct, harvesting elk to provide meat for a funeral held by a tribal religious longhouse for which he is its designated hunter is unlawful and subjects him to criminal prosecution if he undertakes this activity other than within the narrow, approximately two week recreational sports hunting season, which in this case ended on November 4, 2012. The

decendent for whose funeral appellant had an obligation to provide meat for died on March 21, 2013. Once the appellant demonstrated to the trial court the sincerity of his religious beliefs and the trial court had before it a criminal information charging appellant with a felony violation of RCW 77.15.410 for engaging in a practice central to his religion, a *prima facie* case warranting issuance of defendant's requested instruction was made out and the burden of proof shifted to the prosecution to demonstrate a compelling state interest in applying the statute to the defendant's conduct and that the measure taken, prosecution, was the means least restrictive of defendant's exercise of religion which could be taken. Since the court previously concluded that defendant's religious based defense involved factual questions to be resolved by the jury, allowed testimony regarding it before the jury, determined the beliefs to be sincere, and a burden existed by virtue of prosecution under a statute subjecting him to criminal prosecution, the jury should have been instructed on the law governing the defense raised by Mr. Watlamet. Defendant Watlamet never waived his right to trial by jury and, by taking it upon itself to find that the appellant's exercise of religion was not burdened, deprived him of his right to trial by jury on his defense.

Additionally, application of the state regulations regarding the taking of big game to appellant affect the right of appellant Mc Means

under the Washington State Constitution to protect her property, acting through appellant Watlamet from depredateing elk. In this regard, since appellant Mc Means is an elderly widow living alone on her ranch, the Court's issuance of Jury Instruction number 21 referring to Watlamet as her "designee" was entirely appropriate.

As clearly enunciated by the Washington State Supreme Court:

To qualify for First Amendment protection individuals must prove *only* that their religious convictions are sincere and central to their beliefs. The court will not inquire further into the truth or reasonableness of the individual's convictions.

Backlund v. Board of Commissioners, 106 Wn. 2d 632 (1986) (emphasis added). As the U.S. Supreme Court has eloquently stated, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit Constitutional protection. *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 714 (1981). Here, the trial court held that the appellant's religious beliefs were sincere. That was the very case in Backlund, where:

The trial court held that Dr. Backlund's beliefs are sincere. Dr. Backlund's beliefs, being sincere, warrant First Amendment protection.

Id. The trial court, having previously ruled that the defense involved questions of fact for the jury rather than questions of law, and having

allowed presentation of testimony from two witnesses regarding the religious beliefs and practices of the appellant, and having concluded that appellant's beliefs were sincere, should have allowed the instruction. The reason being that, once a defendant presents evidence of the sincerity and centrality of his or her religious beliefs, the burden of proof shifts to the government to demonstrate a compelling governmental interest in applying a law or regulation to the defendant's conduct and that this measure is the least restrictive means of furthering such interest. Again, as stated in Backlund:

Since Dr. Backlund's beliefs are protected by the free exercise clause of the First Amendment, the burden of proof shifts to the [government] to prove that (1) a compelling governmental interest justifies the regulation in question and (2) the regulation is the least restrictive imposition on the PRACTICE of his belief to satisfy that interest.

106 Wn. 2d 632 (capitalized in original). The reason for this is that it has been long recognized that Article I, Section 11 of the Washington State Constitution "absolutely protects the free exercise of religion, [and] extends broader protection than the first amendment to the federal constitution." First Covenant Church v. Seattle, 120 Wn. 2d 203 (1992).

There are not less than seven tribal longhouses among the Yakama Nation which exercise traditional Yakama religion. Ricky Watlamet is a

traditional leader and designated hunter among the Yakama Nation; funeral services among the people of the Yakama Nation are complex and comprise a 3-4 day period; and fresh—not preserved—ceremonial natural foods are a required element of the funeral feast. The facts of this case show that the prosecution of Mr. Watlamet is a mirror image of the prosecution of Native Alaskan Carlos Frank which the Alaska Supreme Court found unconstitutional in Frank v. Alaska, 604 P. 2d 1068 (1979).

Article 1, section 11 of the Washington State Constitution absolutely protects "freedom of conscience in all matters of religious sentiment, belief, and worship" and guarantees that "no one shall be molested or disturbed in person or property on account of religion." This constitutional guaranty of free exercise is "of vital importance." Boiling v. Superior Court, 16 Wn.2d 373 at 381 [(1943)]. If the "coercive effect of [an] enactment" operates against a party "in the practice of his religion", it unduly burdens the free exercise of religion. Witters v. Comm'n for the Blind, 112 Wash. 2d 363, 371, 771 P.2d 1119, cert. denied, 493 U.S. 850 (1989); City of Sumner v. First Baptist Church, 97 Wn.2d 1, at 5 (1982). The Washington State Constitution provides even greater protections on the free exercise of religion than does the First Amendment of the United States Constitution.

The first prerequisite for any free exercise challenge is that the

parties have a *sincere* religious belief. "To qualify for First Amendment protection individuals must prove only that their religious convictions are sincere and central to their beliefs. The court will not inquire further into the truth or reasonableness of the individual's convictions." Backlund v. Board of Comm'rs, 106 Wn.2d 632, 639, 724 P.2d 981 (1986), *appeal dismissed*, 481 U.S. 1034, 107 S. Ct. 1968, 95 L. Ed. 2d 809 (1987).

First Covenant Church v. City of Seattle, 114 Wash. 2d 392, 787 P.2d 1352 (1990), *rev'd*, 499 U.S. 901, 111 S. Ct. 1097, 113 L. Ed. 2d 208 (1991) (First Covenant I); First Covenant Church v. City of Seattle, 120 Wash. 2d 2013, 215, 840 P.2d 174 (1992) (First Covenant II); and First United Methodist Church v. Hearing Examiner, 129 Wash. 2d 238, 916 P.2d 374 (1996), largely govern the analysis of article I, section 11 and the free exercise of religion. This Court applies a strict scrutiny test to the analysis of religious exercise cases:

Since free exercise of religion is a fundamental right, First Covenant I applied the strict scrutiny test of *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). Under this test, the complaining party must first prove the government action has a coercive effect on the practice of religion. Once a coercive effect is established, the burden of proof shifts to the government to show the restrictions serve a compelling state interest and are the least restrictive means for achieving the government objective. If no compelling state interest exists, the restrictions are unconstitutional.

First United Methodist, 129 Wash. 2d at 246.

The Incident Report of Washington Department of Fish & Wildlife Agent Rich Mann, who initially interviewed Watlamet, states *inter alia* as follows:

We discussed that the elk were meant for a funeral for Winnier and that the dressing was on Monday and the actual funeral on Tuesday. I asked a few questions about how the meat was used and distributed at a funeral and was told that they would normally have 2-3 meals and any leftover meat was generally given to guests to take home.

(CP 64, Memorandum in Support of Defendant's Proposed Jury Instructions, Feb. 15, 2015, pg. 6; CP 17, pg 4 and Exhibit E if Motion to Dismiss, May 1, 2014). There is no question that Mr. Watlamet was acting in accordance with sincere religious beliefs in fulfilling his obligation to provide meat for a funeral. He was invited to a location where the Colockum Elk Herd was congregated in large numbers to such a degree that there was no compelling state interest in conserving their number and in fact it is lawful for landowners to kill them in order to protect property or crops. His prosecution has a chilling effect upon the exercise of Yakama religion under the facts of this case. Such a burden upon the exercise of religion by other faiths would not be tolerated. It would be tantamount to the destruction of one's church or prohibiting persons from taking communion. One example is Church of the Lukumi

Babalu Aye v. Hialeah, 508 U.S. 520 (1993). There, the Supreme Court held that ordinances of the City of Hialeah that prohibited animal sacrifices impermissibly infringed upon central practices of the plaintiff's religion. The Afro-Caribbean based religion had only recently opened a church in Florida. Here, we have Yakama people who have resided in what is documented as having been Yakama territory for thousands of years and whose ethnology documents their harvest of big game for funerals as a central tenet of their beliefs for centuries. Certainly, their ability to practice their religion by providing fresh *elk* meat for consumption at a funeral meal is just as entitled to Constitutional protection as one sacrificing a *goat*. Application of the First Degree Unlawful Hunting Statute—a felony—to the defendant's conduct in this case prevents him from fulfilling his religious obligations.

In United States v. Abeyta, 632 F. Supp. 1301 (D. N.M. 1986), the defendant, a Pueblo Indian, challenged the indictment as an unconstitutional burden on his exercise of religion. The Court found that the fact that the golden eagle was not threatened in New Mexico and that permits to kill eagles had been issued weighed against the government's compelling interest. Significantly, the court found that the defendant's failure to apply for a permit to possess eagle parts did not negate his claim against the permit system. Instead, the court stated that the permit system

was “burdensome, ineffectual, and offensive.”

In Frank v. Alaska, 604 P. 2d 1068 (1979), Carlos Frank, an Athabascan Indian, harvested a moose during a closed season for a funeral potlatch. Frank appealed his conviction to the Alaska State Supreme Court on grounds that his prosecution violated his right under the Alaska Constitution to the free exercise of religion. Frank had been hunting to provide food for a funeral potlatch, an important ritual in Athabascan culture. The sharing of fresh foods is the cornerstone of the ritual. The Alaska Supreme Court concluded that the defendant’s conduct in harvesting the animal during a closed season was consistent with the free exercise of his religion:

We think the evidence is inescapable that the utilization of moose meat at a funeral potlatch is a practice deeply rooted in the Athabascan religion. While moose itself is not sacred, it is needed for proper observance of a sacred ritual which must take place soon after death occurs. Moose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions.

In this strikingly similar case, the trial court erred when it assumed the duties of the trier of fact and denied them the opportunity, as is their province, to determine the validity of appellant’s defense.

Conclusion

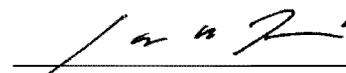
For the foregoing reasons, the decisions of the trial court should be reversed.

DATED this 14 day of September, 2015.

Respectfully submitted,

TOWTNUK LAW OFFICES, LTD
Sacred Ground Legal Services, Inc.

By:

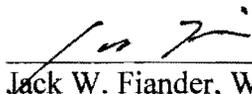


Jack W. Fiander, WSBA #13116
Counsel for Appellants
Cindy Lou Mc Means
and Ricky K. Watlamet

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:

Gregory Zempel
Candace Hooper
Kittitas County Prosecutor
205 West Fifth
Ellensburg, WA 98926



Jack W. Fiander, WSBA 13116

APPENDIX

Appendix

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Defendant's Proposed Instruction No. 11.....	A-4

A-1



Tony Swartz Add to contacts 12/10/13

To: Jack Fiander Cc: Ramona Fritz

Just an FYI – the elected wants this moved straight to Superior Court for felonies if you file any motions.



Tony Swartz

Kittitas County Deputy Prosecutor

509-962-7689 // tony.swartz@co.kittitas.wa.us

From: Jack Fiander [mailto:towtnuklaw@msn.com]

Sent: Tuesday, December 10, 2013 10:39 AM

To: Tony Swartz

Subject: CC 2013-129 DFW CN

MTD attached.

Notice: All email sent to this address will be received by the Kittitas County email system and may be subject to public disclosure under Chapter 42.56 RCW and to archiving and review.

message id: 38eb45916c6dcbdac24bb8719d004a14

A-2

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KITITAS COUNTY
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**IN THE KITITAS COUNTY SUPERIOR COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

vs.
CINDY MCMEANS,
WILLIAM LAWRENCE,
RICKY WATLAMET,
JONATHAN WATLAMET,

Respondents.

No. 14-1-00085-4
14-1-00086-2
14-1-00088-9 ✓
14-1-00087-1

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. FINDINGS OF FACT

The matter came before this Court on defendants' motions to dismiss. This Court heard testimony and argument on May 30, 2014. This Court reviewed all submitted materials by plaintiff and defendants. This Court makes the following Findings of Fact:

- 1) On March 22, 2013, defendant Cindy McMeans allowed Ricky and Jonathan Watlamet to enter her property at 820 Colockum Road in Ellensburg, Washington. This Court reviewed a photograph of the property.

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- 1 2) Prior to March 22, 2013, McMeans granted an easement and right of way to
2 Bonneville Power Administration (BPA), thus allowing BPA access to her property
3 for power transfer and power lines. McMeans pays property taxes on this land. This
4 Court reviewed the easement document related to the applicable land.
- 5 3) Ricky and Jonathan Watlamet hunted elk on McMeans' land. A portion of the field
6 where elk were killed also contained the BPA easement area.
- 7 4) On November 13, 2013 at 11:55am, Deputy Prosecutor Tony Swartz filed one count
8 of Big Game II, a gross misdemeanor, charging each defendant in this case in
9 Kittitas County Lower District Court.
- 10 5) On November 13, 2013 at 1:17pm, defendant McMeans received an email
11 notification that the Daily Record newspaper in Ellensburg, Washington received a
12 letter to the editor written by defendant McMeans. The letter, in part, contained
13 criticism of the Washington State Department of Fish and Wildlife's management of
14 the Colockum elk herd.
- 15 6) On December 10, 2013 at 10:39am, defense counsel Jack Fiander, on behalf of Ricky
16 and Jonathan Watlamet, informed Deputy Prosecutor Tony Swartz that he filed
17 motions to dismiss in Kittitas County Lower District Court.
- 18 7) On December 10, 2013 at 11:10am, Deputy Prosecutor Tony Swartz sent an email
19 to Jack Fiander. The email stated "Just an FYI – the elected wants this moved
20 straight to Superior Court for felonies if you file any motions." On the same day at
21 5:55pm, Mr. Fiander responded, "Oops. Too Late."
- 22 8) On December 10, 2013 at 6:01pm, Mr. Swartz sent another email to Mr. Fiander
23 that said, "I can give you more time to look at the misdemeanor offer before we do
24 any motions, or alternatively I can move it to Superior Court if you want to litigate.
25 No sweat off my back either way – just need to know." On the same day at 6:53pm,
26 Mr. Fiander responded via email with "Welcome to the big leagues."

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- 1 9) Mr. Fiander filed one motion in Lower District Court on December 10, 2013, two
2 motions on December 12, 2013, and a fourth motion on December 17, 2013.
- 3 10) The Lower District Court case was dismissed on December 20, 2013. Defendants
4 were not able to argue any motions in Lower District Court given the dismissal.
- 5 11) Via an affidavit filed with this Court by Mr. Swartz, this Court finds the Prosecutor's
6 Office made a charging decision to file felonies in Superior Court on February 7,
7 2014.
- 8 12) On March 23, 2014, an article featuring defendant McMeans' concerns about elk
9 damage to her property was published in the Yakima Herald-Republic newspaper.
- 10 13) On March 28, 2014, defendants were charged with one count of Big Game I, a class
11 C felony, in Kittitas County Superior Court.
- 12 14) Via an affidavit filed with this Court by Mr. Swartz, this Court finds that Mr. Swartz
13 did not see the March 23, 2014 newspaper article until after felony charges were
14 filed on March 28, 2014 in Kittitas County Superior Court.

16 II. CONCLUSIONS OF LAW

17 Based upon the above Findings of Fact, this court makes the following Conclusions of Law:

- 18 1) This Court finds that defendant McMeans retains a possessory interest in the land
19 involved as the situs of the State's allegations. The easement and right-of-way
20 agreement did not change the possessory owner of the land from McMeans to the
21 federal government. Therefore, jurisdiction is proper.
- 22 a. This Court denies defendant's motion to dismiss for jurisdictional reasons
23 based on conclusion (1) above.

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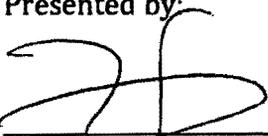
2) This Court finds that the legal issues contained in defendants' Lower District Court motions are the same legal issues later filed in Kittitas County Superior Court. Those motions are the subject of this Findings of Fact and Conclusions of Law. The prosecutor's December 20, 2013 dismissal was not vindictive given the issues were later litigated in Kittitas County Superior Court.

a. This Court denies defendant's motion to dismiss for vindictive prosecution based on conclusion (2) above.

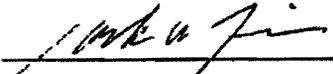
3) This Court finds defendant's free exercise of religion motion to be a factual question to be determined by the jury. As such, the court neither grants nor denies defendants' motion to dismiss for free exercise of religion.

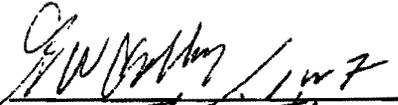
Dated this 14 day of ~~July~~, 2014.
AUGUST


SUPERIOR COURT JUDGE SCOTT SPARKS

Presented by:

Tony Swartz, WSBA #45206
Deputy Prosecuting Attorney


Chelsea Korte, WSBA #7189
Attorney for Cindy McMeans and William Lawrence


Jack Fiander, WSBA #13116
Attorney for Ricky Watlamet


for authorization
George Colby, WSBA #5938
Attorney for Jonathan Watlamet

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**IN THE SUPERIOR COURT OF WASHINGTON
KITITAS COUNTY**

STATE OF WASHINGTON,

Cause No. 14-1-00085-4

Plaintiff,

Cause No. 14-1-00088-9

vs.

CINDY L. MC MEANS,

and

RICKY K. WATLAMET,

Defendants.

COURT'S INSTRUCTION TO THE JURY

DATED: May 29, 2015.



THE HONORABLE SCOTT R. SPARKS

INSTRUCTION NO. 1

It is your duty to determine the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, than you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that if evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the

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**IN THE SUPERIOR COURT OF WASHINGTON
KITITAS COUNTY**

STATE OF WASHINGTON,

Cause No. 14-1-00085-4

Plaintiff,

Cause No. 14-1-00088-9

vs.

CINDY L. MC MEANS,

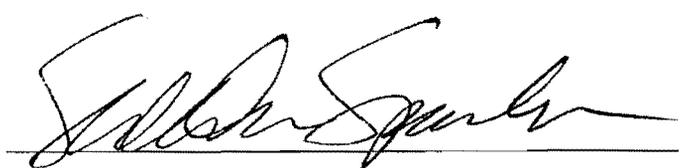
and

RICKY K. WATLAMET,

Defendants.

COURT'S INSTRUCTION TO THE JURY

DATED: May 29, 2015.



THE HONORABLE SCOTT R. SPARKS

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Instruction No. 3

A separate crime is charged against each defendant. You must decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

INSTRUCTION NO. 1

It is your duty to determine the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, than you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that if evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the

INSTRUCTION NO. 4

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 5

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime, The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is accomplice.

INSTRUCTION NO. 7

A person commits the crime of Unlawful Hunting of Big Game in the First Degree when he or she hunts for, takes, or possesses three or more big game animals within the same course of events and violates any Department of Fish and Wildlife rule regarding seasons, bag or possession limits, closed areas, closed times, or any other rule governing the hunting, taking, or possession of big game.

INSTRUCTION NO. 8

To convict the defendant of the crime of Unlawful Hunting of Big Game in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd of March 2013, the defendant did hunt, take, or possess big game;
- (2) In hunting, taking, or possessing big game, the defendant did violate a Department of Fish and Wildlife rule regarding seasons, bag or possession limits, closed areas including game reserves, closed times, or any other rule governing the hunting, taking, or possession of big game;
- (3) That the defendant did hunt for, take, or possess three or more big game animals within the same course of events; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

“To hunt” means an effort to kill big game.

INSTRUCTION NO. 10

Possession means having an Elk in one's custody or control. It may be actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

INSTRUCTION NO. 11

“Same course of events” means within one twenty-four hour period or a pattern of conduct composed of a series of acts that constitute unlawful hunting of big game over a period of time evidencing a continuity of purpose.

INSTRUCTION NO. 12

A hunter may use modern firearms, such as a rifle or shotgun, to hunt elk, but only during the Modern Firearm Elk Season.

INSTRUCTION NO. 13

“Closed season” means all times, manners of taking, and places other than those established by rule of the commission as an open season.

“Closed season” also means all hunting, taking or possession of game animals that do not conform to the special restrictions or physical descriptions established by rule of the commission as an open season or that have not otherwise been deemed legal to hunt, take, or possess by rule of the commission as an open season.

INSTRUCTION NO. 14

“Open season” means those times, manners of taking, and places established by rule of the commission for the lawful hunting, taking, or possession of game animals that conform to the special restrictions or physical descriptions established by rule of the commission or that have otherwise been deemed legal to hunt, take, or possess by rule of the commission.

“Open season” includes the first and last days of the established time.

INSTRUCTION NO. 15

Modern Firearm Elk Season for the April 1, 2012 through March 31, 2013 time period in Game Management Unit 328 and 329 ended by November 4, 2012.

Master Hunter special permit Season for the April 1, 2012 through March 31, 2013 time period in Game Management Unit 328 and 329 ended on ~~February 28, 2013~~.

03/31/2013

INSTRUCTION NO. 16

“Commission” means the Washington State Fish and Wildlife Commission.

INSTRUCTION NO. 17

An elk is big game.

INSTRUCTION NO. 18

The defendant is charged with Unlawful Hunting of Big Game in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Unlawful Hunting of Big Game in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 19

A person commits the crime of Unlawful Hunting of Big Game in the Second Degree when he or she hunts for, takes, or possesses big game animals and violates any Department of Fish and Wildlife rule regarding seasons, bag or possession limits, closed areas, closed times, or any other rule governing the hunting, taking, or possession of big game.

INSTRUCTION NO. 20

To convict the defendant of the crime of Unlawful Hunting of Big Game in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd of March 2013, the defendant did hunt, take, or possess big game;
- (2) In hunting, taking, or possessing big game, the defendant did violate a Department of Fish and Wildlife rule regarding seasons, bag or possession limits, closed areas including game reserves, closed times, or any other rule governing the hunting, taking, or possession of big game; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

A landowner or her designee who kills elk in defense of the landowner's property is not guilty of violating the law if such killing was reasonably necessary for the defense of the property.

The State has the burden of proving beyond a reasonable doubt that the killing was not reasonably necessary for such purpose.

INSTRUCTIN NO. 22

In considering whether a landowner or designee is acting reasonably, a fact finder may take into consideration the measures provided by the Wildlife Code of the Department of Fish and Wildlife, and any other factors that bear on the issue when determining what is "reasonably necessary." However a landowner or designee need not demonstrate exhaustion of every such measure.

INSTRUCTION NO. 23

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and two verdict forms, A and B, for each defendant.

When completing the verdict forms as to each defendant, you will first consider the crime of UNLAWFUL HUNTING OF BIG GAME IN THE FIRST DEGREE as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty" according to the decision you reach. If you cannot agree on a verdict, do not fill in the blanks provided in Verdict Form A.

If you find that defendant guilty on verdict form A, do not use verdict form B. If you find that defendant not guilty of the crime of UNLAWFUL HUNTING OF BIG GAME IN THE FIRST DEGREE, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of UNLAWFUL HUNTING OF BIG GAME IN THE SECOND DEGREE. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

If you find a defendant guilty of the crime of UNLAWFUL HUNTING OF BIG GAME but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on verdict form A and to find the defendant guilty of the lesser included crime of UNLAWFUL HUNTING OF BIG GAME IN THE SECOND DEGREE on verdict form B.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express

your decision. The presiding juror will sign it and notify the bailiff, who will bring you into court to declare your verdict.

IN THE SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

STATE OF WASHINGTON
Plaintiff,

v.

CINDY L. MC MEANS,
Defendant.

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No. 14-1-00085-4

VERDICT FORM A

We, the jury, find the defendant CINDY L. MC MEANS

(guilty or not guilty)

Of the crime of Unlawful Hunting of Big Game in the First
Degree as charged in Count One of the Information

Date

Presiding Juror

IN THE SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

STATE OF WASHINGTON)	
Plaintiff,)	No. 14-1-00088-9
)	
v.)	VERDICT FORM A
)	
RICKY K. WATLAMET,)	
Defendant.)	
)	

We, the jury, find the defendant RICKY K. WATLAMET

_____	Of the crime of Unlawful Hunting of Big Game in the First
(guilty or not guilty)	Degree as charged in Count One of the Information

Date

Presiding Juror

A-4

INSTRUCTION NO. 11

It is a defense to a charge of Unlawful Hunting of Big Game in the First Degree if, at the time of the offense:

- (1) The defendant was exercising a sincerely held religious belief;
- (2) Governmental action was a substantial burden on the defendant's exercise of that belief;

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

If you find that the defendant has met this burden, then the state must prove beyond a reasonable doubt that:

- (3) The State had a compelling state interest in restricting defendant's exercise of his religious belief; and
- (4) The burden upon defendant's religion caused action taken by the State was the least restrictive means of accomplishing the state's purpose.

If you find that the defendant has met the burden on (1) and (2) and the State has not proved (3) and (4) beyond a reasonable doubt it will be your duty to return a verdict of not guilty.

U.S. Constitution, Am I; *Wisconsin v. Yoder*, 406 U.S. 205 (1972).