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DECEMBER 21, 2015
Court of Appeals
Division III
State of Washington

No. 33515-1 III
33516-0 III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CINDY L. MC MEANS,
RICKY K. WATLAMET,

Defendant/Appellant

Respondent's Brief

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RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

- 1. Charges should not be dismissed because there was no vindictive prosecution.**
- 2. It was not error to refuse to give appellant's proposed jury instruction about religious belief.**

I. STATEMENT OF FACT

In March of 2013, Cindy McMeans lived on property abutting State land in Kittitas County. (See Trial Exhibit 2, and also RP Jury Instruction Conference of May 29, 2015, hereafter JIC, 7) She lived on an elk migration path and every year in early Spring, thousands of elk would move through her property, eating her pasture. (CP 215-217) The Department of Fish and Wildlife attempted to work with her year after year and offered many alternatives to her to move the elk along or mitigate the damages. (CP 23-24) She insisted that Washington State give her money for the damages, but she would not sign the cooperative agreement that would have allowed for this payment. (CP 23)

She wrote emails in 2013 to the Department of Fish and Wildlife indicating she planned to hire tribal members to come kill elk on her property. Officials from the Department of Fish and Wildlife wrote her and told her not to do that. It would not be lawful. (CP 216) March was out of season for hunting elk except with special permits. (See Trial Exhibit 6)

On March 23, 2013 a neighbor saw numerous dead elk on the McMeans

property and called the Department of Fish and Wildlife. (CP 24) Officers came out to investigate. (CP 23-24) Officer Scherzinger was able to see three whole carcasses of elk and another gut pile and cow elk head. (CP 24)

On March 24, 2013, when the officers came back to speak with Mrs. McMeans, she told them she had approved tribal members to hunt elk on her property. (CP 25) The officers drove out to the area of her property with her and found (among other things) dead elk gut piles on the property. (CP 26) Mrs. McMeans would not say whom she had called, but said the tribal member would call the officers. (CP 26) Mr. Watlamet, a registered tribal member, did call Sgt. Grant and told him he and his son had been invited by Cindy McMeans, a friend of the family, to look at the elk on Mrs. McMeans' property and get the elk off. (CP 27, RP Watlamet and Lewis testimony, hereafter WL, 5-6) He was not originally planning to shoot elk or hunt. (RP WL 6, 10) He said he tried to get them off the property but they wouldn't go. (RP WL 10) Sgt. Grant said Mr. Watlamet said that he shot 4 elk (CP 27) and Captain Mann later went to his property and testified he saw four elk that had been shot. (CP 29, RP WL 19) Mr. Watlamet disputed the number and said they shot three. (RP WL 19) He did know he was on Cindy McMeans' private property. (RP WL 21-22) There was

also testimony that he did not have a state hunting license or master hunter designation. (RP WL 22) It was against State Hunting Regulations to hunt elk at that time and place without a special master hunter designation. (See Trial Exhibit 6) Mr. Watlamet testified that he did end up providing two of the elk for a funeral he had been notified about. (RP WL 22) He also provided elk for the funeral from other places. (RP WL 22) He agreed he could have obtained elk from the Yakama reservation or from other land besides Ms. McMeans' private property. (RP WL 22) Gerald Lewis testified that Mr. Watlamet is one of several hunters who provide meat for funerals. (RP 29) He talked about how hunters leave an offering behind when they hunt, though there was no testimony that Mr. Watlamet deliberately did that. (RP 30, 19-23). Mr. Lewis testified the elk to be provided for a funeral did not have to come from this property but could have come from anywhere. (RP WL 31)

The killing of the elk outside of elk season on Mrs. McMeans' private property was charged in Kittitas County Lower District Court on November 13, 2013 for both Mr. Watlamet and Mrs. McMeans. (CP 13, 18-20, 102) with the Summons paperwork filed at the same time. (CP 21-32) It is dated November 13, 2013, and stamped by the court 11:55 a.m. (CP 13, 18, 21). The prosecutor who

filed the charges wrote in an affidavit that he had no knowledge of a letter to the editor that Mrs. McMeans wrote to the local paper about her elk issue, which the paper received that date but which was printed later. (CP 42-43, 102, RP Motion Hearing of May 30, 2014, hereafter MH 27). The prosecutor made a plea offer on December 3, 2013, and told Mr. Fiander, counsel for defendant, that if the offer were not accepted and they proceeded to file motions, he would be dismissing the case in District Court and filing in Superior Court. (CP 43, 38-39, 102 RP MH 28-29) He found out from Mr. Fiander's reply to his email on December 10 that just that day, Mr. Fiander had sent a motion to District Court. (CP 38, 102) Mr. Schwartz wrote back and offered to give defense more time to look at the misdemeanor offer, or, if Mr. Fiander preferred, he could go ahead and move it to Superior Court to argue motions. (CP 38, 102). Mr. Fiander's response was "Welcome to the big leagues," which Mr. Schwartz took to mean defense rejected the offer and knew it would be filed in Superior Court. (CP 38, 102, RP MH 29) The defendant, Mrs. McMeans certainly understood that if she did not plead in District Court, it could be filed in Superior Court. (RP MH 13, 17) Mr. Schwartz dismissed the case in District Court on December 20, 2013. (CP 103)

Thereafter, Mr. Schwartz sent charging instructions for the potential

Superior Court charges to the prosecutor's Superior Court secretary on February 7, 2014. (CP 41, 103) The case was filed in Superior Court on March 28, 2014. (CP 1, 103) A Yakima Herald news article about a civil case involving the property was published on March 23, 2014, however Mr. Schwartz had not read it and did not know anything about it until defense moved to dismiss on March 31, 2014. (CP 43) The Superior Court charge was based upon RCW 77.15.410(2)(a) which indicates if three or more big game animals are hunted, taken, or possessed in violation of the season and other rules, it is a Class C felony. (CP 1) The District Court case had previously alleged four violations, occurring at the same time. (CP 18-20) Defense brought a motion to dismiss in Superior Court, alleging that the prosecution was vindictive, and alleging various other things, including an allegation that arraignment the day after Christmas was punitive, and alleging that the filing appeared to be tied to the various newspaper letters and articles. (CP 2) The State responded with documents showing arraignment was actually set for December 2 and ended up being waived, and no hearing occurred December 26 since the case had been dismissed December 20. (CP 15-16) A hearing was held on this motion May 30, 2014. (RP MH entire). That motion was denied. (CP 101-104)

Trial in Superior Court occurred from May 27 to May 29, 2015. (CP 202-213) Numerous witnesses testified. (CP 202-213) At a jury instruction conference, the defense relied heavily on a defense of property defense from the State v. Vanderhouwen case. (CP 243-244, RP JIC page 5, with considerable discussion on further crafting of that defense instruction pages 10-16, State v. Vanderhouwen, 163 Wn.2d 25 (2008)) The Vanderhouwen instructions were given. (CP 243, 244). Defense for Mr. Watlamet wished to give an instruction that indicated it was a defense to the charge if at the time of the charge, the defendant was exercising a sincerely held religious belief and governmental action was a substantial burden on the defendant's exercise of that belief. (CP 96, RP JIC 3-5) The State opposed the giving of this instruction. (CP 5-7) The court did not give the instruction. (CP 221-247, (RP JIC 7-8). The defense for Mrs. McMeans had not proposed this instruction and specifically noted they had no objection to the court's failure to give the religious belief instruction. (RP JIC 9)

The jury convicted both defendants of the Unlawful Hunting of Big Game in the First Degree. (CP 213)

This appeal followed.

ARGUMENT

1. Charges should not be dismissed because there was no vindictive prosecution.

In State v. Korum, 157 Wn. 2d 614 (2006), the Court, noting that “Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges,” held that the prosecutor decision to add charges after Mr. Korum withdrew his guilty plea did not constitute prosecutorial vindictiveness. Korum at 625. Citing Deal v. United States, 508 U.S. 129, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993), Korum reminds us that prosecutors have universally available and unavoidable power to charge or not to charge an offense.

This includes charging a potential felony as one or more gross misdemeanors in District Court, with the understanding that if an offer to plead in District Court is rejected, the case can be refiled as a felony in Superior Court.

In the present case, RCW 77.15.410 states in relevant part:

“(1) A person is guilty of unlawful hunting of big game in the second degree if the person:

(a) hunts for, takes, or possesses big game and the person does not have and possess all licenses, tags, or permits required under this title; or

(b) violates any 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.

(2) A person is guilty of unlawful hunting of big game in the first degree if the person commits the act described in subsection (1) of this section and:

(a) The person hunts for, takes, or possesses three or more big game animals within the same course of events...”

Thus, if a person commits subsection (1) three times or more within the same course of events, it could be charged as three gross misdemeanors or as one felony. This is precisely the sort of discretion which is left to prosecutors. The defendants were given the opportunity to resolve the case at a misdemeanor level¹ but chose not to do so.

Moreover, when a defendant chooses not to plead guilty to an offer, but to file pretrial motions instead, and the prosecutor follows

¹ This choice continued to be re-offered even once the case was moved to Superior Court and even after many motions were filed and argued.

through on amending a charge or adding additional charges, the facts do not give rise to a presumption of prosecutorial vindictiveness. This has been long standing in Washington courts, and is part of the nature of plea bargaining itself. See State v. Bonisisio, 92 Wn. App.783 (1998), which holds that a prosecutor may increase an initial charge when a fully informed and represented defendant refuses to plead guilty to a lesser charge. Bonisisio at 790. In the present case, Mrs. McMeans testified that she knew the charge could be raised to a felony if she did not plead guilty (RP MH 13, 17) And Mr. Watlamet’s attorney was offered a chance to hold off on the filing in Superior Court if he wanted to plead (CP 38, 102) Specifically, the prosecutor offered on December 10, 2013,

“I can give you more time to look at the misdemeanor offer before we do any motions, or alternatively I can move it to Superior Court if you want to litigate. No sweat off my back either way – just need to know.” (CP 38)

The prosecutor clearly offered the defense plenty of time to make a decision on the plea offer. Mr. Watlamet’s attorney clearly decided he preferred to have the motions in Superior Court over pleading in District Court when he responded to the prosecutor, “Welcome to the big leagues.” (CP 38)

There is clearly no vindictiveness in the current case. There is no requirement that the prosecutor charge all possible crimes. State v. Gamble, 168 Wn. 2d 161 (2010) And there has been no presumption of or finding of prosecutorial vindictiveness when the State increases a charge after the defendant refuses to plead guilty. State v. Lee, 69 Wn. App. 31 (1993). Otherwise the entire plea bargain system would break down. Defendants were given an opportunity to decide on a plea first, and decided against it. The four charges were not dismissed until December 20, 2013. Charges were not refiled as one felony charge until March.

Finally, the defendants did not give up any rights, since many pretrial motions were heard in Superior Court. The Superior Court correctly refused to dismiss the case for suspicion of prosecutorial vindictiveness.² There simply was no prosecutorial vindictiveness where defense was told that if they did not want to plead in District Court, the case would go to Superior Court and motions would be argued there.

² If one looks at the original vindictiveness motion in CP 2, the defendants were especially upset about the timing of the filing of charges, which by happenstance coincided somewhat with various newspaper letters or articles. However the coincidental nature of the timing turned out to be

The court did not err.

2. It was not error to refuse to give appellant's proposed jury instruction about religious belief.

Appellant Watlamet argues that the Court erred by failing to give a proposed jury instruction about the free exercise of a religious belief.

Appellant McMeans did not ask for the instruction, and specifically and affirmatively indicated during the jury instruction conference that she did not object to the court's failure to give this instruction. Therefore, the issue is and should be waived as to her. State v. Williams, 159 Wn.App. 298 (2011)

As to Mr. Watlamet, the jury instruction which was proposed did not fit the facts of the case as they came out at trial. The defense proposed the following instruction:

“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;

precisely that—coincidental, and thus is properly not urged by defense any longer.

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." (CP 117)

The Game statute at issue here, which is facially neutral, controls how the State's wildlife resource may be harvested. The chapter and its attendant annual rules set forth reasonable obligations regarding permits, and regarding when and where animals may be killed. (See Trial Exhibit 6, the hunter's pamphlet.) But the instruction defense proposed requires two assessments to be made: first, that the defendant was exercising a sincerely held religious belief, and second, that governmental action was a substantial burden on the defendant's exercise of that belief. The court

held *as a matter of law* that the defense could not show that the statute that the defendant was convicted of was any sort of burden on the defendant's exercise of a sincerely held religious belief.

There have been cases brought in other jurisdictions about religious free exercise. The instruction the defense proposed was purported to be taken from Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). In that case, the Supreme Court of the United States held that the Amish defendants should not be forced to send their children to high school, since they had shown that the compulsory school laws of Wisconsin, which required school attendance to the age of sixteen was in direct conflict with the religious upbringing of Amish youth, and did significantly burden the free exercise of their religion. This proposed jury instruction from the current case was not discussed; nor was there any requirement that a jury determine whether the defendants showed a burden on free exercise of religion. It was in fact the *Court* in Yoder that performed that analysis.

In this case, there was no prima facie showing that the hunting regulation imposed any burden whatsoever, even attenuated, upon Mr.

Watlamet's exercise of religion. Although State v. Balzer, 91 Wn. App 44 (1998) is cited by defense as illustrative, it has no relevance for that proposition at all. The Balzer case dealt with a man who claimed that he used marijuana for religious reasons. With regard to burden, the Balzer court said only about the statute, "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." Balzer at 55. In Balzer, the *court* found a prima facie case for a "religious use" defense in the defendant's testimony at pre-trial and at trial. The court there cited to Munns v. Martin, 131 Wn.2d 192 (1997). In Munns, as in Balzer and other cases, the *court* was the one that found that the ordinance burdened the complaining party's free exercise of religion, not the jury.

In this case, there was simply no prima facie showing that would have supported the proposed jury instruction to be given.

Defendant discusses in some detail the requirement that a defendant have a sincerely held religious belief. The court, in denying the use of this jury instruction, indicated, "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.” (RP JIC 7-8)

The defense is treating the free exercise of religion as an affirmative defense. In an affirmative defense, the defense would have the burden of production of evidence first, and then, if the instruction is given, the jury is instructed that the defendant would have to prove the defense by preponderance of evidence. State v. Lively, 130 Wn.2d 1 (1996) The defendant must start, however, by making a prima facie case that the defense exists. Courts have properly held that this prima facie case is required before the affirmative defense instruction is given. State v. Adams, 148 Wn.App. 231 (2009) This the defendant did not do. The defense needed a prima facie showing not only that Mr. Watlamet had a sincerely held religious belief, but that the government statute or regulations burdened the exercise of his belief.

It was brought out in the case that Mr. Watlamet was a member of the Yakama Indian tribe and that he lived in Yakima County. (RP WL 5) He did not go to Mrs. McMeans property to hunt any elk. (RP WL 10)

His mission was simply to help her get the elk off her property. (RP WL 9) He had made a deal with her that if it was necessary to kill some of the animals he was going to keep some of the meat, (RP WL 10) but he was helping her defend her property.

Thus, his reason for being at this property and for hunting really was not to procure meat for the funeral. But, even more important, the government's restriction on shooting the elk at this time and place was not a restriction of any kind on his shooting elk that day. Mr. Watlamet testified that the meat for the funeral could come from any elk killed any place. (RP WL 22-23) Mr. Lewis, an elder, also testified about using meat at funerals. However, he also indicated that elk meat for a funeral could come from any place. (RP WL 31) Moreover, there was testimony about elk not just on Mrs. McMeans property, but also on the State land that adjoins the property, and Mrs. McMeans had indicated that in case Wildlife agents saw him on the nearby State land, she had provided Mr. Watlamet with written permission to be on her property. (RP JIC 7) Some of the relevant testimony was summarized during the argument about this instruction. Elk were not endangered, they were plentiful, they

were located on the reservation, and they were all around on the public land around Mrs. McMeans. (RP JIC 7) Mr. Watlamet fully admitted he could have gotten some elk from the reservation, which was where he lives. (RP JIC 22) Or he could get them from other open land in Yakima County. (RP JIC 22-23) There was considerable discussion with the court about his ability to hunt out of season on open and unclaimed land (See numerous discussions of this in various motions, CP 105, 120, 218)

Since Mr. Watlamet, as a tribal member, was not restricted by the Washington State hunting regulations except for hunting on private property (such as the McMeans property), since there was open and unclaimed land adjoining the McMeans property, and since there were thousands of elk in migration at that time, the Court was correct in finding that there had been no evidence whatsoever that the law placed a burden upon his free exercise of religion.

Counsel cites United States v. Abeyta, 632 F.Supp 1301 (1986) to support his proposition. However, in Abeyta, the taking of any golden eagle anywhere was prohibited. Use of feathers for religious purposes was through a special permit application which was very unwieldy and

described as a “labyrinthine procedure.” No application to kill a golden eagle had ever been granted. Abeyta at 1303.

In the present case, Mr. Watlamet could have gone THAT DAY to public land adjoining Mrs. McMeans property and shot elk. Or he could have shot elk that morning in Yakima, much closer to his own home. Under Washington law, pursuant to State v. Chambers, 81 Wn.2d 929 (1973), Yakama tribal members have the right to kill animals on open and unclaimed land in the ceded treaty area. Under Chambers, these are lands which are not in private ownership, which would have included the State Land around the McMeans property, as seen on Exhibit 2. The Washington State hunting regulations were no burden to him at all.

It is the court’s job, not the jury’s job, to determine whether a prima facie case had been made before the instruction would be given to a jury. The court determined it had not. The refusal to give that instruction was proper.

CONCLUSION

Since the State had warned the defense that if they did not wish to take the plea offer, the State would file the charge as a felony in Superior Court, and since the defendants decided not to take the offer and the charges were subsequently filed in Superior Court, there is no vindictive prosecution.

Since the defendant Mr. Watlamet did not set out to obtain the elk as part of a religious duty, since he was not planning to hunt elk that day and only decided to hunt once he was there, and since there was no need for the elk to come from a piece of property that was unlawful for him to hunt on when there were many other lawful options open to him, the court did not err by finding as a matter of law that there was no evidence that the hunting regulations were imposing a burden on his free exercise of religion. The Court did not err by refusing to give the defendant's proposed instruction on religion.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "L. Candace Hooper".

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PROOF OF SERVICE

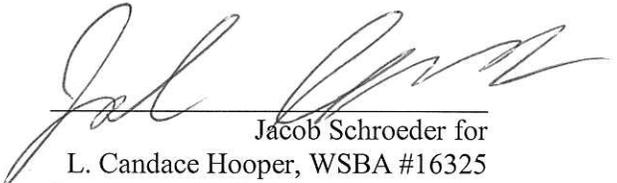
I, Jacob Schroeder, do hereby certify under penalty of perjury that on December 21st 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Respondent's Brief:

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