

66005-5

66005-5

NO. 66005-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL LOVEN,

Appellant.

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

The Honorable Regina Cahan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in not excusing jurors 25 and 47 for cause.
2. Appellant was denied his state constitutional rights to an impartial jury as guaranteed by Const. article 1, §§ 21 & 22.
3. Application of the federal rule in Martinez-Salazar¹ will deprive appellant of his state constitutional right to an impartial jury as guaranteed by his state constitutional right to appeal.
4. The trial court erred in failing to instruct the jury it must unanimously agree on which act of possession and which image supported conviction for count 7. RP 1493-97.

Issues Related to Assignments of Error

1. Did the trial court err in denying appellant's challenges for cause, where two biased jurors admitted their biases in questionnaires and voir dire, where the court's rehabilitation failed, and where multiple similar cases show the court abused its discretion?
2. Did appellant preserve the error for review and reversal by challenging the jurors for cause and using all peremptories?
3. Is the contrary plurality decision in State v. Fire² unpersuasive, incorrect, and harmful?

4. Where (a) the state presented evidence of multiple acts of possession of multiple different images and videos on multiple different storage media in multiple locations, and (b) the state refused to elect any image or images to support the charge, was the trial court obligated to instruct the jury it must be unanimous?

5. Is the contrary decision in State v. Furseth³ unpersuasive, incorrect, and harmful?

B. STATEMENT OF THE CASE

1. Introduction

The state charged appellant Russell Loven with four counts of child rape, one count of molestation, one count of exploitation, and one count of possession of depictions of a minor engaged in sexually explicit conduct. CP 80-83. During the four-year period covering counts 1-7, Loven was between 39 and 43 years old. CP 80-81; RP⁴ 1372; Ex. 100.

¹ . United States v. Martinez-Salazar, 528 U.S. 304, 307, 315-16, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000).

² State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001).

³ State v. Furseth, 156 Wn. App. 516, 233 P.3d 902, rev. denied, 170 Wn.2d 1007 (2010).

⁴ This Brief refers to the 11-volume trial transcript as “RP” (1/4/10 – 4/9/10). The three sentencing transcripts are referenced as: 2RP – 6/11/10; 3RP – 8/13/10; 4RP – 8/27/10.

By the time of closing argument, the only contested issue was whether R.B. was younger than 14 during any of the alleged incidents of intercourse. The defense argued the state failed to prove this element beyond a reasonable doubt. Counsel argued the jury should find Loven guilty of all charged offenses except first and second degree child rape. CP 96, 99; RP 1530-49.⁵

The state responded the jury could determine that R.B. was not the same age when various acts occurred during the charging periods, largely based on: (1) R.B.'s testimony, and (2) photos and video admitted as Exhibits 124A and 124B. RP 1513-1517, 1525-26.

2. Procedural Facts

On October 28, 2008, the King County prosecutor charged Loven with one count of sexual exploitation of a minor and one count of possessing depictions of minors engaged in sexually explicit conduct. Supp. CP __ (sub no. 1, No. 08-1-12213-8). In a different cause number filed November 13, 2008, the state charged Loven with three counts of child rape. The state theorized Loven had sexual intercourse with R.B. during charging periods when R.B. was between 10 and 14 years old. CP 1-7. Nearly a year later, the

⁵ The stakes were significant, as the state alleged Loven had been previously convicted of a "sex-strike" offense. CP 135-236. A second conviction for first or second degree rape of a child would lead to a sentence of life without parole. RCW 9.94A.030(37)(b); CP 246, 249.

state amended the information to charge one count of third degree child molestation and one count of third degree child rape of C.J., during a period of time when he was 14 or 15 years old. CP 8-10.

After plea negotiations did not succeed,⁶ the matters were called for trial on January 4, 2010. Over Loven's consistent and renewed objections, the trial court granted the state's motion to join the exploitation and depictions counts with the rape and molestation counts. CP 57-62, 63-68; RP 142-52, 476-77, 644-62, 1419-21.⁷

After six days of testimony and argument, the jury found Loven guilty on all seven counts. CP 127-33; RP 664-1569.

3. Voir Dire Error in Denying Challenges for Cause.

The state expected to present evidence showing that Loven had oral intercourse with R.B. on multiple occasions. Anticipated evidence would include R.B.'s testimony, as well as photos and videos of at least one of those alleged acts when it occurred. Such evidence was in fact presented at trial.⁸

⁶ RP 166-67, 281; 3RP 37.

⁷ The court initially severed the depictions count, then reconsidered on the state's motion. RP 172-73, 215-18, 262-81.

⁸ Relevant facts and citations to the record are set forth in argument 2.a, infra.

In addition, the police seized numerous items of digital storage media from Loven's apartment and automobiles. The state planned to present evidence that Loven possessed more than 4,000 images and roughly three dozen videos that could support conviction on the depictions count.⁹ Despite repeated defense requests, the state had not made up its mind as to which of these images it planned to show the jury.¹⁰

Not surprisingly, before trial the parties and the court discussed difficult issues for jurors who would see and hear this inherently distasteful evidence. RP 239-43, 298-306.¹¹ In arguing against joinder, defense counsel was particularly concerned that jurors could not be fair after seeing evidence related to the depictions count. RP 12-21, 263-71, 476-88, 1416.

⁹ The state admitted 26 CDs and DVDs containing images and videos. RP 1399-1404; Supp. CP __ (sub no. 104, Exhibit List). Detective Savas ultimately testified these contained, "[a]mong other things, numerous, thousands of images of children engaged in sex acts with other children, children engaged in sex acts with adults, photographs that depict naked, partially clothed, or fully clothed children in sexually suggestive poses we call child erotica." RP 1408. Detective Vradenburg twice called the images "child pornography," despite the court's pretrial rulings prohibiting the use of that conclusory and prejudicial label. RP 224, 233, 292-93, 656-61, 706, 785. Vradenburg's violations led to two mistrial motions. RP 706-10, 800.

¹⁰ RP 16-19, 481-87, 650-62, 1385-90.

¹¹ Detective Vradenburg called the images "pretty disgusting." RP 706.

The parties and the court ultimately presented prospective jurors with a one-page questionnaire. The questionnaire included the following:

13. Are you able to sit on a jury in a case involving an accusation of sexual misconduct by an adult male against two male children?

14. Are you able to sit on a jury in a case involving an accusation of rape of a child?

15. Are you able to sit on a jury where you would view graphic images of children engaged in sexual conduct?

Supp. CP __ (sub no. 95, Juror Questionnaires). Jurors 25 and 47 answered each of these questions “no.” Juror 25 further explained, “As a mother, I’m not sure that I can provide an unbiased viewpoint of sexual assaults against children.”¹²

Juror 25: During voir dire numerous jurors stated they would be inclined to believe a child who accuses an adult of sexual misconduct. Juror 25 agreed. RP 513-25. Juror 25 also agreed based on her own experience with her children, she would tend to believe a young witness’s allegations of sexual abuse unless there was evidence that the young witness had gained the knowledge from some other source. RP 525-26.

¹² The two cited questionnaires are attached as appendix A.

During later follow-up questions, the court kept jurors 11, 24, 25, and 29 after releasing the other jurors for lunch.¹³ The court prefaced the follow-up questions by noting the state “needs to prove each and every element of the accusations beyond a reasonable doubt” and asked if the jurors would assess the testimony of child witnesses looking at the facts of the case “or are you going to simply believe what they say because they’re kids talking about allegations of sexual abuse. So that’s kind of our framework.” RP 555-56.

Juror 25 persisted, stating she would be inclined to start from a position of believing a child witness. RP 559-61. The court then interjected:

THE COURT: I have a couple questions. You answered no on those questions on whether you were able to sit. Now that you've been here and you understand our system a little, I understand that might not be your preference.

JUROR NO. 25: Yes. It's not a comfort (inaudible).

THE COURT: I understand it's not a comfortable subject, but my question is do you think that you could be fair and impartial on a case? It's very important that both the State and the defense get a fair trial. So can you listen to evidence regarding this topic and assess witnesses' credibility and be a fair and unbiased juror?

JUROR NO. 25: I would like to say yes, but my experience in a previous criminal trial that I was on, when it came down to it, it was semantics, and I don't -- I really feel like I need a preponderance of evidence, I guess, physical evidence, or I don't want it to be a he said she said kind of thing or some

¹³ Defense counsel asked the jurors not to feel like they were in trouble or being held after school. RP 556.

definition of what a legal term is in the case of a child. It would just break my heart. I don't --

THE COURT: Let me put it this way. I understand that it might be difficult, but is the fact that a child is involved, would you still be able to hold the State to its burden of proof and, you know, assess whether there was sufficient evidence presented to meet the elements of the crime?

JUROR NO. 25: I guess I'd have to say yes, I would be. I would have to say -- the crime shows that I watch, you know, they get away with something, they don't tell the truth on the stand. Everyone says you have to tell the truth on the stand, but crime shows kind of don't always show that that is what happens, and I don't know. It just -- my faith in the legal system --

THE COURT: Can you do your job as a juror in this kind of case where you have these allegations and assess whether witnesses are telling the truth, whether they are children or adults, and listen to any evidence that's presented and determine if the State has met its burden of proof? Can you do that?

JUROR NO. 25: I'm confident I can do that.

THE COURT: So you're not comfortable, but you feel that you can do it.

JUROR NO. 25: I'm confident I can.

THE COURT: Thank you. That's what I need to know.

MR. GOLDSMITH [defense counsel]: I don't mean to put you on the spot in any way, but it sounds like, and I can see you're really giving us --

JUROR NO. 25: Yeah.

MR. GOLDSMITH: -- your honest --

JUROR NO. 25: How I feel.

MR. GOLDSMITH: -- effort here, and so is it fair to say that there's a bit of a difference between kind of what you were saying before and what you're saying now?

JUROR NO. 25: Uh-huh, yeah. It's a different type of (inaudible).

MR. GOLDSMITH: I guess what my question was, you know, when we were talking before, sounds like what you were saying, correct me if I'm wrong, but that when you hear a child make this sort of allegation, you start from the position that it's true unless -- it's true until -- and is that a fair characterization of how you feel? If you were having a debate with a friend of yours and your friend said, listen, you really have to change your view 180 degrees on that, would that be something that would be possible for you to do?

JUROR NO. 25: It would be difficult, but with evidence (inaudible) I'm confident (inaudible).

MR. GOLDSMITH: Okay. So as long as you're shown enough evidence, you think you could change your view from believing the child (inaudible)?

JUROR NO. 25: Uh-huh, yes.

MR. GOLDSMITH: One of the things that I think the judge wants to let you know is that the way the law works is kind of the polar opposite of your point of view, right? That your gut reaction that we all respect and nobody is trying to change is that a child tells a baseless sort of allegation --

JUROR NO. 25: Yes.

MR. GOLDSMITH: -- and it needs to be proven that it's true or not true.

JUROR NO. 25: (Inaudible) innocent.

MR. GOLDSMITH: Sort of in this kind of case guilty until proven innocent, right?

JUROR NO. 25: Yeah.

MR. GOLDSMITH: And that's okay. Nobody's saying that we're trying to change your feeling about that.

JUROR NO. 25: Yeah.

MR. GOLDSMITH: But it's fair to say for you in these sorts of cases it's still guilty until proven innocent.

JUROR NO. 25: In the case of a child. I just –

RP 561-64. The Court again interrupted:

THE COURT: I need clarification on that because I don't want anyone to put words in your mouth. Is that what you're saying, or are you saying that initially when you hear something that would be your initial thought, but you're going to listen to the witnesses and make a determination.

JUROR NO. 25: Yes.

THE COURT: I mean you have to tell us.

JUROR NO. 25: No, you're right. I would have probably more of a leaning to believe the child, in which case would make more of an attempt to help that child to find out what's true or not, but I would find out what's true. I wouldn't just assume it's right. I would find out if it's true. I don't know.

THE COURT: Here's another way of asking the same question. Just because there are serious allegations, accusations of serious allegations, do you jump to believing the child because of those allegations, and you might, you know, coupled with the fact that you might see some graphic

pictures, or do you -- you know, just meaning what I'm saying is it's a disturbing subject matter, right? Do you jump to someone must be guilty because I'm seeing something disturbing or can you objectively look at those disturbing things and hear accusations and assess whether people are telling you the truth? And you're the only one that knows.

JUROR NO. 25: The thought of seeing disturbing images of a 10- to 14-year-old put in that position, I would have to say that I don't know whether there's a verdict I would give on something like that because I don't think that they should be put in that position ever. So am I saying do I feel like they're guilty already if I saw that? I would have to say yes, that that's not –

THE COURT: I don't think I quite phrased that right. Only because the question -- let's do a different example. If you saw let's say -- let's say it's an issue of who owns something and what it is is a disturbing image, but you still might not have that thing of who actually has it or whatever, you see what I'm saying? There's one through four elements, and let's say the image is only one of them. Can you assess the other three elements to determine if the State's met its burden? That's what we're trying to figure out. Or is the content of that one element going to be so disturbing to you that you can't objectively look at the other three? And if the answer is yes, that's fine, but we just need to know.

JUROR NO. 25: I don't know.

THE COURT: Don't know. Okay.

RP 564-66. In the last questions before lunch, the court later asked Juror 29 (not Juror 25) if she could “presume the defendant innocent until proven guilty and can you hold the State to its burden of proof?”

JUROR NO. 29: Yes, I can. I used to be a paralegal , so I know how important this is. I don't know if that disqualifies me because I was (inaudible).

THE COURT: Juror number 25, can you do that?

JUROR No. 25: Yes.

RP 568.

Upon returning from lunch, defense counsel challenged Juror 25 for cause.¹⁴ Her questionnaire and voir dire answers showed her core belief that she could not presume innocence, she started from the belief that a child would be telling the truth, and she would need evidence to change her mind. The court's colloquy got her to "answer eventually that she thought she could be fair, but that doesn't abrogate her prior answers." RP 569-70. Citing authority,¹⁵ counsel argued that affirmative answers to a court's leading rehabilitation does not counteract the juror's prior statements. RP 570-71

Counsel for the state briefly responded she did not believe Juror 25 could not be fair, but in comparison "it was even more clear" that Juror 29 was not biased. RP 572.

¹⁴ Counsel also challenged jurors 11 and 29. RP 569-73.

¹⁵ State v. Fire, 100 Wn. App. 722, 725-26, 998 P.2d 362 (2000), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001).

The court stated it did not think Jurors 11, 25, or 29 “were burden shifting” and did not see “they can’t be fair and unbiased jurors[.]” RP 573. The court therefore denied the challenges for cause. The defense later used one of its six peremptories to excuse Juror 25. RP 635.

Juror 47: Juror 47’s questionnaire answers revealed additional information. Her daughter was the victim of sexual exploitation. Her husband had taken photographs of their 13- and 14-year-old daughter “as she went into adolescence, and he insists that it was art, but I thought it was very inappropriate[.]” RP 388, 392. She believed she could not sit on a case involving similar accusations “[b]ecause it brings up feelings that I had, you know, at the time my husband did that.” RP 389. She also related an incident where her friend’s 11-year-old adopted daughter had been raped by her friend’s ex-husband. RP 388.

When the court asked the standard rehabilitation question whether she could be a fair and impartial juror, she answered “I probably could.” RP 389. The court again asked “[d]o you think you can be a fair and impartial juror for both the defense and the State given what’s happened? Can you set aside what happened with your daughter and only listen to the evidence in this case? Juror No. 47: I believe I can.” RP 389.

She nonetheless admitted she thinks about the issue several times a year. The situation was uncovered when her daughter's fiancé asked probing questions and he found out, which was followed by an unpleasant confrontation. Juror 47 described herself as "horrified." Her husband said he destroyed the pictures but the fiancé did not believe him. RP 390.

Juror 47 never thought her daughter was not telling the truth about the allegations. She admitted that she believed children most often tell the truth. She also did not want to sit on a jury with this kind of charge because she did not like reliving the incident. RP 391. She thought she could "handle it," but she had no real answer as to how she would do that. RP 392.¹⁶

Defense counsel challenged Juror 47 for cause, noting her responses on the questionnaire, how she had become emotional as she recalled the incidents, and the similarity of the accusations. The court denied the challenge, finding that the juror might prefer not to sit on the case, but that is not the standard. RP 393-94. The defense later used one of the six allocated peremptories to excuse Juror 47. RP 636.

4. Trial Testimony

As cited in argument 2.a, infra, the state presented testimony from R.B. and C.J., who testified that Loven had oral sex with them during the

¹⁶ Parts of the voir dire transcript have numerous "inaudibles."

charging periods. Nearing the close of testimony, ostensibly to support the depictions count, the state decided it would play one video showing what appeared to be an adult male having anal sex with what appeared to be a 5- to 6-year-old girl. The defense again objected. RP 1416-21, 1527-28. The state played one video each from Exhibits 113 and 115. Savas then testified that other videos were “consistent” with images on those exhibits. RP 1428-29.

In closing argument, the state again played the video allegedly showing Loven and R.B. engaged in oral intercourse. RP 1511. Additional relevant facts are discussed in argument 2.a., infra.

C. ARGUMENT

1. THE TRIAL COURT’S FAILURE TO EXCUSE JUROR 25 VIOLATED LOVEN’S STATE RIGHT TO AN IMPARTIAL JURY.

The Washington Constitution guarantees the right to trial by an impartial jury and the right to appeal. Const. art. 1, § 22 (“In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases. . .”). The Washington Constitution also guarantees “[t]he right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record . . .”. Const. art. 1, § 21. Since early

statehood, a long series of appellate decisions have applied these guarantees, reversing convictions when trial courts erred in denying challenges for cause to remove biased jurors. The error required reversal when it forced the accused to use a peremptory challenge to remove the otherwise biased juror. See e.g., State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1970); McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 30, 236 P. 797 (1925); State v. Stentz, 30 Wash. 134, 70 P. 241 (1902); State v. Lattin, 19 Wash. 57, 60-61, 52 P. 314 (1898); State v. Moody, 18 Wash. 165, 170-72, 51 P. 356 (1897); State v. Rutten, 13 Wash. 203, 43 P. 30 (1895); State v. Wilcox, 11 Wash. 215, 223, 39 P. 368 (1895); State v. Murphy, 9 Wash. 204, 37 P. 420 (1894); State v. Stackhouse, 90 Wn. App. 344, 351-52, 957 P.2d 218 (1998).

a. Juror 25 Was Biased and Should Have Been Removed for Cause.

To protect the right to an impartial jury, a juror is excused for cause when her views would “prevent or substantially impair the performance of h[er] duties as a juror in accordance with his instructions and his oath.” State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002) (internal quotations omitted). Actual bias is “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and

without prejudice to the substantial rights of the party challenging[.]” RCW 4.44.170(2).

The denial of a challenge for cause should be reversed where the trial court abuses its discretion. Gonzales, 111 Wn. App. at 278; State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d 99 (1996), rev. denied, 130 Wn.2d 1022 (1997). “[A]ppellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp.” State v. Fire, 100 Wn. App. 722, 729, 998 P.2d 362 (2000), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001).

Strict protection of the right to an impartial jury spans Washington’s history. In 1894 the Murphy court discussed why trial courts must carefully consider challenges for cause, reasoning:

No possible harm, at least no harm that rises above a little temporary inconvenience, or additional costs, which ought not to be seriously considered where a citizen is on trial for his life or liberty, can be done by discharging the juror; but very grave harm may come from retaining him.

Murphy, 9 Wash. at 215.

When applied here these cases show little doubt of Juror 25’s disqualifying bias where the allegations involved sexual contact with and exploitation of children. She admitted she would presume guilt and presume a

child witness was telling the truth until presented with contrary evidence. Her answers, quoted at length supra, speak for themselves.

There is equally little doubt that the court's aggressive rehabilitation efforts ultimately failed.¹⁷ When faced not merely with the prospect of allegations of physical sexual contact, but also of viewing disturbing images, Juror 25 said "I don't know" when the court asked if she could objectively consider the elements of the charges. RP 566. Despite the court's overtly leading questions, this answer was the best Juror 25 could offer. The cited cases are littered with similarly failed rehabilitation.

Under Gonzales, Witherspoon, Fire, and Murphy – as well as Parnell, Stentz, Moody, Rutten, Wilcox and Stackhouse – the court erred in allowing Juror 25 to serve. Although perhaps not as obviously, the trial court also erred in denying counsel's challenge of Juror 47.

b. Before State v. Fire, Reversal Was Required.

Loven preserved the error for review by challenging jurors 25 and 47 for cause and by using all peremptory challenges. RP 393-94, 569-73, 634-

¹⁷ "Aggressive" is an appropriate word. At one point, when interrupting defense counsel's appropriate questions, the court went so far as to tell Juror 25 the court did not want to let counsel "put words in [her] mouth." RP 564.

38.¹⁸ Under previously settled Washington law, reversal of the convictions would be required. Parnell, 77 Wn.2d at 508; McMahon, 135 Wash. at 28-29; Stentz, at 143-44; Rutten, at 204; State v. Fire, 100 Wn. App. at 726-27.

- c. Where Loven's Peremptories Were Exhausted, the Error Cannot be Harmless. State v. Fire Conflicts With the Inviolable State Right to an Impartial Jury and the Right to Appeal.

In response, the state will argue the trial court's error was harmless even though Loven was forced to peremptorily challenge jurors 25 and 47. If this case were governed by federal procedural rules, the state would be correct. United States v. Martinez-Salazar, 528 U.S. 304, 307, 315-16, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) ("We hold . . . that if the defendant elects to cure such an error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right"). Under state law, however, the state is wrong. Although a four-member plurality adopted Martinez-Salazar in State v. Fire, the plurality's legal analysis is unpersuasive, incorrect and harmful.

The Fire court was badly fractured. Justice Bridge, writing for the four-justice plurality, reasoned that Washington had applied two different

¹⁸ The state also used all of its eight peremptories; six for the panel, and one for each alternate. RP 634-38.

rules and the court had already implicitly rejected Parnell. Fire, 145 Wn.2d at 158-65. Justice Sanders, writing for the four-justice dissent, recognized that Parnell was the longstanding Washington rule that had never been rejected. Fire, at 168-78. In his solitary concurrence, Chief Justice Alexander agreed with the dissenters that Parnell was the Washington rule.¹⁹ He concurred with the plurality's result, however, as he concluded that Martinez-Salazar was the "better rule" and should be adopted in Washington. Fire, at 166-68 (Alexander, C.J., concurring).

(i) The Fire Plurality Misunderstood and Overlooked Prior Washington Law.

The Fire plurality initially addressed the Sixth Amendment, holding there is no federal violation when a trial court erroneously denies a challenge for cause and forces the accused to use a peremptory challenge on that juror. Fire, at 158-59 (citing Martinez-Salazar). The plurality then discussed state law, asserting there were "two conflicting lines" of Washington authority, one following Parnell and the other "aris[ing] out of State v. Latham, 100 Wn.2d 59, 64, 667 P.2d 56 (1983)." Fire, at 159.

¹⁹ For this reason, this brief refers to the Fire "majority" as the five justices who agreed that Parnell stated the rule in Washington. Justice Bridge's opinion is the "plurality" as its reasoning did not carry the court's majority.

The plurality briefly noted the Parnell rule had long roots, citing Stentz (1902) and Rutten (1895). Fire, at 159-60. But according to the plurality, Latham “chipped away” at Parnell, even if the Latham court did so without, “strictly speaking, reaching the issue.” Fire, at 160-61. As the Fire majority more aptly put it, any discussion in Latham was dicta, since Latham found no error in denying any challenge for cause. Fire, at 173-75 (Sanders, J., dissenting) (discussing Latham and subsequent cases in detail).²⁰

The plurality then noted that more of the recent cases had cited Latham than Parnell. According to the plurality, State v. Roberts, 142 Wn.2d 471, 517-18, 14 P.3d 713 (2000), tolled Parnell’s death knell when it cited Martinez-Salazar but not Parnell. Fire, at 161-63. The five-justice majority again showed why Parnell was not at issue in Roberts. Fire, at 175-76 (Sanders, J., dissenting).

The plurality then reasoned that no Washington case had “recognized a difference between the right to an impartial jury” under the federal and state constitutions. The plurality noted Stentz did not specify “which constitution” led to its decision. Fire, at 163. Parnell and Roberts had cited both state and federal authority. From this, the Fire plurality satisfied itself that Washington

²⁰ Nor did the Latham court, “strictly speaking,” cite Parnell, let alone analyze its longstanding rule.

could lock step with the federal rule and create no state constitutional problems. Fire, at 163-65.

(ii) The Fire Majority Applied Prior Washington Law.

The court's majority, however, rejected the plurality's revisionist view of prior state law. Washington has an independent rule dating at least to State v. Moody in 1893. The majority tracked the rule from Moody through Rutten and Stentz, then on to McMahon and Parnell. See Fire, at 169-77 (Sanders, J., dissenting); at 166-67 (Alexander, J., agreeing re: Washington law).

Washington had long recognized the rule adopted in Martinez-Salazar was followed by a "majority" of other state courts. McMahon, 135 Wash. at 30. But the McMahon court expressly rejected that majority rule, finding it failed to protect the underlying reason for peremptory challenges – "to enable parties to excuse from the jury those whom they may, for any reason, feel would not make fair jurors even though nothing is disclosed on the voir dire." McMahon, at 30.

As to prior Washington law, the Fire majority was demonstrably correct. The first post-statehood case to apply the rule was Rose v. State, 2 Wash. 310, 26 P. 264 (1891). The trial court erred in allowing a juror with preconceived opinions of guilt to remain on the jury. "By the court's ruling the defense was compelled to peremptorily challenge the juror to avoid the

danger of his presence with a fixed opinion in his mind.” Rose, at 312. The court reversed Rose’s conviction. Rose, at 320. This was a particularly strong application of the rule; Justice Scott pointed out in dissent that Rose had not exhausted all of his peremptories. Rose, at 321.

In State v. Coella, 3 Wash. 99, 103, 28 P. 28 (1891), the court reversed a murder conviction where the trial court erred in denying a challenge for cause and all peremptories were used.

In State v. Murphy, 9 Wash. 204, 37 P. 420 (1894), the court clearly applied article 1, § 22 of the state constitution. Murphy, 9 Wash. at 214. The issue was preserved for appeal by the objection and the exhaustion of all peremptory challenges. Murphy, 9 Wash. at 208 (“[t]he record shows that defendant’s peremptory challenges were all exhausted”).

Shortly after Murphy came State v. Wilcox, 11 Wash. 215, 223, 39 P. 368 (1895), where the court reversed a manslaughter conviction. The court again applied a constitutional rule. Wilcox, 11 Wash. at 223 (“it is the constitutional right of every citizen to be tried by an impartial jury, and, when that right is denied, he must have redress”). Again, the court noted that all peremptories had been exhausted. Wilcox, 11 Wash. at 223 (“[t]he defendant had exhausted all his peremptory challenges”).

Next was State v. Rutten, 13 Wash. 203, 43 P. 30 (1895). After the trial court denied Rutten's challenges for cause, Rutten excused three jurors peremptorily. Rutten, 13 Wash. at 204. On appeal Rutten argued the trial court's error required reversal.

The Rutten court held the trial court erred in denying the challenges for cause. Rutten, 13 Wash. at 208 (citing Wilcox and Murphy). The court also stated this clear rule:

All these jurors were peremptorily challenged by appellant after the refusal of the court to sustain challenge for cause, but the record shows that the appellant exhausted all his peremptory challenges; and, if the court wrongfully compelled him to exhaust peremptory challenges on jurors who should have been dismissed for cause, his rights were invaded as much as though the jurors had been accepted after his peremptory challenges were exhausted[.]

Rutten, 13 Wash. at 204.

The Supreme Court had no difficulty citing or applying Rutten. In State v. Moody, 18 Wash. 165, 170-72, 51 P. 356 (1897), the court reversed a murder conviction where "the defendant's peremptory challenges were all exhausted." Moody, at 166.²¹

Five years later in Stentz, the court reversed a manslaughter conviction because Stentz was forced to peremptorily challenge a juror who

should have been excused for cause. Stentz, 30 Wash. at 137. The court stated this was a constitutional rule. Stentz, 30 Wash. at 139. Quoting Murphy, the Stentz court reasoned that allowing a trial with biased jurors would be “little less than a farce, and our boasted constitutional privilege of a trial by an impartial jury would be a privilege existing more in theory than in practice.” Stentz, at 143. Citing Rutten, the court held

A refusal to sustain challenges for proper cause, necessitating peremptory challenges on the part of the accused, will be considered on appeal as prejudicial where the accused has been compelled subsequently to exhaust all his peremptory challenges before the final selection of the jury.

Stentz, 30 Wash. at 143-44. Stentz might have peremptorily challenged different jurors but for the court’s error. The error violated Stentz’ constitutional right to an impartial jury. Stentz, at 139-44.

In 1925, the Supreme Court faced the same question raised by the state in Fire: which of the two rules to apply. McMahon v. Carlisle-Pennell Lumber Co., 135 Wash. 27, 236 P. 797 (1925). The McMahon court recognized its prior decisions in Rutten, Moody, and Stentz. McMahon, at 28-29. It also recognized that the “majority rule” applied by other states presumes the error harmless when the trial was heard by twelve otherwise fair

²¹ A year later, in State v. Lattin, 19 Wash. 57, 60-61, 52 P. 314 (1898), the court reversed a manslaughter conviction for similar error, without bothering to note if all peremptories had been exhausted.

and impartial jurors. The court nonetheless expressly rejected the Martinez-Salazar rule because it fails to recognize the reasons for peremptory challenges.

[W]e think that the majority rule entirely overlooks at least one of the purposes of the peremptory challenges allowed by law. If it be conceded that the purpose of the peremptory challenge is merely to allow a juror to be removed when the court has refused to allow him to be excused for cause actually shown, or to remove those who have shown by their answers that they are probably prejudiced or unfair jurors, then the majority rule should govern. However, it seems to us that the right to peremptory challenges is given to enable parties to excuse from the jury those who they may, for any reason, feel would not make fair jurors even though nothing is disclosed on the voir dire. As a matter of actual experience, every practitioner knows that many jurors are excused because of known prejudices which counsel in the case do not wish to question the jurors concerning. Political and religious opinions, nationality, and other causes give rise to prejudice in the minds of many people, and very often while this is known to the parties to the action, counsel would not wish to disclose that fact in the presence of other jurors. Again, parties to the action may have confidential information as to some juror's viewpoint, and, knowing they would be unable if a challenge for cause is denied to substantiate it in any way, refuse to question the juror concerning it. It was to protect the rights of parties in just such cases as these that the right to the exercise of peremptory challenges was granted.

McMahon, 135 Wash. at 30-31.

In Parnell, the trial court erred in refusing a challenge for cause. Defense counsel used a peremptory to exclude the juror. Parnell, 77 Wn.2d at 507-08. Applying Stentz and Rutten, the court rejected the state's

argument the error was obviated when the biased juror did not deliberate.

Parnell, at 508. Justice Hill added:

This may seem to be no more than a delaying gesture,^[22] but more important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.

Parnell, at 508.

Given this indisputable history, there can be no doubt the Fire majority correctly held that Parnell, Stentz and Rutten were the settled Washington rule. The Fire plurality was wrong.

- (iii) Washington Does Not Abandon Long-Settled Stare Decisis Without a Showing it is Harmful and Wrongly Decided.

The second problem with the Fire plurality is that it neglected its own precedent when addressing stare decisis. In purporting to abrogate Parnell and Stentz, the plurality found none of these cases “harmful and wrongly decided.” In fact, Latham and Roberts did not cite or discuss Parnell, Stentz, or the long-settled Washington rule.²³

²² Students of Justice Hill’s jurisprudence will know this means the state’s case was strong.

²³ The Fire plurality admitted as much; where Parnell was not cited or discussed, the best the Fire plurality could do was suggest it had been “tacitly abandoned.” Fire, at 161.

Before the Washington Supreme Court will abandon controlling authority, the party seeking the new rule must show the old rule to be “both incorrect and harmful.” State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (citing, *inter alia*, In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)); *accord*, State v. Abdulle, __ Wn.2d __, __ P.3d __ (No. 84660-0, 5/3/12), slip op. at 5.

We have been mindful to respect this doctrine's role to promote the evenhanded, predictable, and consistent development of legal principles, foster reliance on judicial decisions, and contribute to the actual and perceived integrity of the judicial process.

State v. Barber, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (internal quotations omitted).

In Fire, the state and the plurality failed to make this showing. A similar failure plagued the short-lived decision in State v. Lucky, 128 Wn.2d 727, 735, 912 P.2d 483 (1996), *overruled in* State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997) and State v. Warden, 133 Wn.2d 559, 947 P.2d 708 (1997).

In Lucky, a seven-member majority stated a rule which narrowly restricted the availability of lesser included offenses. Lucky, at 735. The Lucky majority rejected the longstanding rule of State v. Workman,²⁴ and

²⁴ State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).

claimed that its decision was justified by the "new rule" announced in two other cases. Lucky, at 735 (citing State v. Davis, 121 Wn.2d 1, 846 P.2d 527 (1993) and State v. Curran, 116 Wn.2d 174, 183, 804 P.2d 558 (1991)). Reasoning that Lucky had failed to show that Davis and Curran's "new rule" was "incorrect or harmful," the Lucky majority concluded it was bound by the principles of stare decisis to reject Lucky's argument. Lucky, at 735.

In Berlin, the seven-member majority exposed the flaw in the Lucky majority's reasoning. The courts in Davis and Curran had never shown why the Workman rule was incorrect and harmful. Thus, the Lucky majority had shown no basis for its departure from Workman's "stare decisis". Berlin, at 548. The Berlin court then discussed several reasons why Lucky was incorrect and harmful, and expressly overruled Lucky. Berlin, at 547-48.

Berlin was decided by a seven-member majority, five of whom had been in the Lucky majority. See Berlin, at 554 (Alexander, J., dissenting). As Berlin illustrates, numerous justice can change their opinions when a decision is determined to be incorrect and harmful.

In contrast to the uphill battle faced by those who challenged the 7-2 decision in Lucky, only five justices concurred in the Fire result. One justice expressly noted he would not abandon Parnell if it were a constitutional

rule,²⁵ and as shown both supra and infra, it is a constitutional rule. The Fire plurality cannot withstand fair scrutiny.

Loven recognizes that the Court of Appeals is not entirely free to disregard Supreme Court decisions. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227, 39 A.L.R.4th 975 (1984). But the Court of Appeals has not shied from careful criticism in appropriate cases.²⁶ Such criticism has been important in changing erroneous decisions.²⁷

(iv) The Fire Plurality is Harmful and Wrongly Decided.

Although the Martinez-Salazar rule has never been properly adopted in Washington, it is harmful and wrong. As quoted above, the McMahon

²⁵ Fire, at 167 (Alexander, J., concurring).

²⁶ See, e.g., State v. Allen, 161 Wn. App. 727, 756, 255 P.3d 784 (Ellington and Cox, J., concurring) (criticizing State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984)), rev. granted, 172 Wn.2d 1014 (2011); State v. Ferguson, 76 Wn. App. 76 Wn. App. 560, 570 n.13, 886 P.2d 1164 (1995) (criticizing the rule in State v. Davis as "go[ing] too far"); accord Seattle v. Wilkins, 72 Wn. App. 753, 757 n.6, 865 P.2d 580 (1994); State v. Berlin, 80 Wn. App. 734, 743, 911 P.2d 414 (1996) (reluctantly following Davis, stating that the supreme court "should clarify and limit Davis"), rev'd, 133 Wn.2d 541, 947 P.2d 700 (1997)).

²⁷ See, e.g., Berlin, 80 Wn. App. at 734 (criticizing Davis); see also State v. Wilson, 83 Wn. App. 546, 553, 922 P.2d 188 (1996) (criticizing State v. Thompson, 95 Wn.2d 888, 892, 632 P.2d 50 (1981)), rev. denied, 130 Wn.2d 1024 (1997). Thompson was later overruled in State v. Hardy, 133 Wn.2d 701, 709 n.9, 946 P.2d 1175 (1997) (citing Wilson's criticism with approval).

court expressly rejected the rule because it fails to recognize the reasons for peremptory challenges in Washington. McMahon, 135 Wash. at 30-31.

The rule encourages brinkmanship, not impartial juries.

[I]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

Fire, at 158. In other words, Martinez-Salazar encourages defendants to ignore erroneous trial court rulings, allow unfairly biased jurors to deliberate, and gamble on a later reversal.

In practice the rule is counterintuitive, at least. In State v. Gonzales, for example, the Court of Appeals reversed Gonzales' brutal first degree assault conviction because the trial court erred in refusing a challenge for cause. Gonzales "used all but one of his preemptor[ies]", but allowed the cause-challenged juror to remain. Gonzales, 111 Wn. App. at 280-81. Applying Martinez-Salazar, reversal was required even though Gonzales gambled on the outcome and did not remove the juror. Gonzales, at 282. The state will not argue that Martinez-Salazar led to a just result in Gonzales.

The Kentucky Supreme Court recently rejected Martinez-Salazar as insufficiently protective of the state-granted right to peremptory challenges. That court saliently noted, "[i]t is fundamentally inconsistent for the Court to

give with one hand and take away with the other, a position that does not invite public trust in the integrity of the judicial system.” Shane v. Commonwealth, 243 S.W. 3d 336, 339 (Ky. 2007). “To shortchange a defendant in this manner is to effectively give the Commonwealth more peremptory challenges than the defendant.” Shane, at 339.²⁸

The Kentucky Supreme Court is absolutely right – this unfair rule effectively gives the prosecution more peremptories than the defense. Under Martinez-Salazar, a trial court may err in denying six defense challenges for cause. CrR 6.4(e)(1). But no reversal would be required unless the defense decided to gamble and allow one of those obviously biased jurors to deliberate. The state would still have six peremptories left to use for their intended purpose.

This imbalance was not an issue under the federal rules, where the government has six peremptory challenges, while the defense has 10. In multiple-defendant cases, the court can grant the defense even more challenges. Martinez-Salazar, 528 U.S. at 312 (citing Fed. R. Cim. Proc.

²⁸ See also, People v. Lefebvre, 5 P.3d 295, 305 (2000) (“Affording the prosecution an additional peremptory challenge is inherently prejudicial because the side with the greater number of peremptory challenges clearly has a tactical advantage because it will have the power to select a jury presumably balanced in its favor by challenging a greater number of jurors”, internal quotation omitted).

24(b)). Unlike the federal rule, Washington grants both sides six peremptories. CrR 6.4(e)(1).

Martinez-Salazar also threatens to render meaningless Washington's longstanding independent rule guaranteeing the right to peremptory challenges "for which no reason need be given." RCW 4.44.140; Laws 1881, §208; accord CrR 6.4(e)(1). Washington has recognized the importance of peremptory challenges since territorial days. Martinez-Salazar, on the other hand, allows a slippery slope to render the long-held state right to peremptory challenges an illusory charade.²⁹

The Martinez-Salazar rationale also conflicts with other Washington decisions. In State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009) and State v. Elmore, 155 Wn.2d 758, 776, 777–78, 123 P.3d 72 (2005), the state claimed a deliberating juror had become unfit to serve. Both trial courts erred by replacing the juror with an alternate. But where neither alternate was challengeable for cause, facially fair juries entered unanimous guilty verdicts.³⁰ Nonetheless, the Supreme Court reversed both convictions,

²⁹ See Rivera v. Illinois, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) (affirming Illinois Supreme Court's determination that the trial court's erroneous denial of Rivera's peremptory challenge was "harmless" because none of the jurors who deliberated were removable for cause).

³⁰ The Elmore court recognized that the Sixth Amendment does not require unanimous state verdicts, but the state constitution does. Elmore, at 771 n.4.

finding the error denied “the right to a fair and impartial jury.” Elmore, 155 Wn.2d at 767-81; Depaz, 165 Wn.2d at 852-62.

If Martinez-Salazar’s logic were persuasive in Washington, the state should have prevailed on a “harmless error” theory in Elmore and Depaz. Both alternate jurors were competent to serve and the verdicts were delivered by facially fair juries.³¹ Under Martinez-Salazar’s rationale, Elmore and Depaz would have lost.³² The result in Depaz and Elmore therefore undermines the Fire plurality and suggests the court has at least “tacitly abandoned” the plurality’s flirtation with Martinez-Salazar.

Finally, Martinez-Salazar is particularly counterintuitive in the context of a case like Loven’s. In closing, defense counsel admitted the state’s evidence on all but one issue was strong. Counsel’s aggressive and thorough defense nonetheless shows counsel’s effort to preserve all potential errors for appellate reversal. But if Martinez-Salazar is ever fairly adopted as the rule in Washington, then by peremptorily challenging jurors 25 and 47,

³¹ As stated by the dissenting Justice in Elmore, “[t]here is no suggestion that the members of the jury who convicted Elmore were in any way unreasonable, unfair, or biased.” Elmore, at 788 (J.Johnson, J., dissenting).

³² “So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated.” Martinez-Salazar, 528 U.S. at 313 (quoting Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)).

instead of allowing them to remain, counsel ineffectively deprived Loven of appellate reversal.

For all these reasons, the Fire plurality is incorrect and harmful. A rule that conflicts with Washington law and leads to such puzzling inconsistencies is not a just rule.

- (v) A Gunwall Analysis Requires Washington to Hold “Inviolate” the State Constitutional Right to an Impartial Jury as it Existed in 1889, and Protects the State Constitution Right to Appeal.

While many criticisms are properly leveled at Martinez-Salazar’s federal rule, it does not govern the inviolate right to an impartial jury protected by the right to appeal under Washington’s independent state constitution: article 1, §§ 21 & 22. Fire’s counsel did not raise a state constitutional claim, nor did Fire provide a Gunwall analysis. Loven does.

As the Fire court stated, “[i]f the party has not engaged in a Gunwall analysis,³³ this court will consider his claim only under federal constitutional

³³ The six Gunwall factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808, 76 A.L.R.4th 517 (1986).

law.” Fire, at 163-64. No published decision appears to have fairly analyzed any similar claim in the years since Fire.³⁴

(a) Significant Differences in Text.

Under article 1, § 21, “[t]he right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record” Article 1, § 22 further provides:

In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . .

(Emphasis added).

In contrast, the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. 6.

³⁴ One case which purported to address the narrower “impartial jury” claim under article 1, § 22, did so only on the state’s briefing, noting the defense had provided no Gunwall analysis. State v. Rivera, 108 Wn. App. 645, 649 n.2, 32 P.3d 292 (2001) (briefly discussing Gunwall criteria and concluding article 1, § 22 provides no more protection than the Sixth Amendment). Rivera is not persuasive, nor does it address Loven’s three-part claim under article 1, §§ 21 & 22.

These provisions contain significant differences. Although the “impartial jury” guarantee arises from similar language, only the Washington Constitution states “the right of trial by jury shall remain inviolate.” “For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties.” Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Unlike the state constitution, there is no right to appeal under the federal constitution.³⁵ Given these profound textual differences, the first two Gunwall factors support an independent interpretation of the right to an impartial jury as protected by our state right to appeal.³⁶

(b) Constitutional and Common Law History and Preexisting State Law.³⁷ **Error! Bookmark not defined.**

³⁵ McKane v. Durston, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894) (as cited in Evitts v. Lucey, 469 U.S. 387, 392, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)).

³⁶ State v. Hobble, 126 Wn.2d 283, 298, 892 P.2d 85 (1995) (the right to trial by jury under the Washington State Constitution is not coextensive with the federal right); accord, City of Pasco v. Mace, 98 Wn.2d 87, 96-101, 653 P.2d 618 (1982).

³⁷ It is not unusual for courts to analyze these two factors at the same time. See e.g., State v. Smith, 150 Wn.2d 135, 152-56, 75 P.3d 934 (2003).

These factors reveal the Fire court's primary analytical failure. The key to analyzing Washington's greater jury trial rights is the status of the law in 1889, when the Constitution was adopted. Hobble, 126 Wn.2d at 300; Smith, 150 Wn.2d at 151; Pasco v. Mace, 98 Wn.2d at 96 (rights under common law preserved); In re Ellern, 23 Wn.2d 219, 224, 160 P.2d 639 (1945) (rights under territorial statutes preserved).

Although not discussed in Fire, several provisions of the 1881 Code are important. Washington has always protected the right to peremptory challenges. "A peremptory challenge is an objection to a juror for which no reason need be given, but upon which a court shall exclude him." Code of 1881, § 208. Section 1147 related to appeals and provided:

On hearing of writs of error, the supreme court shall examine all errors assigned, and on the hearing of appeals shall examine all errors and mistakes excepted to at the time, whether waived by the strict rules of law or not; but the court shall consider all amendments which could have been made, as made, and shall give judgment without regard to technical errors or defects, or exceptions which do not affect the substantial rights of the defendant.

Code of 1881, § 1147 (emphasis added).³⁸ These provisions fleshed out the "impartial jury" guaranteed in article 1, § 22.

³⁸ Similar provisions remained in force upon statehood. Hill's General Statutes 1891, § 341 ("a peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him"); § 1448 (the supreme court's review shall "disregard[] all technicalities").

In light of this and similar other statutes, the Supreme Court refused to reverse convictions where an error was merely technical or did not affect the accused's substantial rights.³⁹ Just prior to statehood, the court applied this harmless error rule when the defense sought to challenge jurors for cause. The "mere possibility of prejudice" would not result in reversal, but instead there must "at least probably" be "an injury to the party complaining." White v. Territory, 3 Wash.Terr. 397, 406, 19 P. 37 (1888).

The same court shortly thereafter reversed numerous convictions where the trial court erroneously forced the defense to peremptorily challenge a juror who should have been excused for cause. See e.g., Murphy, Rutten, and Stentz. Given these results, there is but one logical conclusion: this error has always affected the accused's substantial rights. It is not "technical."

In light of these provisions, Murphy, Rutten, Stentz, and Parnell establish two clear principles. First, peremptory challenges have always been part of Washington's independent right to an impartial jury. Second, at the time of statehood that independent right was protected by the independent

³⁹ See e.g., State v. Straub, 16 Wash. 111, 114-15, 47 P. 227 (1896); State v. Krug, 12 Wash. 288, 291-92, 41 P. 126 (1895); State v. Courtemarshe, 11 Wash. 446, 450, 39 P. 955 (1895); State v. Wright, 9 Wash. 96, 99-100, 37 P. 313 (1894); Styles v. James, 2 Wash.Terr. 194, 2 P. 188 (1883); Lytle v. Territory, 1 Wash.Terr. 435, 440-44, 1874 WL 3287 (1874); Yelm Jim v. Territory, 1 Wash. Terr. 63, 67, 1859 WL 2753 (1859).

right to appellate reversal when a trial court wrongly forced the defense to waste a peremptory on a juror who should have been excused for cause. The Fire plurality overlooked all of this when it wrongly concluded that the coerced use of a peremptory challenge is merely a technical error that does not affect the accused's substantial rights. Fire, at 158.

The Fire plurality's next mistake was its remarkably wrong assumption that any of these early Washington cases might have applied the federal constitution.⁴⁰ They did not. When Washington became a state in 1889, and well into the twentieth century, the Sixth Amendment did not apply to state prosecutions.⁴¹ Given this, the Washington Constitution is the only constitution the courts in Murphy, Rutten and Stentz could have applied.

⁴⁰ Fire, at 163 (the plurality claimed the Stentz and Rutten courts applied a constitutional rule "without specifying which constitution provides the guaranty").

⁴¹ West v. Louisiana, 194 U.S. 258, 24 S.Ct. 650, 48 L.Ed. 965 (1904) ("The 6th Amendment does not apply to proceedings in state courts", citing four cases); see also, Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (discussing the incorporation of various parts of the Sixth Amendment to the states). It was not until the Warren Court that the United States Supreme Court clearly held that an impartial jury is a necessary component of due process. See Morgan v. Illinois, 504 U.S. 719, 726-28, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (recognizing the holdings in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), and Turner v. Louisiana, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), that an impartial jury is a necessary component of due process where state law provides for a jury trial).

It is a shame that this undeniable history was not pointed out to the Fire court. It seems clear that then-Justice Alexander would not have concurred in the adoption of Martinez-Salazar absent the showing required by Stranger Creek.⁴² His concurrence said as much: “[w]hile I would not depart from the rule we established in Parnell if it were constitutionally based, it is clear that is not the case.” Fire, at 167 (Alexander, J., concurring).

Washington’s independent history shows that is, in fact, the case. This rule is constitutional and the Fire plurality was clearly incorrect.

(c) Differences in Structure.

This factor will always favor independent state analysis because “[t]he state constitution limits powers of state government, while the federal constitution grants power to the federal government.” State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 115 S. Ct. 2004 (1995); see also, Smith, 150 Wn.2d at 152.

(d) State and Local Interest.

⁴² Justice Alexander had expressed strong feelings about Stranger Creek. Cf. Berlin, 133 Wn.2d at 554-56 (Alexander, J., dissenting) (pointing out why stare decisis should not be abandoned without careful consideration); State v. Warden, 133 Wn.2d 559, 565, 947 P.2d 708 (1997) (Alexander, J., concurring) (disagreeing with the result, but joining the Warden majority because “I feel bound by principles of stare decisis to join the majority in following Berlin here”).

The Martinez-Salazar court recognized it applied only a federal rule. The Supreme Court has since invited states to provide more protections to ensure impartial juries.⁴³ The Kentucky Supreme Court recently held “[t]here is nothing in . . . Martinez-Salazar that requires the states to adopt [its] reasoning as to the weight, or “substantial” value a state may place on the exercise of peremptory strikes. Shane v. Commonwealth, 243 S.W. 3d 336, 339 (Ky. 2007).

Shane is remarkably parallel. As in Washington, Kentucky long presumed prejudice from a trial court’s erroneous denial of a challenge for cause where the defense used all peremptories. Shane, 243 S.W. 3d at 339 (Ky. 2007) (quoting Thomas v. Commonwealth, 864 S.W.2d 252, 259 (Ky.1993)). “Kentucky courts had consistently held that denial or misallocation of peremptory strikes is per se reversible error.” Shane, at 341. But in Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006), the plurality of a badly fractured (3-1-3) court adopted Martinez-Salazar.

Morgan lasted about two years, when the six-justice majority in Shane court overruled it. The Shane court recognized that peremptories are a “substantial right” and their deprivation not trivial. Shane, at 341. The

⁴³ Rivera v. Illinois, 556 U.S. 148, 162, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) (“States are free to decide, as a matter of state law, that a trial court’s mistaken denial of a peremptory challenge is reversible error per se”).

Martinez-Salazar rule erroneously failed to consider “whether the trial court's error affected the actual fairness of the trial because the defendant was not allowed fair process in selecting the jury that tried him.” Shane, at 338-39.

As discussed supra, the Shane court offered several other salient criticisms of Martinez-Salazar. Shane also shows that Martinez-Salazar does not bind state courts. Washington, like Kentucky, is absolutely free to return to a longstanding rule improperly abandoned by an errant plurality. Other courts continue to adhere to this rule. See e.g., People v. Macrander, 82 P.3d 234, 244 (Colo.1992); People v. Lefebre, 5 P.3d 295, 305-08 (Colo.2000)⁴⁴; State v. Carvalho, 880 P.2d 217, 225 (Haw. App. 1994); State v. Ross, 623 S.2d 643, 644 (La. 1993); Whitley v. State, 857 A.2d 635, 632 (Md. App. 2004); Munoz v. State, 849 P.2d 1299, 1302 (Wyo. 1993).

(e) Gunwall Analysis Conclusion

The Gunwall factors all support a return to Washington's independent rule as consistently stated and applied in Rutten, Stentz, and Parnell.

⁴⁴ The Colorado Supreme Court appears to have granted certiorari to review this issue in several pending cases: People v. Roldan, __ P.3d __, 2011 WL 174248 (Colo.App. 2011), cert. granted, 2012 WL 473247 (Colo. 2/13/12); People v. Novotny, __ P.3d __, 2010 WL 961657 (Colo.App. 2010), cert. granted, 2011 WL 484366 (Colo. 1/31/11).

d. After State v. Fire, Reversal is Required.

For the reasons set forth above, the Fire plurality is unpersuasive, harmful and wrongly decided. The trial court's error in refusing to excuse jurors 25 and 47 for cause requires the reversal of Loven's convictions.

2. THE TRIAL COURT ERRED IN REFUSING A PETRICH⁴⁵ INSTRUCTION ON COUNT 7, THE DEPICTIONS COUNT.

a. Relevant Facts

The state presented evidence of multiple acts that might support conviction on counts 1-6.⁴⁶ Defense counsel proposed Petrich/unanimity instructions for counts 1 – 6. CP 69-76 (citing WPIC 4.25). On those counts the court properly instructed the jury it must be unanimous. CP 97, 100, 103, 105, 110, 114.

The state also offered multiple photographs and digital images to support count 7, the depictions count. The images were seized from various locations throughout the apartment, as well as from two different automobiles. Different witnesses described them. RP 704-07, 734-36, 785-

⁴⁵ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

⁴⁶ RP 724-25, 777-78, 911-14, 931, 945-52, 984, 989-90, 1004-6, 1015-17, 1182-85, 1195-96, 1218, 1220-25, 1242-54; Ex. 93.

86, 935-36, 953-54, 973-74, 1033-45, 1064-88, 1225-26, 1256-57, 1315-32, 1343-60, 1374-79, 1395-99; Ex. 93.⁴⁷

Defense counsel orally asked the court to instruct the jury it must be unanimous to find guilt on count 7. RP 1493-94. The state opposed the instruction, asserting there was only one “unit of prosecution” which could be based on “maybe one photo, maybe 5,000 photos.” RP 1493. The state also discussed how a guilty verdict on the exploitation and depictions counts could be based on the same photo or image without creating a merger problem. The court agreed with the state. RP 1493-96.

Defense counsel excepted to the court’s refusal to provide a unanimity instruction for count 7. RP 1496-97.

In closing argument the state did not elect an image to support count 7. The state instead referred to numerous images on the Canon camera, the 25 CD’s recovered from the apartment, Loven’s custodial statement that he knew some of the kids in the pictures were pretty young, testimony from Detective Savas that he saw numerous images consistent with children under age 16, and that Christina Evans and C.J. had claimed to see various images on Loven’s computer. RP 1526-29.

⁴⁷ For reasons discussed in notes 55-58, *infra*, Loven has designated only one of the exhibits relevant to the depictions count.

- b. Where the State Refuses to Elect Which of Multiple Depictions of Alleged Child Pornography Supports the Charge, the Court Must Include a Petrich Instruction.

The Washington Constitution guarantees the right to a unanimous verdict. Const. art. 1, § 21; State v. Vander Houwen, 163 Wn.2d 25, 38-39, 177 P.3d 93 (2008). Where the state presents evidence of multiple acts that could constitute the crime charged, it “must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act.” State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); Petrich, 101 Wn.2d at 572.

As noted supra, the state presented multiple photographs and digital images found in a variety of locations and described by various witnesses. It refused to elect a depiction on which the jury should base its verdict.⁴⁸ The court refused an instruction to ensure unanimity. RP 1496-97. Under Petrich and its progeny, this was constitutional error.

⁴⁸ See e.g., State v. Kier, 164 Wn.2d 798, 813–14, 194 P.3d 212 (2008) (no “clear election” was made in prosecutor's closing argument when the evidence suggested multiple acts could have constituted the charged crime and the jury instructions did not specify the underlying criminal act).

c. State v. Furseth Was Wrongly Decided.

In response, the state will rely on State v. Furseth, 156 Wn. App. 516, 233 P.3d 902, rev. denied, 170 Wn.2d 1007 (2010).⁴⁹ The Furseth court held that possession of multiple images of “child pornography” is a single act of possession. The court claimed support for this novel conclusion⁵⁰ could be found in State v. Sutherby, where the Supreme Court held that possession of multiple images is a single “unit of prosecution.” Furseth, 156 Wn. App. at 520-21 (citing State v. Sutherby, 165 Wn.2d 870, 879, 204 P.3d 916 (2009)).

But the “unit of prosecution” issue in Sutherby is governed by a different legal analysis. To determine the “unit of prosecution” a court focuses on legislative intent, not on the facts of any given case. Sutherby, 165 Wn.2d at 878. If a statute is ambiguous and does not clearly identify the unit of prosecution, the ambiguity is resolved by the rule of lenity. A single transaction will not be turned into multiple offenses. Sutherby, 165 Wn.2d at 878 (citing, inter alia, State v. Adel, 136 Wn.2d 629, 634-35, 965 P.2d 1072 (1998)).

Multiple acts cases raise a different, fact-specific question: whether “some jurors may have relied on one act or incident and some another,

⁴⁹ Loven’s case was tried in January 2010; Furseth was not decided until June 2010.

resulting in a lack of unanimity[.]” Vander Houwen, 163 Wn.2d at 39 (quoting Kitchen, 110 Wn.2d at 411).

Furseth is right about one thing: Sutherby held as a matter of law that multiple possessed images will support only one conviction under this statute. But Furseth erred by transposing that legal holding into an assumption that there can never be multiple acts of possession as a matter of fact. This assumption fails common sense scrutiny and conflicts with the state’s factual theory in Loven’s case.

There is no doubt that possession can occur in different ways, and at different times and places. It can be constructive, actual, or unwitting. CP 120-22; see generally, WPIC 49A.03, 50.03, 52.01.

Here, for example, the state offered evidence that Loven possessed various photographs, digital images and videos in various storage media in his apartment, and entirely different images and photographs in his cars. The defense persuasively showed that some of the images were almost certainly planted by someone else after the detectives thoroughly searched the vehicles and apartment and seized all items they believed had evidentiary value. RP 791-97, 886-92, 1007-10, 1046-54, 1089-98, 1265-91, 1429-31, 1452-54,

⁵⁰ Prior unpublished cases had reached a contrary conclusion.

1476-83. Given these facts, any rational juror could have doubts as to which images Loven possessed.

Some jurors also could conclude that many of the images of slightly clothed or nude children⁵¹ were not “sexually explicit.” Other jurors might disagree. As this shows, without the state’s election or a Petrich instruction, unanimity is sacrificed on two levels.

Furseth also conflicts with unanimity analysis in other possession contexts. Possession of a drug in two places is one unit of prosecution, but is still considered “multiple acts” under Petrich. State v. Adel, 136 Wn.2d at 632-33 (marijuana found in two different places was one unit of prosecution); State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994) (one possession charge for two separate quantities of cocaine; Petrich instruction necessary).⁵²

Although Furseth offers an expedient appellate band-aid to hide the wound, it does nothing to heal the injury to unanimity rights.⁵³ Simply put, the state offered thousands of different images from multiple sources to

⁵¹ “Not all possession of nude pictures of minors is illegal.” State v. Griffith, 129 Wn. App. 482, 488, 120 P.3d 610 (2005) (citing State v. Grannis, 84 Wn. App. 546, 548–49, 930 P.2d 327 (1997); State v. Huckins, 66 Wn. App. 213, 219, 836 P.2d 230 (1992)).

⁵² Curiously, the Furseth court did not cite or distinguish King.

⁵³ While the state may claim it will be injured by reversal, that injury was self-inflicted. RP 1493-95.

support its possession theory. While the jury might have unanimously agreed that Loven possessed one image that supported conviction, nothing in this record ensures the conclusion required by Petrich. The right to a unanimous jury demands more protection than Furseth's transparent and ineffectual poulitice. Vander Houwen, 163 Wn.2d at 39 (“while the jury may have acted in unison, we do not have a verdict that shows that they did so”) (court’s emphasis).

For all these reasons Furseth is harmful and wrongly decided. It should be abrogated.

d. The Error Requires Reversal.

With the Furseth hurdle now cleared, the last question is whether the error requires reversal. Petrich error is presumed prejudicial. The state bears the burden to show the error harmless beyond a reasonable doubt.⁵⁴ The state cannot meet this burden if a rational juror could have a reasonable doubt as to whether Loven possessed any of the images, or whether any image did not depict sexually explicit conduct. Kitchen, 110 Wn.2d at 411.

As the deputy prosecutor conceded in the trial court, the state offered “thousands” of images on which the jury could rely to support this

⁵⁴ Vander Houwen, 163 Wn.2d at 39; Kitchen, 110 Wn.2d at 411-12.

conviction. RP 1408-10, 1429, 1528. There is little doubt that many of the images could support conviction.⁵⁵ But a rational juror could also find that many images would not support conviction. See e.g., Ex. 93.⁵⁶ Reasonable jurors could not unanimously conclude that all of the state's "thousands" of images "depict[] a minor engaged in sexually explicit conduct[.]" CP 121.⁵⁷

⁵⁵ To provide effective assistance, Loven's appellate counsel has visited the exhibit room to view a sample of the admitted images. Following that review Loven does not claim the evidence is insufficient to support conviction on count 7. Given this concession there is no reason to designate the exhibits to this Court.

⁵⁶ Ex. 93 includes images recovered from the memory of Loven's camera and includes images of R.B. with and without clothing. RP 1343-52.

⁵⁷ The jury was instructed that "[s]exually explicit conduct means actual or simulated: sexual intercourse whether between persons of the same or opposite sex; or masturbation; or exhibition of the genitals or unclothed pubic or rectal areas of any minor for the purpose of sexual stimulation of the viewer; or touching of a person's clothed or unclothed genitals, public areas, buttocks, or breast area for the purpose of sexual stimulation of the viewer." CP 118. Many of the images on the CDs are of naked children doing nothing that could be construed as "sexually explicit conduct." In addition, as defense counsel repeatedly noted below, the state offered no expert testimony that the images were of actual as opposed to virtual children, nor did the state offer expert testimony as to the age of the children depicted. RP 1418-20, 1502; Cf. State v. Luther, 157 Wn.2d 63, 73, 134 P.3d 205 (2006) ("Washington's child pornography prohibition does not permit a conviction for possession of virtual images of children engaged in sexually explicit conduct"), at 81-82 (trial court need not require expert testimony to find images were of children).

That is the only test that governs this purely legal question.⁵⁸ Because the state cannot show the error is harmless, reversal of count 7 is required.

D. CONCLUSION

For the reasons stated in argument 1, this Court should vacate all convictions and remand for a new trial. For the reasons stated in argument 2, this Court should vacate the count 7 conviction and remand for a new trial.

DATED this 10th day of May, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

King County, WA
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

[Signature] 5/10/12
Name Done in Seattle, WA Date

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STATE OF WASHINGTON
2012 MAY 10 PM 4:23

⁵⁸ Hopefully the state will not try to obscure this test by flooding this Court with other images. That tactic should only irritate the writing judge and law clerk who otherwise would not have to view them.

APPENDIX A

No. 66005-5-1

JUROR QUESTIONNAIRE

JUROR NUMBER 47

1. Have you, a relative, or close friend ever been the victim of some form of sexual abuse or misconduct by another person? Yes No
2. If the answer to Question 1 is "yes," do you know who committed the sexual assault? Yes No
3. If the answer to Question 2 is "yes," please specify whether the assault was committed by a relative (father, brother, uncle), a friend, or acquaintance (please specify). father my husband, also a friend's husband
4. If you were the person who was sexually assaulted, how old were you at the time? n.a. (not me) (2 incidents separate)
5. If you were the person who was sexually assaulted, did you report the incident to anyone (e.g., a parent, a counselor, a friend, or the police)? Yes No n.a., not me
6. Did anyone else report it to the police? Yes No
7. If the incident was reported, was anyone ever prosecuted? Yes No
8. If the perpetrator was prosecuted, was he or she ever convicted? Yes No n.a.
9. Have you, a relative, or a close friend ever been accused of some form of sexual misconduct? Yes No
10. If the answer to Question 8 or 9 is "yes," do you believe that you or the accused person was treated fairly? Yes No
11. Has anyone ever reported an incident of sexual misconduct to you? Yes No (the above)
12. Do you believe that you have any specialized training, education or experience in the area of sexual assault or sexual misconduct? Yes No
13. Are you able to sit on a jury in a case involving an accusation of sexual misconduct by an adult male against two male children? Yes No
14. Are you able to sit on a jury in a case involving an accusation of rape of a child? Yes No
15. Are you able to sit on a jury where you would view graphic images of children engaging in sexual conduct? Yes No
16. Would you prefer to discuss answers to any of these questions outside the presence of other prospective jurors? Yes No (Question #s 3)
17. If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this space to provide that information.

I, Janice Linville, declare under penalty of perjury that the foregoing answers to this Jury Questionnaire are true and correct to the best of my knowledge.

Janice H Linville
Signature

1/6/09
Date of Signing

Seattle
City Where Signed

JUROR QUESTIONNAIRE

JUROR NUMBER 25

1. Have you, a relative, or close friend ever been the victim of some form of sexual abuse or misconduct by another person? Yes No
2. *N/A* If the answer to Question 1 is "yes," do you know who committed the sexual assault? Yes No
3. *N/A* If the answer to Question 2 is "yes," please specify whether the assault was committed by a relative (father, brother, uncle), a friend, or acquaintance (please specify). _____
4. *N/A* If you were the person who was sexually assaulted, how old were you at the time? _____
5. *N/A* If you were the person who was sexually assaulted, did you report the incident to anyone (e.g., a parent, a counselor, a friend, or the police)? Yes No
6. *N/A* Did anyone else report it to the police? Yes No
7. *N/A* If the incident was reported, was anyone ever prosecuted? Yes No
8. *N/A* If the perpetrator was prosecuted, was he or she ever convicted? Yes No
9. Have you, a relative, or a close friend ever been accused of some form of sexual misconduct? Yes No
10. *N/A* If the answer to Question 8 or 9 is "yes," do you believe that you or the accused person was treated fairly? Yes No
11. Has anyone ever reported an incident of sexual misconduct to you? Yes No
12. Do you believe that you have any specialized training, education or experience in the area of sexual assault or sexual misconduct? Yes No
13. Are you able to sit on a jury in a case involving an accusation of sexual misconduct by an adult male against two male children? Yes No
14. Are you able to sit on a jury in a case involving an accusation of rape of a child? Yes No
15. Are you able to sit on a jury where you would view graphic images of children engaging in sexual conduct? Yes No
16. Would you prefer to discuss answers to any of these questions outside the presence of other prospective jurors? Yes No (Question #s _____)
17. If you feel that in the spaces provided you were unable to sufficiently answer any particular question, please use this space to provide that information.

As a mother, I'm not sure that I can provide an unbiased viewpoint of sexual assaults against children.

I, Linda L Gleade, declare under penalty of perjury that the foregoing answers to this Jury Questionnaire are true and correct to the best of my knowledge.

Linda L Gleade
Signature

1/6/2010
Date of Signing

Seattle
City Where Signed