COA No. 43932-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW AHO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable Beverly G. Grant

REPLY BRIEF

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A. REPLY ARGUMENT

(1). COUNT 4 (FIREARM THEFT) AND COUNT 5 (POSSESSION OF THE FIREARM) MUST BE REVERSED BASED ON ASSIGNMENTS OF ERROR 1, 2, 3, 4 AND 5.

a. The prosecution's repeated failure to timely amend its charges rendered the defense strategy in the State's case-in-chief impotent; there was no notice, the information was amended too late to change the charge to a different crime, and the verdicts on counts 4 and 5 lack any assurance of jury unanimity. After delaying reporting a burglary for a month during which time he used self-help to strong-arm a possible suspect at her home, the alleged victim told police he had a .357 revolver taken in the incident. The prosecutor filed an information charging the defendant with stealing a .357 revolver, and unlawfully possessing it (forming counts 4 and 5), and Mr. Aho went to trial on those specified allegations. CP 1-5; 8/22/12RP at 271.

However, it turns out that the victim later claimed to police that he had a 10 mm handgun taken. He so testified, at times, at trial. Although he appeared at other times to state that his revised claim was true, he had never corrected his previous written property loss claim that he had submitted to the police listing a .357. As a result, not even the police officer at trial could not say if

the victim was claiming both guns were stolen, or was claiming that one, or the other, was stolen. Exhibit 50, Exhibit 51, 8/20/12RP at 81, 115; 8/22/12RP at 189; 8/23/12RP at 377; Opening Brief, at pp. 5-8.[1]

As argued in the Opening Brief there was evidence of multiple possible incidents – multiple firearms -- that could support the crime charged, thus requiring a Petrich instruction. Opening Brief, at pp. 27-35. The victim's shifting claims over time, and the other evidence, including the uncorrected police property theft claim form, and the police officer's testimony, left the question open. Mr. Aho was entitled to a unanimity instruction ensuring that his jury was not composed of 6 jurors who believed Mr. Gambill, the victim, testified correctly or honestly in his claims at trial, and 6 jurors who found that certain of his claims at trial were non-credible assertions of a theft designed to change guns and boost his insurance recovery.[2]

A jury so divided cannot issue an expressly unanimous verdict on the charge beyond a reasonable doubt. A jury must

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[1] Neither the prosecutor nor the alleged victim ever produced a remaining, ***non-stolen*** firearm, if any.

[2] As noted, Mr. Gambill openly complained to the trial court that he had been required to submit his theft inventory report to the sheriff's office, but then later, he was angered to learn that his newly-changed homeowner's insurance policy "didn't cover anything." 8/21/12RP at 123.

unanimously agree on the act that underlies a conviction, and this act must be the same one as charged in the information. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911); Wash. Const. art. 1, § 21, § 22; U.S. Const. amend. 14; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1995). Notably, because of the constitutional basis for the unanimity requirement, unanimity error may be raised for the first time on appeal where the error is manifest.[3]

Respondent contends on appeal that it was clear that Gambill's theft claim was that a 10mm was stolen, such that no Petrich multiple facts issue is even presented. BOR, at pp. 13-14, 27. But for purposes of determining whether a Petrich unanimity

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[3] The circumstances here created manifest constitutional error under RAP 2.5(a)(3). Unanimity error enables some jurors, presented with several different acts, to rely on different acts to find guilt than other jurors, without the jury as a whole agreeing on a particular act which it is persuaded proves the charged offense beyond a reasonable doubt. State v. Furseth, 156 Wn. App. 516, 520, 233 P.3d 902, review denied, 170 Wn.2d 1007 (2010). The result – absence of express unanimity -- is a manifest constitutional error which may be raised for the first time on appeal where it had practical and observable consequences of prejudice at trial. State v. Knutz, 161 Wn. App. 395, 406-07, 253 P.3d 437 (2011); see also State v. Bobenhouse, 166 Wn.2d 881, 912, 214 P.3d 907 (2009); State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997). In this case the evidence presented multiple acts, but the jury was not instructed pursuant to WPIC 4.25 that it had to unanimously agree on one act as the basis for guilt, resulting in a verdict unaccompanied by the express assurances of unanimity that are guaranteed by the state constitution. RAP 2.5(a)(3); State v. O'Hara, 167 Wn.2d 91, 98–99, 217 P.3d 756 (2009).

issue is presented, the evidence includes all the testimony and documentary information properly admitted and relevant to the question, not just certain portions of the complainant's testimony.

Here, the information read to the jury specifically charged that the gun was a .357. CP 1-5. The complainant, who left little doubt with the jury that he was primarily concerned with receiving maximal insurance recompense, appeared to be claiming at trial that a 10mm was taken, but frequently waffled in his testimony as to whether that was indeed the, or a, gun taken. Regarding the property loss claim he wrote down on the police theft inventory sheet, on which he specified a .357, Mr. Gambill testified:

> I was confused, I guess. I don't know, mad or something, when I was filling this out. I don't know. **There's a chance I made a mistake but I'm sure the values are pretty close to being the same, I suppose**.

(Emphasis added.) 8/21/12RP at 118. The foregoing is evidence that Gambill was now claiming a 10mm was stolen, and evidence that he was also perhaps claiming that a .357 was taken. Petrich applies. Notably, Mr. Gambill's police statement had offered *detailed* support for his assertion that a .357 was taken, describing his handling of that claimed gun with plans to oil it and place it in a different holster, describing its mechanical attributes, and noting its

specific provenance as a gift from his father. Exhibit 51. This supported a contention that a .357 was taken. Petrich applies.

Respondent argues in its brief that Gambill later called the police to report that the gun taken "was actually" the 10mm. BOR, at p. 13. But Respondent neglects to mention that the officer, Sheriff's Deputy Anthony Filing, told the jury that after the investigation began, Mr. Gambill orally told him that he was "missing **another** handgun," a 10 mm. (Emphasis added.) 8/23/12RP at 377; 8/20/12 at 115. This was evidence that two guns were taken. Indeed, Gambill, according to the Deputy, *never retracted his detailed written claim that a .357 was taken.* CP 51; 8/23/12RP at 376-77 ("No, he never retracted that information."). The Petrich rule, arising in cases where there appear to be multiple possible bases of support for the crime charge, applies.

A proper, clear election in closing argument can forestall reversible Petrich error but here, no adequate election cured the absence of a unanimity instruction. The State claims that the prosecutor elected the 10mm handgun in closing argument as the firearm taken and then illegally possessed. BOR, at p. 36. But Mr. Aho argues that it is not an election for the prosecutor to simply mention the victim's varying claims:

> You might hear some argument, and I anticipate that you will, probably hear a lot of argument from the defense attorney, Mr. Burgess, about what about this firearm? It's a 357 revolver? It's a 10 millimeter. Is it both? Is it neither? Was there even a firearm that was taken?

8/27/12RP at 530. Mr. Aho contends that where the prosecutor never told the jury to disregard the claim of a .357, and never told the jury that all 12 of them had to agree on a particular gun, the verdict was not expressly unanimous as to the charges. See, e.g., State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995) (unanimity error where jury could have deliberated, following lack of jury unanimity instruction, to find the defendant passenger possessed cocaine found in the car, or in his backpack).

Mr. Aho argues that all of this matters and he relies on all of the arguments advanced in his Appellant's Opening Brief on Assignments of Error 1, 2, 3, 4 and 5 regarding not only jury unanimity, but also notice of the charge. Criminal Rule 2.1.

Further constitutional error occurred in the amendment of the information in violation of the *per se* prohibition of Pelkey.

b. The decisions show that changing the subject matter of the crime changes the charge itself, and this is *per se* impermissible after the State has twice rested its case in chief,

requiring reversal. CrR 2.1 strictly prohibits amendments to the information which prejudice the accused, and the Washington Constitution imposes a rule of categorical or *per se* prejudice, applicable where the State seeks to amend the information after the prosecution rests its case-in-chief, which the prosecution in this case did twice. CrR 2.1(d); Wash. Const. art 1, § 22 (amend. 10); State v. Pelkey, 109 Wn.2d 484, 487-90, 745 P.2d 854 (1987); 8/27/12RP at 477, 481.

After the State has rested, amendments to the original charge are only permitted if the amendment is to a lesser degree of the same charge, or to a lesser-included offense. Pelkey, 109 Wn.2d at 491. The Supreme Court in Pelkey, addressing late amendments, articulated a bright-line constitutional rule of prejudice:

> A criminal charge may **not** be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.

(Emphasis added.) Pelkey, 109 Wn.2d at 491. As Mr. Aho discussed in his Opening Brief, there is an exception to Pelkey for non-material amendments to the charge that simply change the manner in which the alleged crime was committed. These are not considered to be a charge of a new or different crime, and thus are

excepted from the Pelkey rule. AOB, at pp. 16-18 (citing, inter alia, State v. DeBolt, 61 Wn. App. 58, 808 P.2d 794 (1991)).

Under that exception, the State may amend an information to correct scrivener's errors, or even to correct a non-material manner of committing the crime, such as what the alleged date was when the crime was committed -- so long as a statute of limitations period is not at issue, or so long as the defense does not involve an alibi centered on the originally charged date. The former sort of amendments are a matter of *form* rather than material substance, but the latter are plainly material to the defense, and are categorically prohibited at such a delayed juncture. Pelkey, 109 Wn.2d at 491; Debolt, at 61-63; State v. Kiliona-Garramone, 166 Wn. App. 16, 23 and n. 6, 267 P.3d 426 (2011); State v. Gosser, 33 Wn. App. 428, 656 P.2d 514 (1982); see also State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995).

Here, the Respondent's contention is as follows: that changing the criminal charge in counts 4 and 5 from the original specified written allegation in the charging document of a .357 to the new subject matter of a 10mm was 'non-material,' or, put another way, was merely a non-substantive change to the form of

the charge or the manner of commission of the alleged crime. BOR, at pp. 25-30.

Those contentions should not be accepted in this case as they are contrary to the facts of trial below and contrary to settled law. The amendment in this case was many things. It was dilatory, considering that the prosecution's case itself attempted to show that Mr. Gambill, before trial, informed the authorities that he had a 10mm stolen. The amendment was late, occurring as it did after the prosecution rested its case, re-opened its case to read a stipulation, and then rested its case yet again.

The amendment was also after the fact, coming as it did, after the defense waited for the State to amend the information, but the State instead rested, after the defense waited for the State to amend the information after it re-opened its case, but the State instead rested again, and after Mr. Aho, perhaps naively believing the system to be an adversarial one, then raised the proper, required, essential motion to dismiss for failure to make out a *prima facie* case supporting the charge. State v. Rhinehart, 92 Wn.2d 923, 927-28, 602 P.2d 1188 (1979) (a motion to dismiss for failure of the State to make out a *prima facie* case is determined by the

allegations in the then-existing information) (citing, inter alia, State v. Dixon, 78 Wn.2d 796, 802, 479 P.2d 931 (1971)).[4]

The prosecution responded to the motion to dismiss by aggressively fighting to amend the information, the defense motion to dismiss was denied, and the defense cross-examination of Mr. Gambill based on the standing information was retroactively rendered at best a nullity, if not affirmatively inculpating of the lawyer's client, the accused. In these circumstances, this Court should completely reject the State's argument that the amendment was a mere matter of 'non-material form.'

The State points out that it may change the 'manner' of committing the same crime at any time, and argues that doing so does not run afoul of the Pelkey rule, relying on cited cases. BOR,

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[4] As the Court stated in Rhinehart,

> The State did not charge the petitioner with possession of stolen parts of a vehicle although clearly the prosecuting attorney could have done so initially or by amendment after it became clear that there was insufficient proof that petitioner ever possessed the stolen vehicle. The information put petitioner on notice that he must answer the charge as to a stolen Ford Bronco, not one part thereof. This was the charge his defense prepared to meet. The Court of Appeals is reversed and the trial court's order of dismissal is affirmed.

Rhinehart, 92 Wn.2d at 927-28 (also citing CrR 2.1(b)). As additionally argued, the trial court erred in denying Mr. Aho's motion to dismiss for failure of the State to make out a *prima facie* case of the charge in the existing information. Assignment of Error 5 (AOB, at pp. 2, 4, 16).

at pp. 25-27 (citing, *inter alia* State v. Debolt, 61 Wn. App. 58, 60-62, 808 P.2d 794 (1991)). But the cases cited by the State involve changes in 'manner' of commission in the form of mere technical alteration to the dates of commission of the crime charged, in trials where the date of the crime is immaterial and undisputed – i.e., cases in which there is no claim of alibi as to the original dates specified in the charge. Such alteration is indeed a mere change to the 'manner' of committing the crime.

But the change in this case – akin to changing the person said to have been murdered after resting, then arguing that 'it's still the same crime' – cannot be deemed a mere matter of form. Pelkey *per se* prohibits what occurred below.

The State's attempt to distinguish the case authorities cited by Mr. Aho, on the basis that those cases involved the State improperly changing the crime charged by means of ***jury instructions*** that diverged from the crime stated information (rather than by the technique of improper ***amendment*** of the information, is untenable and meritless. Indeed, the Washington cases, which Respondent has failed to distinguish, hold that changing the subject matter of the crime is changing the charge itself, not a mere change

to the 'manner' of committing the crime. The cases cited in the Opening Brief plainly stand for this proposition. AOB, at pp. 12-23.

The State's answer to these cases is to note that they involved improper jury instructions, rather than amendments to the information. BOR, at pp. 28-30. But the issue in all of these cases was whether the jury instructions improperly allowed defendants to be convicted of crimes *not charged* in the information. The Washington courts have consistently held a new, different crime is charged when the prosecution, by amendment and/or jury instructions, changes the identity of the subject property. See, e.g., State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980) (reversing conviction when information charged defendant with assaulting both victims but jury was instructed that guilt could be based on assault of either of two victims); State v. Phillips, 27 Wash. 364, 67 P. 608 (1902) (reversing conviction for stealing Canadian currency when defendant charged with stealing United States currency); State v. Van Cleve, 5 Wash. 642, 32 P. 461 (1893) (denying amendment changing name of larceny victim from Wm. Burkbank to Walter Burbank).

In all of the cases cited by Mr. Aho and the State, the issue is the same – was the new allegation an allegation of a different

charge than the charge alleged in the information? The amendment was *per se* prohibited, and Pelkey requires reversal of counts 4 and 5.

(2). COUNT 8 (POSSESSION OF A FIREARM ON JANUARY 28, 2011) MUST ALSO BE REVERSED, FOR LACK OF *PETRICH* FACTUAL UNANIMITY, FAILURE OF ALTERNATIVE MEANS, AND THE ERRONEOUS JURY INSTRUCTION.

a. The Respondent hasn't answered Mr. Aho's *Petrich* argument that the question whether a criminal verdict carries express assurances of unanimity requires the reviewing Court to look to the entire record below.

i. There was no election adequate enough for this Court to be able to say that the verdict carries express assurances of unanimity.

Contrary to the Respondent's argument in its brief, the prosecutor, in closing argument, did not adequately elect the 9mm handgun so as to inform the jury to disregard the entire case that had come before, and to forestall its attention to everything that occurred thereafter. See BOR, at pp. 36-37.[5]

[5] Initially it must be pointed out that the Respondent's statement in its brief, that the jury was given a unanimity instruction regarding the firearm possession charge of count 8, is mistaken. Respondent states that "there was an instruction which required unanimity in the jury's verdict to count VII," and cites CP 8-49, which are the Court's Jury Instructions, and specifically references Instruction no. 22. BOR, at p. 38. However, Instruction no. 22, which is CP 34, is the 'to-convict' instruction for count 8. CP 34. There is no Petrich unanimity

In order to effectively "elect" one particular instance of alleged commission of the crime for the verdict sought, in a multiple acts case in which the jury deliberates upon a set of jury instructions that does not contain a Petrich unanimity instruction, the prosecutor must make clear that the jury should unanimously agree on a particular act. Multiple acts cases require a Petrich unanimity instruction, State v. Coleman, 159 Wn.2d 509, 513, 150 P.3d 1126 (2007), although a special verdict will also suffice. See State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990) (a general verdict finding proof beyond a reasonable doubt will necessarily reflect unanimous agreement solely if only one possible violation occurred).

As this Court of Appeals has noted, WPIC 4.25 is the pattern instruction that provides the constitutional protection addressed in Petrich, by telling the jury that one particular act of the crime must be proved beyond a reasonable doubt, and that the jury must unanimously agree as to which act has been so proved. 11 Washington Practice: Washington Pattern Jury Instructions: 4.25 Criminal (3d ed.2008); State v. Wallmuller, 164 Wn. App. 890, 894 and n. 7, 265 P.3d 940 (2011); State v. Petrich, 101 Wn.2d at 572.

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instruction for count 8, or indeed for any of the multiple-act firearm counts, rather, there are only general verdicts. See State v. Hanson, supra, 59 Wn. App. at 657.

If there is no Petrich instruction or special verdict, unanimity error may be forestalled if the prosecutor, in closing argument, does what the jury instructions *fail* to do – make clear to the jury that all 12 jurors must agree on the same, specific act as a basis for finding commission of the crime.

Such an election must be clear in these respects. State v. Heaven provides guidance, arising in the context of a successful double jeopardy challenge to a second prosecution for sex offenses. The defendant was convicted in a first trial on two counts, but the jury could not agree on the third count. The case involved multiple possible factual bases for the counts, and a Petrich instruction. State v. Heaven, 127 Wn. App. 156, 160-61, 110 P.3d 835 (2005). However, a second trial on count three was deemed impermissible because of the prosecutor's "decision not to elect" which acts it wanted the jury to rely on for the counts. Heaven, 127 Wn. App. at 162. The prosecutor had merely mentioned that certain acts could be the predicate for guilty verdicts on the several counts. This was deemed inadequate by the Court of Appeals. Heaven, 127 Wn. App. at 161-62.

Here, there was no election adequate to make clear to the jury that it should rely on the 9mm, and not on the disabled former Enfield.[6]

ii. There was no election given the circumstances of the entire case's presentation to the jury.

Furthermore, even if there had been language that in isolation could be viewed as an election of a particular gun, the guarantee of an expressly unanimous verdict requires this Court to look at the entire record of the presentation of the case to the lay jury, including what came before closing, and in this case, *in particular what came **after** closing argument.*

What came afterwords was that the State ***continued*** to "insinuate" to the lay jury that the Enfield was part of the evidence and fully part of the State's case for Mr. Aho's guilt on count 8, just

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[6] Additional assignments of error in this appeal regarding the Enfield include whether the jury was erroneously instructed contrary to statute when it was given the special instruction that a "firearm" need only not be a mere "toy gun or gun like object," and whether the evidence was insufficient to prove that the Enfield was a firearm under RCW 9.41.010 and RCW 9.41.040. Assignment of Error 6, Assignment of Error 9; AOB, at pp. 2-3, 35-51. However, as also argued, even if the jury could be deemed properly instructed in that respect, and/or even if the evidence was *sufficient* to establish that the Enfield was a statutory firearm, the Petrich error regarding the 9mm and the Enfield as to count 8 would only be rendered harmless beyond a reasonable doubt if there was *overwhelming*, and *uncontroverted*, evidence that the Enfield was a statutory firearm. This is the long-standing harmless error test in Petrich cases; it is not satisfied here. AOB, at pp. 31-39, 46-47 (citing State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1998) (Petrich error harmless only "if no rational juror could have a reasonable doubt as to any one of the incidents alleged")); see also State v. Coleman, 159 Wn.2d 509, 511, 514, 150 P.3d 1126 (2007).

as the State had done in the presentation of its case. Coleman, at 515.

The cases cited in the Opening Brief at pp. 29-31 indicate that protecting unanimity requires looking to the whole case. State v. Bland, 71 Wn. App. 345, 351–52, 860 P.2d 1046 (1993) (in determining whether there are adequate assurances of unanimity, the reviewing court considers the whole record of trial, including the evidence, information, argument and instructions); State v. Corbett, 158 Wn. App. 576, 593, 242 P.3d 52 (2010) (considering instructions, evidence and closing arguments, any reasonable jury would have known that it must find separate and distinct acts for each of four guilty verdicts); State v. Moss, 73 Wash. 430, 432, 131 P. 1132 (1913) (multiple possible acts of adultery were admitted as to one count charged, but no unanimity instruction necessary because State tried the defendant "from the beginning to the conclusion of the case" only for the specified first incident).

Our Supreme Court follows this broad look at the circumstances of the entire case in determining whether express unanimity is lacking, in violation of the important state constitutional guarantee. For jurors, the focus of their decision is framed based

on the trial as a whole, particularly the evidence phase. State v. Coleman, 159 Wn.2d 509, 514, 150 P.3d 1126 (2007).

Indeed, the jury in this case was instructed to base its decision on the evidence, to apply the instructions to the facts it decides were proved, and, "in this way to decide the case." CP 9 (Instruction no. 1).

The jury is presumed to have followed all of these instructions. State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010); State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). This includes following the instruction that told the jury the defendant was guilty of possession of a firearm in count 8 if he knowingly had "**a**" firearm in his possession on or about the charging period. CP 34 (Instruction no. 22.

Further, this also includes the instruction wherein this jury was told that it "must consider all of the evidence that [the trial judge has] admitted that relates to the proposition." CP 10 (Instruction no. 1).

Considering these instructions, the entire case before the jury determines whether the unanimity guarantee has been satisfied. Thus in Coleman, the State had argued that the absence of a Petrich instruction did not result in error because the one

disputed, controverted incident, which was among multiple incidents in support of the count, was not the "focus" of trial. Coleman, 159 Wn.2d at 513-15. The Supreme Court, however, looking to the evidence phase, stated that the case was not one "in which a witness says off-handedly that abuse occurred" in other instances in addition to a primary one. Coleman, 159 Wn.2d at 514. Rather, the evidence phase involved evidence of each of multiple incidents, plainly offered in support of the count charged, and the Court noted that in such circumstances, "[t]he focus of a trial, at least for jurors, potentially changes once evidence is introduced of separate identifiable incidents." Coleman, 159 Wn.2d at 514.

The Court noted that the controverted incident was plainly offered to the jury as evidence of the count, because two significant witnesses testified regarding the incident, including a lay victim and a State's abuse interviewer. Coleman, 159 Wn.2d at 514.

In the present case, similarly, two significant witnesses testified regarding the Enfield rifle. These were the State's firearms forensic examiner, and the defendant's girlfriend's father who provided the Enfield to police when they came to arrest Mr. Aho.

There could be no doubt that the Enfield was an evidentiary focus of trial, fully proffered in support of count 8.

The prosecutor discussed the 9mm handgun in closing argument. But without telling the jury that the 9mm was the sole focus of the count, and that all 12 jurors had to agree on the 9mm, the verdict cannot be said to have been expressly unanimous. The jury easily would have considered the prosecutor's discussion of the 9mm as the State's argument of its best evidence, but not the only possible evidence.

Thus, throughout trial and closing argument in Coleman, the State "continued to insinuate that" the disputed incident was one that proved the count by questioning witnesses about it, and the prosecutor certainly did not "abandon" the allegation in the trial phase or closing argument. Coleman, 159 Wn.2d at 515 (noting that "the jury was not directed to disregard the detailed testimony alleging molestation at the movie").

Ultimately, the Coleman Court reversed for Petrich error because, given *all* these circumstances, "this was a multiple acts case, prejudice is presumed, and there is a risk of a lack of unanimity on all the elements. The incident was a focus of the trial." Coleman, 159 Wn.2d at 515.

The same is true here. The jury was never told to disregard the Enfield and the multiple witnesses who testified primarily about it. The Enfield was a sharp focus of trial, and the prosecutor's brief discussion in closing about count 8, regarding the 9mm, is inadequate in the whole circumstances of trial to constitute a clear, proper election of that gun and the necessary caution to the jurors that all 12 must agree on a particular gun for that count.

Furthermore, no party knows better what its purpose and statement in closing argument to the jury was, than the party that has just crafted and delivered that closing argument. The deliberating jury indicated it could not agree as to count 8, then later sent a second note asking if both the Enfield and the 9mm were available as proof of count 8. 8/28/12RP at 571-73; CP 58.

> Do both exhibits 48 and 49 (either/or) apply to count VIII?

CP 65; 8/29/12RP(volume III) at 4.

The State urged the court that the response was "**yes**." The prosecutor stated: "The two firearms, and **yes** they do relate to that same count [count 8]." (Emphasis added.) 8/29/12RP at 4. The court responded to this jury inquiry by writing,

> You should follow the instructions as given to you along with your recollections of the testimony and your notes.

CP 65. The jury asked the question and received the above answer *after* closing argument.[7]

What came *after* the closing argument was this – the jury took with it into deliberations the specific jury instruction regarding guns versus 'toy guns,' which was obviously tailored and targeted to the contentious portion of trial testimony in which a witness stated the Enfield was "inoperable," but "not a toy." 8/27/12RP at 475-76. This special jury instruction came *after* closing argument.

Then, when the jury asked if both exhibits (the Enfield and the 9mm) were each available as a basis for count 8, and the prosecutor said yes, they both were, the prosecutor told the jury to rely on its instructions – which did not identify a particular gun, and indeed told the jury in general terms that Mr. Aho could be found guilty if he possessed "**a**" firearm. CP 34 (Instruction no. 22). The jury took this instruction of law into its deliberations *after* closing argument.

Nothing in the State's closing argument can be deemed to have had any forward-acting affect causing any lay jury to ignore

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[7] The issue whether the jury instruction allowing any "non-toy" to be a firearm was erroneous under RCW 9.41.010 and in conflict with the definition of firearm in the primary instruction is squarely presented in this case. See CP 37 (Instruction 25); CP 31 (Instruction 19). Mr. Aho relies on his arguments in his Appellant's Opening Brief.

the instructions – general, specific, and in answer to the jury's inquiries – that came after closing argument.

In these circumstances, much more is required in this case to deem that there was ever any abandonment by the prosecutor of the State's Enfield case in the evidence phase. The prosecutor's non-limited discussion in closing argument about the 9mm gun was not enough, given what was before the jury before and after that statement. Looking at the case as a whole, the verdict does not carry the express assurances of unanimity required to satisfy the state constitution. "[T]his was a multiple acts case, prejudice is presumed, and there is a risk of a lack of unanimity on all the elements. The incident was a focus of the trial." Coleman, 159 Wn.2d at 515 (reversing). Reversal of count 8 is required here. See also State v. Kier, 164 Wn.2d 798, 813–14, 194 P.3d 212 (2008) (prosecutor's statement in argument was insufficient to make a "clear" election when the evidence and jury instructions indicated that multiple acts could constitute the crime charged).

(3) REVERSAL IS REQUIRED UNDER THE ALTERNATIVE MEANS DOCTRINE.

Count 8 must also be reversed for failure to prove all the statutory alternative means charged, where there was not

substantial evidence that Mr. Aho "owned" or "controlled" a "firearm" on or about January 28. CP 1-3, 55-57 (informations).

The to-convict instruction for count 8 stated that the defendant must be shown to have "knowingly had a firearm in his possession or control," and the prosecutor argued generally in closing that people often "own or possess" items that they are not carrying on their person. 8/27/12RP at 537-38; CP 34 (Instruction 22); see also 8/27/12RP at 531-32, 536 (State referring specifically to count 8 as requiring proof of either possession or control). The jury instruction defining the offense of VUFA stated that a person is guilty when he "knowingly owns a firearm **or** has a firearm in his or her possession **or** control." (Emphasis added.) CP 32 (Instruction 20). As argued in the Opening Brief, the State did not prove each of these alternatives with substantial evidence.

B. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Aho requests that this Court reverse his judgment and sentence.

Respectfully submitted this 13 day of January, 2014.

Oliver R. Davis WSBA 24560
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 43932-8-II
v.	)	
	)	
MATTHEW AHO,	)	
	)	
Appellant.	)	

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Court of Appeals Case Number: 43932-8

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