Supreme Court No. 98199-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,
Respondent,

v.

RICKY ARNTSEN,

Petitioner.

++

(No Claim of A "Right" To "Hybrid Representation")

PETITIONER'S MOTION TO WITHDRAW ISSUE
FROM PETITION FOR REVIEW
(Issue Not Suitable For Review Under Existing Case Law)

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Ricky Arntsen, Petitioner
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I. INTRODUCTION

Comes now, petitioner, Ricky Arntsen, moving this Court for permission to withdraw issue from the Petition for Discretionary Review that is now before this Court that petitioner believes is not suitable for review.

II. ISSUE REQUESTED TO BE WITHDRAWN

In the Petition for Review, at n. 3, pgs. 23-24, the following issue is presented to the Court:

> 3. **"The government presented insufficient evidence of burglary in the first degree and assault in the second degree."**

The way this issue is presented, & based on Division One's reasoning, this issue is not suitable for review.

This should in **no way** be interpreted to mean that Mr. Arntsen concedes guilt. Mr. Arntsen steadfastly maintains his innocence of those charges. Nor does he necessarily concede the issue. Mr. Arntsen merely recognizes that the issue, as presented, is not supported by the prevailing case law on the subject in Washington State.

III. REASONS FOR WITHDRAWAL OF ISSUE

The basis for this issue is under the following theory:

> "While there was testimony that the person who entered Ms. Jackson's home had a rifle, there was no proof that the rifle was not either a replica or a toy."
>
> "Likewise, the witnesses in the Koenig case testified that they believed the perpetrator was armed with a rifle, but no evidence was introduced to establish what they saw was actually a rifle and not something else."
>
> "With no evidence the instrument was actually a firearm, a determination to the contrary must rest on speculation."
>
> Petition for Review, at pgs. 23-24.

The Division One Court of Appeals opinion rejecting these arguments were based on State v. Tasker, 193 Wn.App. 575, 373 P.3d 310 (2016); and State v. Mathe, 35 Wn.App. 572, 668 P.2d 599 (1983). Slip Op., at pgs. 15-17.

Each of these cases hold that "circumstantial evidence" that a firearm is real is sufficient evidence to uphold a conviction where proof of a firearm is required. Each of these cases also hold that an eyewitness's reasonable belief that the gun involved was a

real gun is sufficient circumstantial evidence.

It does not appear that either of these cases have been overturned by any subsequent rulings & are, therefore, still the controlling authorities on the subject.

Mr. Arntsen does not believe that this case -- or, at least not the arguments as they are presented here -- is the right case or the right arguments to convince this Court to overrule Tasker nor Mathe.

Mr. Arntsen does not disagree with appellate counsel that the witnesses observations in this case of what they "**thought**" or "**assumed**" **might** be a firearm is nothing more than mere "**speculation.**" Petition for Review, at pg. 24.

Nonetheless, Mr. Arntsen's agreement with counsel does not overrule Tasker nor Mathe. The rulings in those cases are clear, & this Court has not overturned either of their holdings.

IV. PREVIOUS REQUEST TO WITHDRAW THIS ISSUE

This issue was raised in appellate counsel's "OPENING BRIEF, **at pgs. 39-41, §§ 4 a.**.

Mr. Arntsen submitted "APPELLANT'S MOTION FOR PERMISSION TO FILE AN EXTENDED BRIEF (i.e. MOTION FOR EXTENDED S.A.G.)", with Division One on January 18, 2019.

In the "MOTION FOR EXTENDED S.A.G.", **at pg. 2**, § WITHDRAWAL OF ISSUES, Mr. Arntsen moved to withdraw these same exact issues then, pursuant to United States v. McCoy, --U.S. --, 2018 WL 2186174, **at *5** (("Some decisions [ ] are reserved for the client -notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, & forgo an appeal.'") and **at *9** (('recognizing "'the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.'"')(citations and cases quoted omitted)).

Neither Division One, nor appellate counsel, nor the State responded to the request to withdraw these issues there.

These issues should not have been considered by the Division One Court of Appeals, & any related facts, citations, & legal holdings concerning those these issues, should not even be part of Division One's opinion as a result of Arntsen's request to withdraw them. And if the Court is willing to do so here and now, that portion of Division One's opinion should be deleted based on Mr. Arntsen's previous request to Division One to withdraw these issues. Mr. Arntsen moves this Court to strike that portion of Division One's opinion if the Court deems it to be properly done.

V. CONCLUSION

Pursuant to United States v. McCoy, -- U.S. --, 2018 WL 2186174, **at *5 and *9**; & the holdings in State v. Tasker & State v. Mathe, supra, Mr. Arntsen humbly moves to

withdraw the issues identified here.

Under penalty of perjury under the laws of the State of Washington, I certify & declare that the foregoing is true & correct.

Signed, Sworn, & Submitted this 26 day of OCT., 2020.

Ricky Arntsen

RICKY ARNTSEN, Petitioner

Supreme Court No. ____
(COA No. 76912-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICKY ARNSTEN,

Petitioner.

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

PETITION FOR REVIEW

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trial. Review should be granted to address the deprivation of Mr. Arnsten's due process rights. *Sutherby*, 165 Wn.2d at 883–84.

3. The government presented insufficient evidence of burglary in the first degree and assault in the second degree.

The Court of Appeals found the government presented sufficient evidence that the person who committed the Jackson burglary and Koenig assault possessed a deadly weapon when they did so. Slip Op. at 15. This Court should take review of whether the assumption that someone is armed is sufficient to establish this essential element of these two crimes.

The government is required to establish all elements of a charged offense beyond a reasonable doubt, and the failure to do so requires dismissal of that charge. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. To be sufficient, the government must establish that the person possessed a deadly weapon and not a toy. *State v. Tongate*, 93 Wn.2d 751, 755, 613 P.2d 121 (1980).

While there was testimony the person who entered Ms. Jackson's home had a rifle, there was no proof that the rifle was not either a replica or a toy. *See* RP 1715, 1721, 1987. Likewise, the witnesses in the Koenig case testified that they believed the perpetrator was armed with a rifle, but no evidence was introduced to establish what they saw was actually a rifle and not something else. *See* RP 1668, 1880. To the contrary, expert

testimony established that without more information, it was not possible to determine that the instrument the witnesses saw was in fact a firearm and not a toy, a replica, or an air gun. RP 2953.

In examining sufficiency, reasonable inferences are construed in favor of the prosecution, but they may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). With no evidence the instrument was actually a firearm, a determination to the contrary must rest on speculation. This Court should correct this error.

4. Misconduct prevented Mr. Arnsten from receiving a fair trial.

The Court of Appeals found that the prosecutor's misconduct did not taint Mr. Arnsten's trial. Slip Op. at 18. Because the prosecutor's misconduct deprived Mr. Arnsten of a fair trial, review should be granted.

The Court of Appeals was did not find the prosecutor's arguments that Mr. Arnsten's arguments were pulled from "thin air" to be misconduct. Slip Op. at 18. These arguments, however, denigrated counsel, which is especially prejudicial because Mr. Arnsten severed as his own lawyer. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). This Court should accept review to hold that denigrating pro se counsel is unacceptable and prevents a pro se litigant from receiving a fair trial. *See also State v. Thorgerson*, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011).

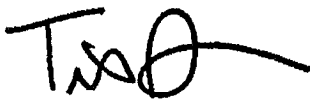
This Court should also grant review for violating the state constitution and because violating the state constitution deprived Mr. Arnsten of his right to a fair trial, equal protection, and due process. *See State v. Patton*, 167 Wn.2d 379, 384, 219 P.3d 651 (2009); *State v. Valdez*, 167 Wn.2d 761, 765, 224 P.3d 751 (2009); *State v. Tibbles*, 169 Wn.2d 364, 367, 236 P.3d 885 (2010); *State v. Snapp*, 174 Wn.2d 177, 182, 275 P.3d 289 (2012). Article I, section 7 provides great protection than the federal constitution. Because Mr. Arnsten was deprived of his right to a trial free from unwarranted seizures, his right to a fair trial, equal protection, and due process was denied. U.S. Const. amend. VI, XIV. Where the above cases all provided for similar relief, Mr. Arnsten was denied the same. This violation of his right to a fair trial, equal protection, and due process requires review. RAP 13.4.

F. CONCLUSION

Based on the preceding, Mr. Arnsten respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 5th of January 2020.

Respectfully submitted,



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