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Supreme Court No. 98545-6

NO. 52585-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

v.

LARRY PETERS.

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

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Larry Peters, appellant below, seeks review of the Court of Appeals decision designated in Part B.

II. COURT OF APPEALS DECISION

Mr. Peters appealed his Pierce County convictions for kidnapping in the first degree, assault in the second degree, felony harassment, and deadly weapons enhancements. On April 21, 2020, the Court of Appeals affirmed the convictions in an unpublished opinion. Appendix. This motion is based upon RAP 13.4(b)(1).

III. ISSUES PRESENTED FOR REVIEW

1. The prosecution must inform the accused of favorable evidence known to law enforcement that is either exculpatory or impeaching. Approximately three weeks before trial, a primary detective in the State's case was found to be in violation of police department policies related to the misuse of access to telecommunication lines, including listening to privileged attorney-client phone calls. The State did not provide this information to the defense. Did the State's failure to disclose material impeachment evidence prejudice Mr. Peters's right to a fair trial and undermine confidence in the outcome of the case, and did the Court of

Appeals decision conflict with decisions of this Court, requiring review?

RAP 13.4(b)(1).

2. When evidence of multiple criminal acts is introduced to support a conviction, the court must give a unanimity instruction unless the prosecution elects a single act upon which to proceed. Here, the State introduced evidence alleging Mr. Peters used a number of different weapons, including a taser and a machete, but failed to elect the weapon associated with the deadly weapon enhancement. Did the court's failure to give a unanimity instruction violate Mr. Peters's right to a unanimous verdict as to the enhancements, and does the Court of Appeals decision conflict with decisions of this Court, requiring review? RAP 13.4(b)(1).

IV. STATEMENT OF THE CASE

Mr. Peters incorporates by reference his statement of the case from his opening brief. Brief of Appellant at 3-10.

In large part, the complainant testified at trial that she had sex with Mr. Peters, her ex-boyfriend, seven times on the night of the incident. 3/12/18 RP 134. The complainant stayed in her motel room with Mr. Peters all night, and then drove him to breakfast the following morning. Id. at 143-46. The couple proceeded to a nearby 7-11, and then went back to the motel. Id.; 3/12/18 RP 148; 3/13/18 RP 448. Only once the two

were back at the motel, did the complainant leave Mr. Peters. 3/12/18 RP 149-50.

The complainant reported she had been kidnapped and raped by Mr. Peters and that he had threatened her with an array of weapons. 3/13/18 RP 428-34, 462-64. A number of weapons were seized from Mr. Peters's room at a local motel. 3/8/18 RP 416.

Mr. Peters was charged with kidnapping in the first degree, rape in the first degree, felony harassment, assault in the second degree, and violation of a court order. CP 46-50.

The evidence at trial showed that Mr. Peters was excluded as a significant contributor to the DNA profile obtained in the case, although there were four other contributors, in addition to the complainant. 3/14/18 RP 550-52, 555-57. Following the trial, Mr. Peters was acquitted of rape in the first degree. CP 196.

He was convicted of the kidnapping, assault, and harassment counts, as well as the deadly weapon enhancements. CP 192, 195, 200, 202, 203, 206. The jury did not specify, and was not asked to agree upon, what deadly weapon was used. CP 170, 187-89. The jury was unable to reach a unanimous verdict as to whether Mr. Peters assaulted the complainant with a deadly weapon. CP 204.

Mr. Peters's Brady motion to dismiss for its failure to disclose misconduct of one of its primary detectives was denied. CP 225-44; 8/24/18 RP 795-96.

Mr. Peters appealed, and on April 21, 2020, the Court of Appeals affirmed the convictions in an unpublished decision. He respectfully seeks this Court's review. RAP 13.4(b).

V. ARGUMENT

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b) (1).

1. The State's failure to disclose material impeachment evidence denied Mr. Peters a fair trial and undermines confidence in the verdict.

Detective Jeff Nolta was the first officer to interrogate Mr. Peters after his arrest. 3/12/18 RP 20-25. Nolta was also responsible for conducting the forensic analysis of Mr. Peters's phone. Id. at 30-56. Nolta introduced incriminating statements against Mr. Peters through both of these official duties. 3/12/18 RP 25-26, 42-45, 75-80.

At the same time Nolta was working on the Peters case and preparing to testify at trial, he was under investigation for misconduct by the Fife Police Department. CP 234. In fact, a few weeks before Mr. Peters's trial, Nolta faced a departmental hearing and was found to have

committed two counts of misconduct. CP 234-44 (Investigation Report of Fife Police Captain Aaron Gardner). The State failed to notify the defense of this misconduct until two months following Mr. Peters's trial. RP 779-80. The State's failure to disclose material impeachment evidence denied Mr. Peters his right to a fair trial, as it would have changed the outcome.

- a. The State must disclose material evidence, known to them, that is favorable to the accused, whether it is exculpatory or impeaching.

“[O]ne essential element of fairness” in a criminal case “is the prosecution’s obligation to turn over exculpatory evidence.” Milke v. Ryan, 711 F.3d 998, 1002 (9th Cir. 2013); see Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). There are three components of a Brady violation. The evidence must be favorable to the accused, either as exculpatory or impeachment evidence; the State must have failed to disclose the evidence, “either willfully or inadvertently;” and “prejudice must have ensued.” Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

The requirement that the government disclose material favorable evidence to a criminal defendant is required by the due process clauses of the State and Federal Constitutions as well as the constitutional guarantee

of meaningful opportunity to present a defense. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22.

The prosecution’s duty to disclose evidence favorable to an accused arises even when there has been no request by the accused. In re Pers. Restraint of Stenson, 174 Wn.2d 474, 486, 276 P.3d 286 (2012). “The scope of the duty to disclose evidence includes the individual prosecutor’s ‘duty to learn of any favorable evidence known to others acting on the government’s behalf.’” Id. (citing Strickler, 527 U.S. at 281; Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

b. The requirement to disclose favorable evidence includes impeachment evidence.

“Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness ” United States v. Jackson, 345 F.3d 59, 70 (2d Cir. 2003); see Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); see e.g., United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) (“Brady/ Giglio information includes ‘material ... that bears on the credibility of a significant witness in the

case.’ ”) (omission in original) (quoting United States v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir.1992)); Stenson, 174 Wn.2d at 486.

Here, the State claimed the evidence was not material because, among other reasons, Detective Nolta was not the sole officer to interrogate Mr. Peters. CP 252. The State argued that the Investigation Report finding Nolta guilty of violating Fife Police Department policy was not “related in any way” to Mr. Peters’s case, and Nolta’s misconduct only involved his misinterpretation of departmental policy. CP 246, 251.

First, the value of impeachment evidence is not mitigated by the fact that other impeachment evidence exists. United States v. Price, 566 F.3d 900, 914 (9th Cir. 2009); cf. Benn v. Lambert, 283 F.3d 1040, 1056 (9th Cir. 2002) (holding that Brady material is especially likely to be prejudicial if it “would have provided the defense with a new and different ground of impeachment”). Evidence is material when it might have been used to impeach a government witness, including “any inference therein which bears on credibility.” Price, 566 F.3d at 912, 913 n.14.

Moreover, the other officer in the room during Mr. Peters’s interrogation, Sergeant Thompson, was also part of the internal investigation of Nolta. CP 236-42 (Thompson interrogated Nolta as to his misuse of phone system, including listening to privileged attorney-client

calls). Sergeant Thompson and Captain Gardner, both of whom testified at Mr. Peters's trial, were an integral part of the Nolta investigation.

The question is whether all of the impeachment material, taken together, would have affected the jury's assessment of the case. State v. Gregory, 158 Wn.2d 759, 800, 147 P.3d 1201 (2006).

c. The failure to disclose the impeachment evidence reasonably affected the outcome of the trial.

Whether the prosecution's failure to disclose the evidence prejudiced Mr. Peterson is reviewed de novo. Stenson, 174 Wn.2d at 491. Sufficient prejudice exists where there is a reasonable probability of a different result. Kyles, 514 U.S. at 434. A "reasonable probability" of a different result is shown when the government's failure to disclose favorable impeachment evidence "undermines confidence in the outcome of the trial." Id. (quoting Bagley, 473 U.S. at 678).

In cases in which the witness is central to the prosecution's case, the defendant's conviction indicates that in all likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility. Therefore, the suppressed impeachment evidence, assuming it meets the test for disclosure, takes on an even greater importance.

Benn, 283 F.3d at 1055.

The United States Supreme Court has emphasized the critical role of cross-examination at trial. "It is not up to us to decide, ex ante, what

evidence is trustworthy and what is not.” Williams v. Illinois, 567 U.S. 50, 138, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012) (Kagan, J., dissenting); see Melendez-Diaz, 557 U.S. at 317–318; see also Bullcoming v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). “[T]he Confrontation Clause prescribes its own ‘procedure for determining the reliability of testimony in criminal trials.’” Id. (quoting Crawford v. Washington, 541 U.S. 36, 67, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

The importance of meaningful cross-examination to the jury’s weighing of evidence underscores the critical nature of presenting jurors with reasons to question the evidence. If “there is a reasonable probability that the withheld evidence would have altered at least one juror’s assessment” of the evidence presented at trial, the outcome would have been different and the Brady violation requires a new trial. Price, 566 F.3d at 914.

Here, the nondisclosed material affected the jury’s assessment of the case. Had Mr. Peters been timely provided with the Investigation Report regarding Detective Nolta’s misconduct, which was known to the State for three weeks before trial, Mr. Peters would have proceeded differently in a number of ways, including re-interviewing the Fife police

officers, changing his voir dire and opening statement, and altering his cross examination of three different witnesses, at least.

In fact, the trial court agreed with Mr. Peters that knowledge of Detective Nolta's misconduct was imputed to the prosecutor's office, "and at the very least, could have been obtained and ... or should have been known about prior to the time of [Mr. Peters's] trial." 8/24/18 RP 796. The delayed disclosure of Nolta's misconduct deprived the jury of a reasonable basis to question the State's case, undermining confidence in the outcome of the trial. It is reasonably probable that the State's failure to disclose this impeachment evidence affected the outcome of the trial.

The Court of Appeals determined the undisclosed evidence here was not material, finding there was no reasonable probability the result of the proceeding would have been different if the information had been timely disclosed. Appendix at 7. Because the determination of the Court of Appeals as to materiality is in conflict with decisions of this Court, review should be granted. RAP 13.4(b)(1).

2. The deadly weapons enhancements violated article I, section 21, because the jury was not required to render a unanimous verdict as to the deadly weapon.

According to the evidence presented at trial, Mr. Peters had a taser, a machete, and other weapons in the motel room. 3/12/18 RP 113, 121-22.

To prove the deadly weapon enhancement, the State was required to prove Mr. Peters was either armed with the machete, or had used the taser in a manner that could easily and readily produce death. Here, the jury's verdict was not unanimous as to the weapon used by Mr. Peters.

a. Article I, section 21 guarantees an accused person the right to a unanimous verdict.

Article I, section 21 guarantees the right to a unanimous jury verdict. Const. Art. I, § 21; State v. Elmore, 155 Wn.2d 758, 771 n.4, 123 P.3d (2005). Before conviction, jurors must unanimously agree that a defendant committed the charged criminal act. State v. Coleman, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If the State presents evidence of multiple acts, then either the State must elect a single act or the court must instruct the jury to agree on a specific criminal act. Id. at 511.

In the absence of an election, failure to provide a unanimity instruction is presumed prejudicial.¹ Id. at 512. Without proper election or instruction, each juror's guilty vote might be based on facts that his or her fellow jurors do not believe were established. Id. Failure to provide a unanimity instruction requires reversal – or here, vacation of the

¹ The omission of a unanimity instruction, accordingly, is a manifest error affecting a constitutional right, and as such, can be raised for the first time on appeal. RAP 2.5(a); State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009).

sentencing enhancements – unless the error is harmless beyond a reasonable doubt. Id. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts (or enhancements). See id.

b. The absence of a unanimity instruction pertaining to the deadly weapon special verdicts required reversal of the sentencing enhancements, because the State relied on both the taser and the machete, either of which the jury could have relied on for its verdict.

The State presented evidence that Mr. Peters had a taser, and that he also held a machete in the air while threatening the complainant. 3/12/18 RP 113-15, 121-22. Several weapons were recovered from the motel room they shared, including those mentioned above. 3/8/18 RP 416.

The State did not adequately elect in its closing argument which weapon was allegedly used by Mr. Peters in each count, and accordingly, which weapon the jury should rely upon when deliberating. The State failed to elect one weapon as the basis for Count I (kidnapping), Count II (rape), or Count IV (assault).² To the degree the prosecutor did elect in closing, the argument regarding the deadly weapon special verdicts was equivocal and confusing. 3/19/18 RP 683, 687, 696.

² The State did elect the machete for Count III (harassment), and the jury acquitted of Count II (rape).

For example, the prosecutor explained to the jury in closing argument that it should rely on the machete to find the deadly weapon enhancement. 3/19/18 RP 683. He then suggested they could also find the enhancement using the taser, but concluded by “asking” them to rely upon the machete:

The Special Verdict Form is with regard to the machete, so whether the machete was readily accessible, okay. Perhaps also the taser, but I think more – you’re on firmer ground, I would submit and ask you to rely on the machete, okay.

3/19/18 RP 683.

The prosecutor made a similar argument regarding election of the taser or machete regarding the rape count. 3/19/18 RP 687. Likewise, the prosecutor informed the jury they could find Mr. Peters was armed with the taser, but not armed with the machete. 3/19/18 RP 696. This failure to elect seems to have resulted in the jurors’ assault verdict, whereby they were not unanimous as to whether Mr. Peters committed the assault with a deadly weapon, but still found the special verdict as to deadly weapon. CP 203, 204, 206.

The State’s failure to elect is problematic, because the court failed to give a unanimity instruction to the deadly weapon enhancements.³ The State’s closing argument was equivocal, and regardless, the jury was

³ The court gave a general unanimity instruction which did not address this issue. CP 184, 187.

instructed that the lawyers' arguments are not evidence. CP 154. The lack of election, together with a lack of a unanimity instruction applied to the enhancements, violated Mr. Peters's right to a unanimous jury, and gives rise to a presumption of prejudice. Coleman, 159 Wn.2d at 511-12.

This error is further problematic, because while a machete is a *per se* deadly weapon under RCW 9A.04.110(6), a taser is not. For the jury to find that the taser was the deadly weapon, it would require proof the taser was "used" in a manner "likely to produce or may easily and readily produce death." RCW 9.94A.825. There was a lack of evidence presented at trial of such potential lethality. 3/8/18 RP 382; 3/14/18 RP 625-28.

In the absence of a proper election or unanimity instruction, a divided jury might have voted to find the deadly weapon special verdicts. Some jurors may have focused on the taser, while others may have focused on the machete exclusively. The possibility that Mr. Peters was convicted by a divided jury violates his Article I, section 21 right to a unanimous jury. The sentencing enhancements should have been vacated by the Court of Appeals. See Coleman, 159 Wn.2d at 511.

The Court of Appeals found the State "clearly elected the type of weapon used in relation to each of the special verdicts." Appendix at 8.

The Court found the State “clearly elected” the machete, and offered a portion of the deputy prosecutor’s closing argument as a reference.

Appendix at 9-10 (quoting 7 VRP 696-97).⁴ The closing argument referenced by the Court of Appeals was anything but clear –

And was he armed with a deadly weapon at the time? Remember, this regarding the machete, so the question is, so you may – I don’t think you should, but you may determine that when he [stunned] her at the door, that the [stun gun] was a deadly weapon, but he was not armed with the machete, in which case you could return a guilty on the [verdict form for the crime of second degree assault] and answer [the deadly weapon special verdict form related to the second degree assault charge] as a no...

Appendix at 10 (quoting 7 VRP at 696-97).⁵

The State relied on both the taser and the machete, and its muddy closing argument did not clearly elect which weapon it relied upon as the deadly weapon in relation to each of the counts. The Court of Appeals decision was thus in conflict with decisions of this Court and merits review. RAP 13.4(b)(1).

⁴ This is the Court of Appeals citation system for the verbatim reports. This corresponds with 3/19/18 RP 696-97 in the VRP’s used by the parties.

⁵ Brackets and emphasis added by Court of Appeals, including replacement of “taser/tased” with “stun gun/stunned.” 3/19/18 RP 696.

VI. CONCLUSION

For the reasons set forth above, Mr. Peters respectfully requests that this Court grant review under 13.4(b)(1).

DATED this 14th day of May, 2020.

Respectfully submitted,

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APPENDIX

April 21, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

LARRY AYO PETERS, JR.,

Appellant.

No. 52585-2-II

UNPUBLISHED OPINION

CRUSER, J. — Larry Ayo Peters Jr. appeals from his jury trial convictions for first degree kidnapping, felony harassment, and second degree assault of his former girlfriend, MT, and the deadly weapon sentencing enhancements related to each conviction. He argues that (1) the State’s late disclosure of impeachment evidence amounted to a *Brady*¹ violation that violated his right to a fair trial and (2) the deadly weapon sentencing enhancements violated his right to a unanimous verdict because the jury was not instructed that it had to be unanimous as to which weapon he was armed with when it made the deadly weapon special verdict findings. Because Peters fails to show that the late-disclosed evidence was material and the State elected in closing argument what

¹ *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

weapon it was relying on to prove the deadly weapon sentencing enhancements, we affirm the conviction and deadly weapon sentencing enhancements.

FACTS

I. BACKGROUND

On January 12, 2017, at about 12:30 PM, officers from the Fife Police Department responded to a 911 call from MT. MT reported that Peters had lured her to a motel room the night before with a false text message that she thought came from a friend and had attacked her. She told the responding officers that Peters had shocked her with a “stun gun” in the side of her neck and stomach, sexually assaulted her, and threatened to kill her. 5 Verbatim Report of Proceedings (VRP) at 462.

Officers located Peters at the motel. When the officers took Peters into custody, they found and confiscated two cell phones. Peters was transported to the hospital because he was experiencing health issues.

At the hospital, Detective Sergeant Thomas Thompson and Detective Jeff Nolta interviewed Peters. Nolta later downloaded information from the two cell phones and produced reports about their contents, which include text messages to and from MT.

II. PROCEDURE

A. CHARGES

The State charged Peters by amended information with first degree kidnapping, first degree rape, felony harassment, second degree assault, and violation of a domestic violence court order. The State also alleged that Peters committed each of these offenses while armed with a deadly weapon. The case proceeded to a jury trial.

B. TRIAL

Nolta, Thompson, Captain Aaron Gardner, MT, and the sexual assault nurse examiner testified for the State. Peters did not present any evidence.

1. TESTIMONY

a. NOLTA'S TESTIMONY

Nolta testified about his and Thompson's interview with Peters in the hospital. Nolta also testified about his forensic examination of the two cell phones that Peters had been carrying.

b. THOMPSON'S TESTIMONY

Thompson testified about contacting MT at about 12:30 PM following her 911 call on January 12. When he arrived, MT described what had happened; her description was largely the same as her trial testimony. Thompson observed that MT had injuries to her neck and stomach.

After MT was taken to the hospital, Thompson went to the motel, where other officers were taking Peters into custody. Thompson's testimony about what happened at the hospital was the same as Nolta's, but Thompson provided more detail about the interview.

c. GARDNER'S TESTIMONY

Gardner testified that he contacted Peters by phone at the motel and asked him to step out of the room to talk to the officers outside of his room. Peters eventually left the room and was arrested.

d. MT'S TESTIMONY

MT testified that Peters lured her to the motel room by sending her a text purporting to be from another friend and inviting her to the motel on the evening of January 11. When she arrived, she was attacked by a person wearing black clothing and a black mask, whom she later recognized

as Peters. Peters shocked her with a stun gun to the side of her neck, and she fell to the floor. Peters then used the stun gun on her stomach.

MT testified that Peters took away her cell phone and then told her that he wanted to have sex with her “one last time” and ordered her to remove her clothing. 1 VRP (Mar. 12, 2018) at 119. Peters threatened to kill her and then himself and swung a machete within inches of her head. MT complied with Peters’s demands because she feared for her life and thought Peters would kill her with the machete if she did not comply. After having sex, Peters fell asleep, but MT did not attempt to escape because she feared she would wake him and make him angry. MT eventually managed to escape and contact law enforcement.

e. FORENSIC NURSE EXAMINER’S TESTIMONY

Tasha Cushman, the forensic nurse examiner who examined MT, testified that MT told her (Cushman) that she (MT) had cooperated with Peters because she was afraid for her life and thought that if she cooperated she might be able to try to escape. MT described being stunned, and Cushman saw stun gun marks on the left side of MT’s neck and abdomen. MT also described other weapons, such as a machete, “a big long sword thing,” and “zip tied handcuffs.” 6 VRP at 594. MT further reported that Peters had threatened to kill her and then himself and to kill her if she reported the incident.

2. JURY INSTRUCTIONS

After the parties rested, the trial court instructed the jury on the substantive offenses and the deadly weapon sentencing enhancement special verdict forms. The trial court did not instruct the jury that it had to be unanimous as to which weapon was the basis of any deadly weapon sentencing enhancement special verdict, nor did Peters request such an instruction.

3. CLOSING ARGUMENTS AND VERDICT

During its closing argument, the State discussed the deadly weapon sentencing enhancement special verdicts. The State argued that the deadly weapon sentencing enhancement special verdicts were based solely on Peters having been armed with the machete.²

The jury found Peters guilty of first degree kidnapping, harassment, and second degree assault.³ It also found that Peters was armed with a deadly weapon when he committed each of these offenses.

C. MOTION TO DISMISS

After the verdict, but before sentencing, Peters moved to dismiss the charges under CrR 8.3(b), based on governmental misconduct. Peters alleged that the State had violated *Brady* by failing to disclose potential impeachment evidence related to Nolta that had existed prior to Nolta's March 12 testimony.

Peters stated that on May 15, well after Nolta testified, the State disclosed a February 20, 2018 disciplinary report concluding that in a different case Nolta had "committed a series of acts which had potential impeachment value to the defendant in this case." Clerk's Papers (CP) at 226. Peters alleged that the report disclosed that Nolta had been "found to have improperly accessed and reviewed jail phone calls made by a defendant [in another case], without a legitimate investigative purpose, in violation of [Fife Police] Department rules." *Id.* Peters further alleged that "Nolta also listened to at least one privileged phone call between a defendant [in another case]

² We describe and discuss this part of the State's closing argument in more detail in the analysis.

³ The jury also found Peters guilty of violation of a no-contact order, but the trial court later vacated that conviction and dismissed the charge. The jury acquitted Peters on the first degree rape charge.

and an attorney's office without disclosing that he had done so," that Nolta had "allowed others to use his secure login and, in the past, had listened to privileged attorney client phone calls in other cases." *Id.* Peters asserted that Gardner, who had also testified at trial, signed the disciplinary report and that Thompson was involved in the investigation. The trial court denied the motion to dismiss.

Peters appeals his convictions and the deadly weapon sentencing enhancements.

ANALYSIS

Peters argues that (1) he is entitled to a new trial because the State's failure to disclose Detective Nolta's disciplinary action was a *Brady* violation that deprived him of a fair trial and (2) we should reverse the deadly weapon enhancements because the trial court failed to instruct the jury that its verdict on the special verdicts had to be unanimous as to which weapon Peters was armed with at the time of each offense. These arguments fail.

I. *BRADY* ISSUE

Peters argues that the State's failure to disclose Nolta's disciplinary action was a *Brady* violation and that this violation undermines confidence in the verdict and deprived him of a fair trial.⁴ We disagree.

To establish a *Brady* violation, a defendant must demonstrate the existence of each of three elements: "(1) '[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching,' (2) 'th[e] evidence must have been suppressed by the

⁴ Peters does not argue that the trial court erred when it denied his CrR 8.3(b) motion to dismiss for governmental misconduct. He argues that the *Brady* violation undermines only confidence in the verdict and deprived him of a fair trial.

State, either willfully or inadvertently,’ and (3) the evidence must be material.” *State v. Davila*, 184 Wn.2d 55, 69, 357 P.3d 636 (2015) (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

“Evidence is material under *Brady* ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Id.* at 73 (internal quotation marks omitted) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). A reasonable probability exists if the suppression of the evidence “‘undermines confidence in the outcome of the trial.’” *Id.* (internal quotation marks omitted) (quoting *Kyles*, 514 U.S. at 434). Whether the evidence in question is material is a legal issue that we review de novo. *Id.* at 74-75. The undisclosed evidence here was not material because there is no reasonable probability that the result of the proceeding would have been different if this information had been timely disclosed.

As to Nolta’s testimony about his contact with Peters and Peters’s statements while at the hospital, that testimony was merely cumulative because Detective Sergeant Thompson testified to the same facts. Because this same evidence was presented by a second witness whose credibility was not implicated by the late-disclosed evidence,⁵ we hold that the late-disclosed evidence does not undermine confidence in the verdict in this respect.

⁵ Peters appears to suggest that the late disclosure about the investigation was also a *Brady* violation with respect to Thompson and Captain Gardner because they were involved in the investigation of Nolta. But Peters does not explain how mere involvement in an investigation of another officer provided any exculpatory or impeachment evidence. Accordingly, there is no *Brady* violation in respect to Thompson or Gardner.

As to Nolta's testimony about the cell phone data, defense counsel used that information in closing argument to raise issues about MT's credibility. Because Peters himself used this testimony to support his closing argument, Peters does not show how impeaching the source of that evidence would have changed the result of the proceeding.

Because Nolta's evidence was either cumulative or was helpful to Peters, we hold that Peters does not show materiality. Thus, his *Brady* claim fails.

II. DEADLY WEAPON SENTENCING ENHANCEMENTS

Peters next argues that we should reverse the deadly weapon sentencing enhancements for each offense because the trial court did not instruct the jury that it had to be unanimous as to which weapon, the stun gun or the machete, was the basis for the enhancements. He contends that this is a multiple acts issue and that the State's attempts to elect were ambiguous.

Article I, section 21 of the Washington State Constitution gives criminal defendants the right to a unanimous jury verdict. *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017). When the State presents evidence of multiple acts that could form the basis of the crime charged, either the State must elect to rely on just one of the acts or the jury must be instructed to reach a unanimous verdict based on the specific act that supports a finding of guilt. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Here, even presuming, but not deciding, that the unanimity rule applies to deadly weapon sentencing enhancements, there was no unanimity issue because the State clearly elected the type of weapon used in relation to each of the special verdicts.

When addressing the special verdict for the deadly weapon sentencing enhancement for the first degree kidnapping charge, the State argued,

That room was not a big room. It was a standard two-queen room in any motel we've ever been in, and you can see it. You can see those pictures, and she told

you where they were arrayed. The machete at one point was over by the chair, which was between the two beds. She told you the other items were all laid out for him on that table or desk thing that was underneath the TV. They were very much available to him, and that room was not a giant room. There wasn't a ton of walking space in there, so yeah, they're readily accessible to him for offensive or defensive, if she decided to fight back. He had pepper spray, he had gel spray, he had plenty of things to utilize, right?

But really the question -- I should clarify. *The Special Verdict Form is with regard to the machete, so whether the machete was readily accessible, okay.* Perhaps also the [stun gun], but I think more -- you're on firmer ground, *I would submit and ask you to rely on the machete, okay.*

....

... There was a connection between the *machete* and the defendant, and he rented the room, right? It's his room. It was in his room. There's a connection. And there was a connection between the weapon and the crime. *Was there a connection between this machete and the kidnapping?* Yeah. One of the reasons she was restrained in the room, one of the reasons she didn't flee when that door was opened is because she was afraid she was going to die. One of the reasons, one of the ways he kept her under his control that night was with this *machete*. So yes, *there was a connection between the machete and the crime.*

7 VRP at 682-83.

Although the State mentioned other weapons, this argument clearly directed the jury to consider *only* the machete as the basis for the deadly weapon enhancement for the kidnapping charge.

When addressing the special verdict for the deadly weapon sentencing enhancement on the felony harassment charge, the State argued, "Was he armed with a deadly weapon? Again, this pertains to Instruction 34⁶ *regarding the machete*. Yes, he was physically holding it while he threatened to murder her." *Id.* at 692. As Peters himself concedes, this was a clear election of

⁶ Jury instruction 34 instructed the jury on the deadly weapon special verdict and defined the term deadly weapon for this purpose. The State was distinguishing this definition of deadly from the definition of deadly weapon that applied to the substantive offenses, jury instruction 16.

the machete as the only basis for the deadly weapon enhancement for the felony harassment charge.

When addressing the special verdict for the deadly weapon sentencing enhancement on the second degree assault charge, the State argued,

And was he armed with a deadly weapon at the time? Remember, this regarding the machete, so the question is, so you may -- I don't think you should, but you may determine that when he [stunned] her at the door, that the [stun gun] was a deadly weapon, but he was not armed with the machete, in which case you could return a guilty on [the verdict form for the crime of second degree assault] and answer [the deadly weapon special verdict for related to the second degree assault charge] as a no. But remember what Instruction 34 tells us about "armed." Armed means readily available. It doesn't mean in his hand. And what did we have? We had a room where he had staged it and set it up, weaponry laid out, and the machete was near enough that he was dragging her to it. So I would submit to you, yes, you find, yes, he was armed with a deadly weapon, with the machete at the time.

Id. at 696-97.

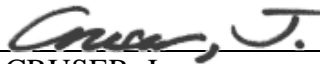
The State's argument clearly distinguished between what weapon the jury was to consider when considering the offense from the weapon it was to consider when considering the deadly weapon special verdict. In fact, the State went as far as to remind the jury that it must answer "no" to the deadly weapon special verdict if it was relying on the stun gun.

This argument, as a whole, clearly demonstrates that the State elected to rely upon the machete as the deadly weapon in relation to each of the charges, not the stun gun or the other weapons in the room. Because the State clearly elected to rely on the machete, Peters's unanimity argument fails.⁷

⁷ Because we hold that the State elected by asking the jury to consider only whether Peters was armed with the machete, we do not address Peters's assertion that the evidence was insufficient to establish that the stun gun was a deadly weapon for purposes of the sentencing enhancement.


We hold that (1) Peters's *Brady* argument fails because Peters does not establish materiality and (2) Peters's unanimity argument fails because the State clearly elected which weapon it was relying on for the deadly weapons sentencing enhancement verdicts during closing argument. Accordingly, we affirm the convictions and the deadly weapon sentencing enhancements.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




CRUSER, J.

We concur:



MAXA, P.J.



GLASGOW, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 52585-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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- petitioner
- Attorney for other party



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