

No. 55766-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TONY FRENCH,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 18-1-03592-1
The Honorable Philip Sorensen, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR ..	3
IV. STATEMENT OF THE CASE	6
A. PROCEDURAL HISTORY	6
B. RELEVANT FACTS	9
1. <u>French and Martinez’s Relationship</u>	9
2. <u>The Child’s Baseball Bat Incident</u>	10
3. <u>The Shooting Incident</u>	11
4. <u>Investigation and Arrest of French</u>	14
5. <u>French’s Testimony</u>	18
V. ARGUMENT AND AUTHORITIES	21
A. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT THE CHILD’S BASEBALL BAT WAS A DEADLY WEAPON.	21
1. <u>The State presented insufficient evidence to support the jury’s finding that French assaulted Stith with a deadly weapon</u>	23

2.	<u>The State presented insufficient evidence to support the jury’s special verdicts on the deadly weapon enhancements.</u>	26
B.	FRENCH’S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED, REQUIRING REVERSAL OF HIS BURGLARY CONVICTION.	29
C.	THE TRIAL COURT SHOULD HAVE GRANTED FRENCH’S MOTION TO DISMISS BECAUSE THE STATE CAUSED THE LOSS AND DESTRUCTION OF MATERIALLY OR POTENTIALLY EXCULPATORY EVIDENCE.	35
1.	<u>Relevant Facts</u>	35
2.	<u>The government has a constitutionally mandated duty to preserve all potentially material and exculpatory evidence.</u>	37
3.	<u>The State’s failure to preserve the black Toyota Camry requires dismissal of the charges.</u>	44
VI.	CONCLUSION	47

TABLE OF AUTHORITIES

CASES

WASHINGTON STATE COURTS

<i>City of Seattle v. Slack</i> , 113 Wn.2d 850, 784 P.2d 494 (1989)	22
<i>City of Tacoma v. Luvane</i> , 118 Wn.2d 826, 827 P.2d 1374 (1992)	21
<i>State v. Burden</i> , 104 Wn. App. 507, 17 P.3d 1211 (2001)....	39, 41, 42, 43
<i>State v. Cheatam</i> , 150 Wn.2d 626, 81 P.3d 830 (2003)	28
<i>State v. Davila</i> , 184 Wn.2d 55, 357 P.3d 636 (2015)	39
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	30
<i>State v. Groth</i> , 163 Wn. App 548, 261 P.3d 183 (2011).....	43, 44
<i>State v. Hardesty</i> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	22, 25, 29
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998)	22, 25, 29

<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 881 P.2d 231 (1994)	30, 32, 34
<i>State v. Owens</i> , 180 Wn.2d 90, 323 P.3d 1030 (2014)	30, 34
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	22
<i>State v. Sandholm</i> , 184 Wn.2d 726, 364 P.3d 87 (2015)	30, 31
<i>State v. Sweany</i> , 162 Wn. App. 223, 256 P.3d 1230 (2011)	22
<i>State v. Tongate</i> , 93 Wn.2d 751, 613 P.2d 121 (1980)	27
<i>State v. Wells</i> , 17 Wn. App. 146, 561 P.2d 697 (1977)	30
<i>State v. Williams</i> , 136 Wn. App. 486, 150 P.3d 111 (2007)	31
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994)	37, 38
FEDERAL COURT CASES	
<i>Arizona v. Youngblood</i> , 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)	38, 39, 47
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)	37

California v. Trombetta, 467 U.S. 479,
104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)37, 38

United States v. Cooper,
983 F.2d 928 (9th Cir. 1993).....40, 41

OTHER AUTHORITIES

RAP 2.5..... 22

RCW 9.94A.825.....26, 27, 28

RCW 9A.04.110.....23, 24, 34

RCW 9A.52.020..... 31

U.S. Const. amend. 14 21

Wash. Const. art. I, sect. 21..... 30

I. INTRODUCTION

The State accused Tony French of contacting his ex-girlfriend, Susan Martinez, on multiple occasions, in violation of a no contact order. French acknowledged some of the alleged contacts with Martinez but denied others.

The State also accused French of breaking into Martinez' home and assaulting her new boyfriend with a child's baseball bat. French denied that he entered the home, and asserted that he struck the new boyfriend only after the boyfriend tried to attack him. The State failed to show that the child's bat was a deadly weapon, and the convictions and deadly weapon enhancements connected to this incident should be vacated and dismissed.

Finally, the State accused French of driving a vehicle to Martinez' home and shooting at Martinez and her new boyfriend. French asserted that he only fired at Martinez and her boyfriend after one of them repeatedly

fired a gun at him while he sat in the vehicle. Even though the vehicle had visible bullet holes along the driver's side, investigators destroyed the car before the defense could inspect it or run forensic tests for evidence to support French's self-defense claim. This violated French's due process rights and the convictions connected to the shooting incident must be vacated and dismissed.

II. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to support the jury's verdict that Appellant committed second degree assault with a deadly weapon.
2. The State presented insufficient evidence to support the jury's special verdicts on the deadly weapon enhancements.
3. Appellant's burglary conviction violated his constitutional right to a unanimous jury verdict.
4. The State presented insufficient evidence to support

each charged and instructed alternative means of committing burglary.

5. The government destroyed evidence in violation of due process.
6. The trial court erred when it denied Appellant's motion to dismiss after the government caused the loss and destruction of material exculpatory evidence.
7. The trial court erred when it denied Appellant's motion to dismiss after the government acted in bad faith and caused the loss and destruction of potentially exculpatory evidence.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State present insufficient evidence to support the jury's verdict that Appellant committed second degree assault, where the evidence did not establish that a child's baseball bat was used or threatened to be used in a manner that was readily

capable of causing death or substantial bodily harm? (Assignment of Error 1)

2. Did the State present insufficient evidence to support the jury's special verdicts on the deadly weapon enhancements, where the evidence did not establish that a child's baseball bat has the capacity to inflict death and was used in a manner that could likely, easily, or readily produce death? (Assignment of Error 2)

3. Was Appellant denied a constitutionally guaranteed unanimous verdict, where he was charged with alternative means of committing burglary, the jury was instructed on the alternative means of committing burglary, the jury instructions told the jurors they did not have to be unanimous as to the means, the prosecutor told the jury in closing argument that they did not have to agree on the means, but where one of the means is not

supported by sufficient evidence? (Assignments of Error 3 & 4)

4. Were Appellant's due process rights violated when the Pierce County Sheriff's Department caused the loss and destruction of the vehicle Appellant was driving at the time of the shooting incident, which had visible bullet holes in the driver's side door frame and therefore clearly possessed materially exculpatory evidence that supported Appellant's claim of self-defense. (Assignments of Error 6)
5. Did the Pierce County Sheriff's Department act in bad faith when it caused the loss and destruction of the vehicle Appellant was driving at the time of the shooting incident, which had visible bullet holes in the driver's side door frame and therefore clearly possessed potentially useful evidence that could have supported Appellant's claim of self-defense? (Assignments of Error 7)

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Tony French with eleven crimes. The State alleged five counts of violation of a no contact order protecting Susan Martinez, committed on five separate days in 2018. (CP 96, 98-101)

In connection with an incident at Martinez's house on July 14, 2018, the State charged French with one count of first degree burglary and one count of second degree assault. The State alleged that the crimes were committed with a deadly weapon, and were aggravated because French was armed with a deadly weapon, specifically a child-sized baseball bat. (CP 97-98) The State also alleged that the burglary was a domestic violence incident, and that the offense was part of an ongoing pattern of abuse. (CP 97-98)

In connection with a shooting incident on September 7, 2018, the State charged French with one

count of attempted premeditated murder, one count of first degree assault, one count of second degree assault, and one count of unlawful possession of a firearm. (CP 94-96) The State also alleged several aggravating facts, including that French was armed with a firearm, that the crimes were domestic violence incidents, and that the offenses were part of an ongoing pattern of abuse. (CP 94-96)

French brought a pretrial motion to dismiss the charges related to the shooting incident because law enforcement failed to retain the vehicle French was driving during the incident, and therefore failed to preserve potentially exculpatory or material evidence. (CP 48-49, 112-19; 09/10/20 RP 518-25)¹ The trial court denied the motion. (CP 48-49, 112-19; 09/10/20 RP 544)

The jury found French guilty as charged. (CP 275-

¹ The transcripts will be referred to by the date of the proceeding.

96; 10/06/20 RP 147-52) After the verdicts, French requested and was granted permission to proceed pro se because he was dissatisfied with his trial counsel's representation. (CP 326-28; 11/06/20 RP 174) French then filed several post-trial motions, including a motion to arrest judgment, a motion for new trial, motion to compel discovery, and a renewed motion relating to destruction of the vehicle. (CP 467-47) The trial court denied all of the motions. (04/16/21 RP 2061-67)

At sentencing, the court merged the premeditated murder and the first degree assault convictions because they were both predicated on French shooting at Martinez. (CP 494; 506) The trial court imposed an exceptional sentence totaling 600 months of confinement. (CP 505, 509, 527-32; 05/07/21 RP 2093-94) French filed a timely Notice of Appeal. (CP 520)

B. RELEVANT FACTS

1. French and Martinez's Relationship

Tony French and Susan Martinez met through a dating app in February of 2016, and dated off-and-on until December of 2017. (09/15/20 RP 831-32) They had a child together, and Martinez retained primary custody. (09/15/20 RP 832) In March of 2018, Martinez obtained an order prohibiting French from contacting her. (09/10/20 RP 575-77; 09/15/20 RP 833; Exh. 423) But between April of 2018 and September of 2018, French called Martinez or came to her home and workplace and tried to talk to her. (09/15/20 RP 834, 847-48, 854, 857)

Autumn Troutman met French and began dating him in May of 2018. (09/14/20PM RP 653) One evening in July of 2018, they had a disagreement over Troutman going out with her girlfriends. (09/14/20PM RP 654) French came over the next morning and they talked and made up. (09/14/20PM RP 655) Troutman testified that

she got into the shower, and when she got out French was gone. (09/14/20PM RP 655) Troutman's car keys and her black 2014 Toyota Camry were also gone. (09/14/20PM RP 653-54, 655) French's older model tan Toyota Camry was still parked in her driveway. (09/14/20PM RP 657, 662-63) After French failed to return with her car and failed to respond to her texts and calls, she contacted the police and reported it stolen. (09/14/20PM RP 657-58)

French eventually contacted Troutman, and in that conversation he told her that he planned to kill Martinez by shooting her when she dropped her children off at school. (09/14/20PM RP 666)

2. The Child's Baseball Bat Incident

On July 14, 2018, French went to Martinez' home at around 6:30 in the morning. (09/15/20 RP 857-58) According to Martinez and her new boyfriend, Devon Stith, French broke a sliding glass window in the bedroom

then entered the room. (09/15/20 RP 862; 09/16/20 RP 892, 979) He appeared surprised to find Martinez and Stith together in her bed. (09/15/20 RP 862) Martinez testified that French said, "Oh shit," then turned and walked back outside. (09/15/20 RP 862) Stith confronted French and, according to Stith, French hit him on the head twice with a child size aluminum baseball bat. (09/15/20 RP 864; 09/16/20 RP 979, 980, 1026)

3. The Shooting Incident

In September of 2018, French contacted Troutman again. (09/14/20PM RP 666) Troutman testified that French said he would kill Martinez because he was upset about their custody situation. (09/14/20PM RP 666, 676-77) Troutman was concerned for Martinez's safety, so she contacted Martinez through Facebook and told her what French had said. (09/14/20PM RP 666)

Martinez testified that Troutman contacted her on September 6, 2018, and told her that French had asked

Troutman to give Martinez a message. (09/16/20 RP 896) According to Martinez, Troutman told her that French would shoot her in the back of the head if she did not give custody of their child to French's sister or Martinez's brother. (09/16/20 RP 896-97)

On the morning of September 7, 2018, while Martinez and Stith were standing in front of their house smoking cigarettes, French approached the house driving Troutman's black Camry. (09/16/20 RP 894, 899-900, 931, 992, 993-94, 1030-31, 1032) According to Martinez, French drove towards her like he was trying to hit her, so she ran across the street and through the intersection next to her home. (09/16/20 RP 894, 903) She could hear French yelling at her and hear gunshots, but she did not see what French was doing. (09/16/20 RP 903, 904, 928) She stopped running when she felt her legs give out, and saw French drive away. (09/16/20 RP 904-05)

Stith testified that he saw the black Camry coming

towards them, so he pushed Martinez and told her to run. (09/16/20 RP 992-93) Stith ran and hid behind a tree. (09/16/20 RP 994) He could hear gunshots, and saw French follow Martinez to the intersection and stop the car, then he heard more gunfire. (09/16/20 RP 994, 995-96)

Neither Martinez nor French ever saw a gun in French's hand. (09/16/20 RP 929; 09/17/20 RP 1082-83, 1083-84) Both Martinez and Stith also recall seeing smoke apparently coming from the engine when French drove away. (09/16/20 RP 942, 945; 09/17/20 RP 1084-85, 1086)

Martinez was struck once in the arm and twice in the abdomen. (09/16/20 RP 969; 09/28/20 RP 1756, 1757; Exh. 78-90) Two bullets entered and exited her body, but one lodged itself in her leg and remains there. (09/16/20 RP 949; 09/28/20 RP 1758-61)

Several neighbors and drivers heard gunshots and

saw the incident as it unfolded. They saw a dark car following a woman running in the street. (09/17/20 RP 1134, 1136; 09/21/20AM 1232; 09/22/20 RP 1288) They heard gunshots, or saw muzzle flashes, coming from the area where the car stopped. (09/17/20 RP 1133, 1136; 09/21/20AM RP 1233; 09/24/20 RP 1647-48, 1653) One witness saw the driver pointing a gun at the woman. (09/21/20AM RP 1238, 1249) Another witness saw the driver holding a gun out of the window and saw the driver shoot at the woman. (09/22/20 RP 1392, 1394, 1399) The witnesses heard what they believed was a single gun and not multiple guns being fired, and none of the witnesses noticed anyone else holding or firing a gun. (09/14/20AM RP 86-8709/17/20 RP 1136; 09/21/20AM RP 1251; 09/21/20PM RP 25, 26, 41-42; 09/22/20 RP 1296-97, 1415, 1421-22)

4. Investigation and Arrest of French

Investigators found a pile of .22 caliber casings and

broken glass near the driveway of Martinez's house, and another pile of .22 caliber casings in the street near where Martinez stopped running. (09/14/20AM RP 21-22, 25, 28, 61; 09/15/20 RP 714; 09/23/20 RP 1533; Exh. 17, 23) They also observed apparent bullet holes in the garage door of Martinez' house and in the siding of the neighbor's house. (09/14/20PM RP 699; 09/15/20 RP 714, 798-99; 09/23/20 RP 1533-34, 1536) Investigators did not locate any spent bullets at the scene. (09/15/20 RP 759, 798-99; 09/28/20 RP 1808)

Witnesses described the suspect's vehicle as a black or dark Toyota with an Oregon license plate starting with the numbers 955. (09/14/20 RP 7; 09/22/20 RP 1290, 1392; 09/24/20 RP 1649) French's tan 2005 Toyota Camry was registered in Oregon, and its license plate number was "955HEE." (09/10/20 RP 594; 09/28/20 RP 1855) Troutman's black Toyota was registered in Washington and its license plate number was "BGH0472."

(09/14/20PM RP 653-54)

Police eventually found Troutman's black Toyota Camry. (09/14/20AM RP 29; 09/22/20 RP 1384) It did not have a license plate on it when it was found. (09/14/20AM RP 29) The front passenger side window was broken out, there was damage to the driver's side mirror and fender, there were apparent bullet holes in the driver's door that had been covered by black tape, and there was a spent .22 caliber casing on the floor. (09/14/20AM RP 31, 32, 33, 46, 61; 09/17/20 RP 1148-49; Exh. 1-4)

Troutman testified that her Toyota Camry was in good condition before French took it, aside from slight damage to the rear bumper and a cut in the driver's door. (09/14/20PM RP 659) The last time Troutman saw her Camry, it had both the front and rear license plates attached, there were no bullet holes in the side, and the window was not broken. (09/14/20PM RP 661-62)

Investigators put out bulletins on Crime Stoppers, Twitter and Facebook identifying French as a suspect in the shooting. (09/28/20 RP 1811-12, 1813) French was taken into custody on September 25, 2018, after he fled a traffic stop and was located in bushes by a police K9 tracker. (09/23/20 RP 1472, 1473, 1477, 1481, 1509; 09/24/20 RP 1627-28, 1629) Arresting officers found a .22 caliber firearm on the ground within arm's reach of French. (09/23/20 RP 1482, 1493 1509, 1521) As he was being escorted to a patrol vehicle, French reportedly said to the officers, "You guys know who I am, you guys know what I did, all that stuff with my ex-girlfriend was for my kids." (09/23/20 RP 1494, 1510)

A forensic analyst compared markings on casings she fired from the .22 caliber gun with the cartridge cases collected from outside Martinez's house and the intersection. (09/23/20 RP 1587; 09/24/20 RP 1619, 1622, 1623) She determined that all of the collected

casings had been fired by the .22 gun found with French when he was arrested. (09/24/20 RP 1624-25)

5. French's Testimony

French acknowledged contacting Martinez despite the no-contact order, but the contact was related to care of their son. (09/28/20 RP 1826, 1826-27, 1830, 1831-32) On July 14, 2018, French went to Martinez' home to give her diapers and money for their son. (09/28/20 RP 1830-31) He went into the backyard because he usually enters the house through the sliding glass door. (09/28/20 RP 1833) When he rounded the corner of the house, he saw Stith standing on the patio smoking a cigarette and drinking a beer. (09/28/20 RP 1833) French introduced himself, but Stith threw the beer bottle towards French, then picked up the child's baseball bat. (09/28/20 RP 1834) French picked up a nearby rake to defend himself. (09/28/20 RP 1834) Stith swung at French but he used the rake to block the bat. (09/28/20

RP 1834) French pushed against the bat and it struck Stith in the head, then flew out of his hands and through the sliding glass door. (09/28/20 RP 1834) French grabbed a stick and struck Stith lightly on the head, then immediately walked to his vehicle and left. (09/28/20 RP 1834)

On September 7, 2018, Martinez contacted French and they made a plan for him to come to her house and bring medicine for their sick child. (09/28/20 RP 1836-37) When French arrived, he saw Martinez and Stith standing outside the house. (09/28/20 RP 1837-35) Troutman occasionally let French drive her black Camry, and he was driving it that day. (09/28/20 RP 1855, 1871) He pulled into the driveway and looked over at Stith, and saw him reach into his sweatshirt and pull out a gun. (09/28/20 RP 1838) French put his hands up and said, "no." (09/28/20 RP 1838) But Stith aimed his gun at French and fired twice. (09/28/20 RP 1838)

French reached into the glove compartment and retrieved his .22 caliber firearm, and fired several “cover fire” shots back towards and over Stith. (09/28/20 RP 1839) Stith then ran behind a tree, but he continued to fire at French. (09/28/20 RP 1842) French heard several bullets hit the Camry and saw Martinez, who was still standing by the car, grab her stomach. (09/28/20 RP 1842, 1843) French felt as if he was a “sitting duck,” so he again returned fire as he backed out of the driveway and drove away in the same direction that Martinez ran. (09/28/20 RP 1843, 1854)

Stith was still firing towards French as he drove away, and one of the bullets shattered the car window. (09/28/20 RP 1843) The car also began shaking and backfiring then stopped in the road, but French was eventually able to get the car to move forward again. (09/28/20 RP 1844, 1848) He smelled oil and smoke as he drove away from the scene. (09/28/20 RP 1848)

French denied ever pointing a gun at Martinez, and testified that the bullet holes in the black Camry were a result of Stith shooting at him. (09/28/20 RP 1847-48, 1849) He learned that he was being sought by police for murder, and he did not turn himself in because he feared, as an African American man, that the police might view him as dangerous and shoot him. (09/28/20 RP1850-51)

V. ARGUMENT AND AUTHORITIES

A. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT THE CHILD'S BASEBALL BAT WAS A DEADLY WEAPON.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14. Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational

trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime or sentence enhancement were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).²

In order to prove both the second degree assault

² A challenge to the sufficiency of the evidence supporting a conviction may be raised for the first time on appeal as a due process violation. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); RAP 2.5(a)(3).

charge and the deadly weapon sentence enhancements, the State had to prove that the child's baseball bat used to strike Stith was a deadly weapon. The State failed to meet its burden because it did not present sufficient evidence to establish that the bat was a deadly weapon as that term is defined in the relevant statutes.

1. The State presented insufficient evidence to support the jury's finding that French assaulted Stith with a deadly weapon.

To find French guilty of second degree assault as charged and instructed in count 7, the jury had to find beyond a reasonable doubt that French "assaulted Devon Stith with a deadly weapon." (CP 98, 256) For purposes of a prosecution for assault in the second degree:

"Deadly weapon" ... shall include any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm[.]

RCW 9A.04.110(6). "Substantial bodily harm," in turn, is

defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

The State did not introduce testimony showing that, in the manner in which it was used in this case, the child’s bat was capable of causing death or substantial bodily harm. Indeed, the evidence at trial supported the conclusion that the bat was not used in a manner likely to cause death or substantial bodily harm.

Stith testified that French struck him in the head once with an aluminum child-sized baseball bat. (09/16/20 RP 979-80) Stith testified it was not a full swing, but rather a “bop on the head.” (09/16/20 RP 1018) French then immediately ran out of the yard and drove away. (09/16/20 RP 983) The only injury Stith sustained was a lump on the right side of his head.

(09/16/20 RP 979-80) But he never testified that he was in fear for his life or that he thought French was likely to seriously injure or kill him.

French testified that Stith was holding the bat and he pushed the bat away and in the process it was pushed against Stith's head. (09/28/20 RP 1834) French then "bopped" Stith in the head with a nearby stick. (09/28/20 RP 1834)

Under either version of events, the manner in which French used the child's bat was not likely to cause death or substantial bodily harm. The State failed to prove this essential element of the crime of second degree assault. French's conviction for this crime, and its attendant deadly weapon enhancement, should be vacated and dismissed. *Hardesty*, 129 Wn.2d at 309; *Hickman*, 135 Wn.2d at 103.

2. The State presented insufficient evidence to support the jury's special verdicts on the deadly weapon enhancements.

The jury entered special verdicts finding that French was armed with a "deadly weapon," the child's baseball bat, when he committed the burglary and second degree assault of Stith. (CP 288, 291)

The State is permitted to seek a deadly weapon special verdict under RCW 9.94A.825. According to the statute,

[A] deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death.

RCW 9.94A.825.

Certain items are *per se* deadly weapons according

to the statute. RCW 9.94A.825.³ A bat is not one of those items. In order to obtain a deadly weapon special verdict where the item is not a *per se* deadly weapon, the State bears the burden of proving that the defendant was armed with an actual deadly weapon. *State v. Tongate*, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980).

The definition of “deadly weapon” for purposes of a sentencing enhancement is very specific and differs from the definition of this term when it is an element of the crime of assault in the second degree. In drafting the deadly weapon sentence enhancement statute, the Legislature did not include the expansive term, “substantial bodily harm.” Instead, it required the State to

³ These *per se* deadly weapons include: “Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.” RCW 9.94A.825.

explicitly prove (a) that the item used had the capacity to inflict actual death, and (b) that it was *likely* to cause death. RCW 9.94A.825. In this case, the State met neither requirement.

First, the State presented no evidence of the bat's capacity to inflict actual death. The State did not introduce expert or other testimony regarding how such a bat could be used to inflict actual death. Expert testimony in this circumstance would have been appropriate, as the determination that an item can actually kill, rather than simply injure, is surely outside the range of facts known to the average lay juror. *State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003) ("expert ... testimony may be admitted to assist juries in understanding phenomena not within the competence of the ordinary lay juror").

Second, the State never introduced testimony showing that by the manner in which it was used in this case, the child's bat was likely to cause death. As argued

in detail above, the testimony did not establish that the manner in which the bat was used was *capable* of causing death or substantial bodily harm. If the State could not even meet this burden, then the same evidence surely cannot establish that the manner in which the bat was used was *likely* to cause death.

The deadly weapon special verdicts were not supported by sufficient evidence. The remedy is reversal and dismissal of the deadly weapon enhancements and remand for resentencing. *Hardesty*, 129 Wn.2d at 309; *Hickman*, 135 Wn.2d at 103.

B. FRENCH'S RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED, REQUIRING REVERSAL OF HIS BURGLARY CONVICTION.

Violation of the right to an expressly unanimous jury verdict requires reversal of the burglary conviction because sufficient evidence does not support each alternative means of committing this offense.

Criminal defendants have the right to a unanimous

jury verdict under article I, section 21 of the Washington Constitution. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to a unanimous jury determination as to the specific means by which the defendant committed an alternative means offense. *State v. Green*, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980); *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). An alternative means crime is one where the statute defining the crime provides that the proscribed criminal conduct can be proved in multiple ways. *State v. Wells*, 17 Wn. App. 146, 150, 561 P.2d 697 (1977).

If there is sufficient evidence to support each of the alternative means presented to the jury, express jury unanimity as to which means the defendant used to commit the crime is not required. *State v. Sandholm*, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). But if there is insufficient evidence to support any one of the alternative means presented to the jury, the conviction must be

reversed. *Sandholm*, 184 Wn.2d at 732.

The crime of first degree burglary is an alternative means crime *State v. Williams*, 136 Wn. App. 486, 498, 150 P.3d 111 (2007). Under the statute, burglary in the first degree may be committed in two different ways, either by being armed with a deadly weapon, or by assaulting any person. RCW 9A.52.020(1)(a)-(b).

French was charged with committing both alternative means. (CP 97) The two alternative means were also presented to the jury with an instruction telling the jury that it did not need to be unanimous as to which alternative French committed. (CP 253) Instruction 47 stated in relevant part:

To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a), or (3)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

(CP 253)

If the jury does not provide a particularized expression of unanimity through a special verdict form, a reviewing court must be able to “infer that the jury rested its decision on a unanimous finding as to the means” in order to affirm. *Ortega-Martinez*, 124 Wn.2d at 707-08. The jury here did not return a particularized finding of unanimity on the burglary count. Further, this Court cannot conclude that the jury rested its decision on a unanimous finding as to the means. Not only did the trial court fail to provide a special verdict form and fail to instruct the jury that it must unanimously agree as to which alternative means the State proved, it *affirmatively told the jury it did not have to be unanimous*. (CP 253)

The prosecutor highlighted this language in closing argument, telling the jury that a unanimous verdict did not require agreement as to which alternative was proved beyond a reasonable doubt. When discussing the identically-worded instructions for the violation of a no-

contact order counts, the prosecutor explained to the jury how the alternative means crimes should be approached:

They're called "alternative means," (3)(a) and (3)(b) for various counts. I should have pointed this out earlier, but when you see those, you don't have to be unanimous as to which one of those the defendant committed in order for you to find a verdict of guilty.

So, for instance, if you are in the jury deliberation room and this half of the room thinks, "You know what, I think he violated the restraint provision by contacting Ms. Martinez," and the other side says, "No, no, no, we think that, beyond a reasonable doubt, the State proved that the defendant violated the distance provision of that no-contact order," well, *the correct verdict, as long as you found the other elements to be proved also beyond a reasonable doubt, would be one of guilty, even though you are not unanimous as to which one of (3)(a) or (3)(b) the State's proven beyond a reasonable doubt. Okay?*

(09/30/20 RP 1987-88, emphasis added) And the prosecutor argued to the jury both that French assaulted Stith and that French was armed with a deadly weapon.

(09/30/20 RP 1981)

As argued in detail above, the State did not prove

that the child's bat was a deadly weapon.⁴ The absence of sufficient evidence of that alternative requires reversal of French's burglary conviction. *Owens*, 180 Wn.2d at 95; *Ortega-Martinez*, 124 Wn.2d at 707-08.

The instructions, together with the State's argument, prevent this Court from being able to infer that the jury rested its decision on a unanimous finding as to the means, and there is insufficient evidence to prove one of the means. Accordingly, this Court should reverse French's burglary conviction.

⁴ The definition of "deadly weapon" used for proving a charge of burglary is the same as the definition used for proving a charge of second degree assault: any "weapon, device, instrument, article, or substance, ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6).

C. THE TRIAL COURT SHOULD HAVE GRANTED FRENCH'S MOTION TO DISMISS BECAUSE THE STATE CAUSED THE LOSS AND DESTRUCTION OF MATERIALLY OR POTENTIALLY EXCULPATORY EVIDENCE.

The State's failure to preserve the black Toyota Camry, which had observable bullet holes in it, constituted a failure to preserve material exculpatory evidence or potentially material or useful evidence, and requires the dismissal of charges related to that incident under the due process clause of the United States constitution.

1. Relevant Facts

Troutman's Toyota Camry was found abandoned in a parking lot, and was impounded and turned over to law enforcement about a week after the shooting incident. (09/10/20 RP 521; 09/14/20PM 668; 09/22/20 RP 1383, 1388) Detectives and a forensic investigator searched and processed the Camry for evidence on September 19, 2018. (09/17/20 RP 1147-48) They removed three

pieces of duct tape stuck onto the driver's side door frame and found what appeared to be three bullet holes. (09/10/20 RP 522; 09/17/20 RP 1148-49) Bare metal and rust was visible around the holes. (09/17/20 RP 1150) Investigators did not conduct any trajectory analysis or make any attempt to determine the age of the rust, and did not conduct any inspection of the interior of the engine compartment. (09/10/20 RP 523, 525, 526; 09/17/20 RP 1178-79, 1180) But they took photographs of the exterior and interior of the car, including the bullet holes. (09/10/20 RP 522-23; 09/17/20 RP 1151; Exhs. 93-129) The Camry was then released by law enforcement and sold at auction, without first notifying the defense. (09/10/20 RP 524; CP 49)

The defense moved to dismiss the charges related to the shooting incident (counts 1, 2 and 3). (CP 48-49) The defense argued that the Camry possessed evidence that was materially exculpatory, or alternatively that law

enforcement acted in bad faith when they failed to retain and preserve it. (09/10/20 RP 518-29; 541-43) The trial court denied the motion. (09/10/20 RP 944)

2. The government has a constitutionally mandated duty to preserve all potentially material and exculpatory evidence.

“The Fourteenth Amendment [to the United States Constitution] requires that criminal prosecutions conform with prevailing notions of fundamental fairness, and that criminal defendants be given a meaningful opportunity to present a complete defense.” *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). To comport with due process, the prosecution has a duty to disclose material, exculpatory evidence as well as to preserve all potentially material and favorable evidence. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Wittenbarger*, 124 Wn.2d at 475. The government violates a

defendant's due process rights where material exculpatory evidence is not preserved. See *Trombetta*, 467 U.S. at 489.

If evidence is destroyed, dismissal is appropriate where (1) the State fails to preserve material exculpatory evidence, or (2) it fails to preserve potentially exculpatory evidence in bad faith. *Wittenbarger*, 124 Wn.2d at 475-77. Material exculpatory evidence is considered evidence that possesses both an exculpatory value that was apparent before it was destroyed, and be of a nature that the defendant would not be able to obtain comparable evidence by other reasonably available means. *Trombetta*, 467 U.S. at 488-89; *Wittenbarger*, 124 Wn.2d at 475. The destruction of material exculpatory evidence violates due process regardless of whether the government acted in bad faith. See *Trombetta*, 467 U.S. at 488; *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

In a case involving merely potentially useful evidence, the defendant must “show bad faith on the part of the police.” *Youngblood*, 488 U.S. at 58. “The presence or absence of bad faith by the [government] for the purposes of the Due Process Clause must necessarily turn on the [government’s] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.” *Youngblood*, 488 U.S. at 56.

Here, in denying French’s motion to dismiss, the trial court found that the black Toyota Camry did not possess materially exculpatory evidence. (09/10/20 RP 944) The court found that the Camry possessed only “potentially useful evidence” and that law enforcement did not act in bad faith. (09/10/20 RP 944) This Court reviews de novo a trial court’s determination of materiality. *State v. Davila*, 184 Wn.2d 55, 74, 357 P.3d 636 (2015); see also *State v. Burden*, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001).

The case of *United States v. Cooper*, 983 F.2d 928, 930 (9th Cir. 1993) is instructive. There, the DEA seized, pursuant to a search warrant, suspected methamphetamine lab equipment and manufacturing chemicals from the defendant's home and business. DEA agents, following departmental policy, destroyed the laboratory equipment based on the presumption that it contained hazardous material, though no tests were done to determine that fact. 983 F.2d at 930. The defendants claimed that the laboratory was legal and not used to manufacture illegal substances and that by destroying the lab equipment, they were deprived of proving that the lab equipment contained no trace of hazardous material. 983 F.2d at 930.

The Ninth Circuit held that the government acted in bad faith in destroying the potentially useful evidence and dismissed the case. *Cooper*, 983 F.2d at 931. The Court concluded:

The defendant's version of the facts, which was repeatedly related to government agents had at least a ring of credibility. They should not be made to suffer because government agents discounted their version and, in bad faith, allowed its proof, or its disproof, to be buried in a toxic waste dump.

Cooper, 983 F.2d at 933.

In *State v. Burden*, the defendant was charged with unlawful possession of a controlled substance. 104 Wn. App at 509. Burden's first trial ended in a hung jury. On the date for retrial, the State learned that exhibits from the first trial were missing from the clerk's office. Missing items included a sweatshirt, gloves, and coat which Burden claimed were not his and that the fit and appearance of the coat, where the drugs were found in a pocket, would prove his unwitting possession defense. 104 Wn. App 510-11. The State argued that a substitute coat, a photo of Burden wearing the coat and a stipulation that the name inside the coat was not Burden's, was comparable evidence available to Burden and that the

destruction or loss of the coat did not violate due process. 104 Wn. App 513. The trial court found that the evidence was material to the defense of unwitting possession and that the alternatives proposed by the State were inadequate. 104 Wn. App at 511.

The trial court dismissed the case, and this Court affirmed, noting that the coat was critical to the defense of unwitting possession and that Burden would be unlikely to receive a fair trial if he had to present the same defense that led to a hung jury without the physical evidence that supported his defense. *Burden*, 104 Wn. App at 512-13. The Court found that the substitute coat and photographs of the original were not an adequate substitute: “the partial photograph, which does not show the other person’s name or the emblem, does not constitute evidence comparable to the actual coat, even with a series of stipulations ... a substitute coat would create credibility issues about the accuracy of the substitute and

... the photograph was inadequate because it did not show the entire coat. 104 Wn. App at 513.

Conversely, in *State v. Groth*, 163 Wn. App 548, 558-59, 261 P.3d 183 (2011), Division 1 found no bad faith after finding destroyed evidence only potentially useful. There, a murder occurred in 1975, and Groth was arrested in 2007 following DNA testing. 163 Wn. App at 551, 555. In 1987, while the case was still cold, a police sergeant, ignoring previous orders, ordered the destruction of all physical evidence except for the murder weapon and crime scene photos. 163 Wn. App at 554. Groth claimed that the destruction of evidence constituted a violation of due process. 163 Wn. App at 556-57.

While the Court of Appeals acknowledged that there was no clear reason as to why the evidence was destroyed, it also found that there was no way for the Sheriff's office to know, in 1987, that the evidence had any exculpatory value given that there was no suspect at

the time and DNA testing was not yet available. *Groth*, 163 Wn. App at 559.

The present case has similarities to both *Cooper* and *Burden* and the result should be the same.

3. The State's failure to preserve the black Toyota Camry requires dismissal of the charges.

The missing evidence here is materially exculpatory. French testified that Stith fired at him, and denied that he fired the shots that struck the vehicle. The vehicle, like the coat in *Burden*, was obviously known to be material to police as they served a search warrant on the vehicle, took photographs of the damage, looked for bullets and casings in the vehicle, took photographs of tire treads at the scene, and took photographs of broken glass, presumably from the vehicle, at the scene. However, they failed to perform testing like examining the engine for bullet damage, measuring the bullet holes to determine whether they were caused by French's gun or

a different caliber weapon, and determining the trajectory of the bullets fired at the Camry.

Like the coat in *Burden*, and the lab equipment in *Cooper*, the evidence is gone and there is no ability for French “to obtain comparable evidence by other reasonably available means.” There are no suitable substitutes here to the evidence of the actual vehicle itself. Police had the authority to impound and retain the vehicle as materially exculpatory evidence and deliberately chose not to do so. Law enforcement routinely maintains vehicles used in suspected homicide cases (09/10/20 RP 524-25), but they chose not to do so here. French was deprived of materially exculpatory evidence which the police knew was exculpatory and there are no suitable substitutes available. The remedy required for this due process violation is dismissal of the charges.

Should the court conclude that, like in *Cooper*, the

evidence the Camry possessed is only “potentially useful,” the result should be the same—dismissal of the charges—because the police acted in bad faith by not maintaining the vehicle for the defense to conduct its own search for bullet fragments, trajectory analysis, and other forensic testing that could have proven or disproven whether or not the shots that struck the vehicle came from French’s firearm or from someone else.

Law enforcement was also made aware of its potential importance to the defense by French himself. When one of the investigating detectives met with French to take DNA samples, French specifically asked the Detective whether he had seen the bullet holes. (09/10/20 RP 540) Law enforcement’s decision to release the black Toyota Camry without notifying the defense, even though they had been made aware of French’s desire to have these bullet holes investigated, shows bad faith.

Similar to the lab equipment in *Cooper*, the vehicle with obvious bullet holes could have been subjected to tests, the results of which could have exonerated French. *Youngblood*, 488 U.S. at 57. This case is similar to *Cooper* and the result should be the same, dismissal of the charges.

VI. CONCLUSION

The evidence was insufficient to support French's second degree assault conviction and that conviction must be reversed and dismissed. Because the evidence was also insufficient to support the jury's special verdicts on the deadly weapon, those findings must be reversed and dismissed. Because the jury did not indicate that it unanimously agreed on the means by which French committed burglary, and one means is not supported by sufficient evidence, that conviction must also be reversed. Finally, the convictions related to the shooting incident must be reversed and dismissed because the State failed

to preserve material or potentially material exculpatory evidence. French's case should be remanded for dismissal of the flawed convictions and for resentencing on the remaining convictions.

I hereby certify that this document contains 7212 words, excluding the parts of the document exempted from the word count, according to the calculation of the software used to prepare this brief, and therefore complies with RAP 18.17.

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