

SUPREME COURT

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Cases decided February 25, 2021.

State of Oregon v. Michael Stuart Ross, (CC 18CR32198; 19CR45558) (SC S067936)

On petition for alternative writ of mandamus from an order of the Washington County Circuit Court, Andrew R. Erwin, Judge. Peremptory writ of mandamus to issue. Opinion of the Court by Justice Lynn R. Nakamoto.

Today the Oregon Supreme Court held that *Ramos v. Louisiana*, 590 US ___, 140 S Ct 1390, 206 L Ed 2d 583 (2020), did not invalidate the provisions of Oregon law permitting nonunanimous acquittals.

In consolidated criminal cases, Michael Stuart Ross (relator) is charged with several offenses. In a pretrial order, the trial court held that, in light of *Ramos*, the provisions of Oregon law permitting nonunanimous not-guilty verdicts could not constitutionally be applied and that the jury would be instructed that its verdict, whether to convict or to acquit, must be unanimous. The trial court understood *Ramos* to hold that Oregon's nonunanimous jury laws were systemically racist and to invalidate those provisions as applied to both convictions and acquittals. Relator filed a petition for an alternative writ of mandamus in the Oregon Supreme Court, seeking a writ directing the trial court to vacate its order. The Court issued an alternative writ, and the trial court declined to vacate its order.

In a unanimous opinion written by Justice Lynn R. Nakamoto, the Supreme Court held that *Ramos* did not support a conclusion that the Sixth Amendment to the United States Constitution, or any other constitutional provision, prohibits acquittals based on nonunanimous verdicts. The Court first addressed whether mandamus was appropriate and concluded that relator lacked a plain, speedy, and adequate alternative remedy for some harms that could result from a jury instruction that misstated the requirements for acquittal.

Turning to the substantive issue, the Court explained that *Ramos* had held

that the Sixth Amendment required jury unanimity for convictions. The Court observed that the holding in *Ramos* was based on the text and history of the Sixth Amendment and that the *Ramos* opinion emphasized that the reasons why laws permitting nonunanimous convictions were adopted lacked relevance to that analysis. The Court explained that, although the Supreme Court in *Ramos* had discussed the origins of the nonunanimous jury provisions in Louisiana and Oregon and had stated that those origins were rooted in racism, it did so as part of considering whether to overrule a prior decision upholding nonunanimous verdicts, rather than as a factor in its own constitutional analysis. The Court concluded that the trial court had erred by reading *Ramos* to invalidate the provisions of Oregon law permitting the receipt of nonunanimous not-guilty verdicts. Accordingly, the trial court must vacate its order and, in accordance with Oregon laws, instruct the jury that it can acquit a defendant in a 10-2 or 11-1 verdict.

State of Oregon v. Daezhar Omani Banks, (CC 17CR64677) (CA A168210) (SC S067549)

On review from the Court of Appeals in an appeal from Multnomah County Circuit Court, Leslie Bottomly, Judge. 301 Or App 853, 455 P3d 1046 (2020). The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings. Opinion of the Court by Justice Rebecca A. Duncan.

Today, the Oregon Supreme Court held that a prosecutor's statements made to prospective jurors during jury selection indicating that the rules of evidence limited the evidence that she could present to the jury in the present case were improper and required reversal.

The state charged defendant with harassment based on an incident at a mobile phone store. Before trial, the state provided defendant with a video from the store's security system, but the video did not show the alleged harassment. During jury selection, the prosecutor told prospective jurors that the "rules of evidence" limited what she could present. Over defendant's objection, the prosecutor continued, stating that "some things are not going to come into the trial today" and that the jury was "not going to have all the facts." In closing argument, defendant focused on the lack of video evidence of the harassment, urging the jury to conclude that the state had not proven its case beyond a reasonable doubt. During deliberations, the jury submitted two written questions to the trial court, asking "Does the prosecutor know if the video [of the alleged harassment] exists?" and "If they know it exists, are they required to show it in trial?" The trial court responded that the jury had already "been provided the admitted evidence in the case." Defendant was convicted.

Defendant appealed, arguing, among other things, that the trial court erred in overruling the objection to the prosecution's *voir dire*. The Court of Appeals affirmed

without opinion. Defendant petitioned for review in the Supreme Court.

In a unanimous opinion authored by Justice Rebecca A. Duncan, the Oregon Supreme Court reversed the decision of the Court of Appeals, reversed the judgment of the circuit court, and remanded the case to the circuit court for further proceedings. The Court noted that the state constitutional right to an impartial jury includes the right to a verdict based solely on the evidence at trial. Consequently, a prosecutor may not suggest to a jury that the state has evidence against a defendant beyond that presented at trial. Such a statement injects extrinsic and prejudicial matter into the trial and invites the jury to speculate. The Court concluded that, because the prosecutor's statements suggested that the state had more evidence than would be presented at trial, the statements violated that basic rule and were therefore improper.

The Court further concluded that the error was not harmless, because the statements were prejudicial, prominent, related to a central issue on which the jury was focused, and undercut a part of defendant's defense.