

63579-4

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NO. 63579-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

IVORY BERUBE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JEFFREY RAMSDELL

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether defendant Ivory Berube has waived his challenges to the prosecutor's closing argument when he made no objection at trial and has not shown that any of the challenged remarks were so flagrant and ill-intentioned that they could not have been cured by an appropriate instruction to the jury.

2. Whether Berube has failed to show that the prosecutor made improper remarks during closing argument.

3. Whether Berube has not shown a substantial likelihood that the claimed misconduct affected the jury's verdict.

4. Whether Berube may not challenge the firearm enhancement jury instruction for the first time on appeal because he did not object to it at trial.

5. Whether the firearm enhancement jury instruction correctly stated the law with respect to the need for jury unanimity.

6. Whether any error in the firearm enhancement jury instruction was harmless given that the jury unanimously found that Berube was armed with a firearm when they convicted him of first-degree assault and unlawful possession of a firearm.

7. Whether the proper remedy for the alleged error in the firearm enhancement jury instruction is retrial on the enhancement.

**B. STATEMENT OF THE CASE**

**1. THE SHOOTING.**

On the night of July 11, 2008, Tanisha Barquet and Kyla Jackson went to Thompson's Point of View, a nightclub located at 23<sup>rd</sup> and Union in Seattle. 4RP 22-26.<sup>1</sup> Outside the nightclub, Emory Berube<sup>2</sup> approached Barquet and accused her of being involved in the shooting of his friend "Clips."<sup>3</sup> 4RP 29-34. Emory repeatedly called Barquet a bitch and stated that he was going to knock her out. 4RP 29-35. Emory said that he was going to call "Clips" and began making calls on his telephone. 4RP 29-35. Barquet then saw "Clips" walk up. 4RP 36-37.

Barquet decided to leave, and she and Jackson crossed the street and headed back to Jackson's car. 4RP 29-41. Barquet saw Ivory Berube exit a car, immediately return to the car and then

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<sup>1</sup> The State adopts the abbreviations for the report of proceedings used in the Brief of Appellant. In addition, though not listed in his brief, Berube had opening statement on April 15, 2009 transcribed. That transcript is identified as "RP(opening)."

<sup>2</sup> In order to avoid confusion with defendant Ivory Berube, Emory Berube is referred to as "Emory" in this brief.

<sup>3</sup> "Clips," whose real name is Diantre Jefferson, was shot in June of 2008. 6RP 16-17.

place something in his waist. 4RP 36-40. He then crossed the street and approached Barquet. 4RP 37.

Fearful, Barquet got into Jackson's car. 4RP 40. Berube walked up to the car, looked at a tattoo on Barquet's arm and stated, "You are a Barquet." 4RP 41. When Barquet confirmed that she was, Berube stated that he grew up with her family. Id.

Jackson and Barquet drove away. 4RP 43. Before they left, Jackson told Barquet that she knew Berube and told Barquet his name. 4RP 75, 94.

Barquet and Jackson visited several other clubs that night and ultimately parted ways. 4RP 42-44. Barquet met up with another acquaintance, Alysha Johnson.<sup>4</sup> 4RP 45-46. Later that night, Johnson drove Barquet to another nightclub, Waid's Haitian Restaurant, near Jefferson Street and 12<sup>th</sup> Avenue. 3RP 9-12; 4RP 44-49.

A number of people were outside Waid's. 4RP 49; Ex. 20. After Johnson parked the car, Barquet crossed the street, and

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<sup>4</sup> Barquet's memory of events was spotty after she met Alysha Johnson. 4RP 46-48, 81-82. Barquet attributed her lack of memory to the injuries that she suffered that night. 4RP 47. She also acknowledged she drank alcohol throughout the night. 4RP 46-47, 76-77. Barquet's blood alcohol level was determined to be .217 after she was shot and taken to the hospital. 5RP 19.

heard a gunshot. 4RP 50. She realized that she had been hit in the head; a bullet had gone through her ear and taken off an earring. 4RP 50-54. Barquet turned around and saw Berube a few feet away pointing a gun at her. 4RP 50-52. He fired again, hitting her in the left leg. 3RP 76; 4RP 50- 52. Barquet ran from him, hid along the side of a nearby house, and passed out. 4RP 52; Ex. 20.

Meanwhile, Joseph Burgess was driving home on Jefferson when he heard the gunshots. 5RP 27-31. He pulled his car over at Jefferson and 13<sup>th</sup> and called 911, but there was no answer. 5RP 32-37. He saw Ivory Berube run past his car. 5RP 36-41. Berube appeared to be placing a gun or an object shaped like a banana in his waistband. 5RP 37-38.

The police were dispatched to the scene based upon a report of shots fired. 3RP 15; 4RP 72. The suspect was described as a black male in his twenties wearing a white t-shirt, white baseball cap, black jeans and possibly wearing glasses. 3RP 17-18; 6RP 22. The shooter was reported to have run away in a northwestern direction. 3RP 125.

A police officer found Barquet lying along the side of a house. 3RP 73-75. She had lost a significant amount of blood, was unresponsive to questions, and was transported to Harborview

Medical Center. 3RP 20-21, 75-77; 4RP 53; 5RP 7-9. The shot to her leg had passed through the femoral artery and a vein. 4RP 55; 5RP 11-13. This injury was life-threatening; Barquet nearly bled to death. 5RP 9. The other shot had gone through her ear, which had to be reconstructed. 4RP 54-55.

## **2. THE INVESTIGATION AND ARREST OF BERUBE.**

At the scene, the police found a fired bullet and Barquet's earring. 3RP 46, 54; 6RP 23-24. The lack of any shell casings at the scene suggested that a revolver had been used. 3RP 53-54.

That night, a few blocks southeast from the scene of the shooting, the police stopped a car occupied by Charles Justice and two women. 3RP 113-15, 124-25; 6RP 27-29; CP 107-09. When the police attempted to arrest Justice, he fled and was taken into custody after being tazed. CP 108. The police later found two semiautomatic weapons in his car. 3RP 64-66.

Two days later, on July 14, 2008, Seattle Police Detective Cooper interviewed Barquet at the hospital. 3RP 103-08. He showed her a montage that include Charles Justice's photograph. 3RP 104-12. Barquet stated that she knew Justice and that he was not involved in the shooting. 3RP 112; 4RP 62-63.

Barquet told the detective the names of the individuals involved in shooting her. 3RP 109. Detective Cooper then prepared two more montages containing the photographs of Ivory Berube and Emory Berube. 3RP 115-22. After looking at the montages, Barquet identified Emory Berube as the person who confronted her at Thompson's. 3RP 121-24; 4RP 60-61. She identified Ivory Berube as the person who shot her.<sup>5</sup> 3RP 121-24; 4RP 61-62.

Joseph Burgess also looked at a photo montage and picked Ivory Berube out of a photo montage as the person he had seen that night. 5RP 44-47; 6RP 57-63. Burgess testified that he thought Berube was the person he saw, though he could not say it with one hundred percent confidence. 5RP 47-48.

The police obtained surveillance video from Waid's. 3RP 128-30; Ex. 20. The video shows numerous individuals milling outside Waid's, and Barquet then arriving and crossing the street.

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<sup>5</sup> Berube suggests that Barquet learned from her family that it was Berube who shot her. Brief of Appellant at 11. In fact, Barquet testified that she learned of Berube's name from Kyla Jackson before the shooting occurred. 4RP 75, 94. When asked whether it was her family that told her that Berube was the shooter, Barquet responded, "No. I know. I've met him. When I met him earlier that night, I seen his face... I know it was him." 4RP 94.

3RP 132. The shooting occurs out of view of the camera, though Barquet can be seen running afterwards.<sup>6</sup> Ex. 20.

Almost a week after the shooting, on July 17, 2008, the police arrested Emory Berube. 6RP 42. The next day, Emory called Berube several times from the jail. 6RP 106; CP 26. In one call, Emory stated that the police had told him that they had a video showing Emory arguing with Barquet, and that they knew that he could identify the shooter. Ex. 31 and 33.<sup>7</sup> Emory warned Berube to "stay out the wind," and Berube responded, "I'm gone tonight." Ex. 31 and 33. In a second call, Berube discussed getting a fake identification, and Emory then expressed concern about talking over the telephone. Ex. 31 and 33.

Berube then fled to his mother's house in New Bedford, Massachusetts. 6RP 42, 48. He took a bus cross-country and arrived sometime around July 22, 2008. 7RP 11-12, 36-37.

On July 28, 2008, the police arrested Berube at his mother's house. 6RP 42, 48. The next day, Seattle detectives traveled to

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<sup>6</sup> At trial, Barquet and Detective Cooper described the events on the video in reference to the time stamp on the recording. 4RP 64-67; 6RP 36-39. In closing, the prosecutor also summarized the events with reference to the time stamp. 9RP 16-18.

<sup>7</sup> Ex. 33 is a reading guide for the calls. While not provided to the jury, the court reviewed it and it was made part of the record. 6RP 96-99.

New Bedford and interviewed him. 6RP 43-45. After being advised of his Miranda<sup>8</sup> rights, Berube acknowledged that he knew why the Seattle police were there and he denied that he had shot Barquet. 6RP 46-48. He admitted that he and his brother Emory were at Thompson's on the night of July 11, 2008, but claimed that he did not recall talking to Barquet. 6RP 48-49. When asked if he witnessed the shooting at Waid's, Berube did not answer and stared back at the detective. 6RP 49.

Using a ruse, the detective (falsely) stated that Emory had already admitted to the police that he and Berube were at Waid's at the time of the shooting. 6RP 49-50. Berube then acknowledged that he and Emory were at Waid's and that he had seen the person who shot Barquet. 6RP 49-51. When Detective Cooper asked the name of the shooter, Berube responded, "That's not how I roll. I'm not down like that." 6RP 52. Berube became upset and told the detectives, "You guys are fucked." Id. He stated that the detectives did not have anything on him and that he would see them in court. Id.

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<sup>8</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

When asked why he was in Massachusetts, Berube claimed that he had planned the trip for a while, although he had not told anyone about it. 6RP 53. He admitted that he was under supervision with the Department of Corrections ("DOC"), and had not told DOC that he had left the state. 6RP 53-54. He also acknowledged that he had had no contact with his mother for 13 years. 6RP 52-53. When asked about leaving his job at Goodwill, he stated that he intended to quit it. 6RP 53. Berube grew more and more agitated by the questioning. 6RP 54. At the conclusion of the interview, Berube stated that the police had witnesses now, but that he wanted to see who would actually follow through at the time of trial and testify against him and his brother. 6RP 54-55.

### **3. THE TRIAL.**

The State charged Berube with first-degree assault and first-degree unlawful possession of a firearm. CP 57-58. The State alleged a firearm enhancement on the assault count. Id. At trial, on the unlawful possession of a firearm count, Berube stipulated to the existence of his prior conviction of a serious offense. CP 27; 6RP 108.

Berube's defense was identity. In court, Barquet identified Berube and testified that she had no doubt that he had shot her. 4RP 37, 51-52. Joseph Burgess testified that Berube looked like the man who ran past him. 5RP 40-41.

Berube's mother, Deborah Berube, testified that, several months before July of 2008, he had begun planning a visit to her. 7RP 6-8. She could not recall the date that he arrived in New Bedford, but it was the first time that she had seen him in 13 years. 7RP 12, 32. Berube told her that, on the night of the shooting, Emory had gotten into an argument with Barquet and that Berube then told Emory to shut up. 7RP 16-18, 39. Berube told his mother that after this argument, he had drinks with Barquet in the back of her truck. 7RP 39-41. Berube admitted that he and Emory were at the scene of the shooting. 7RP 17-18, 43.

Berube testified that he and his brother Emory were at Thompson's on July 11<sup>th</sup>. CP 101. While outside of Thompson's, he approached Kyla Jackson and then spoke with Barquet, who was in Jackson's truck. Id. He spoke with Barquet for about 10 minutes and he drank vodka with her. CP 101-02. He testified that they talked about Barquet's tattoo and that their conversation was

cordial. Id. Later that night, he went to 12<sup>th</sup> and Jackson and was outside when he heard shots fired. CP 102.

He admitted his voice was on the jail recordings, but Berube claimed that he was not concerned about being arrested. CP 103. He denied that he fled to Massachusetts in order to avoid being arrested. Id.

Berube acknowledged that he knew the other people present during the shooting, but he refused to provide their names. CP 105. He admitted that he was in serious trouble and that the names of other witnesses could be helpful to his case. Id. He asked the trial court whether he had to provide their names and tried to assert the "Fifth Amendment." Id. He refused to provide the names of anyone who was present during the shooting and also refused to state the name of the person who picked him up and drove him home that night. Id.

On April 24, 2009, the jury found Berube guilty as charged on all counts and answered "yes" to the special verdict for the firearm enhancement. CP 52-54. The trial court imposed standard range sentences on all counts. CP 130-34.

Additional relevant facts are set forth below.

**C. ARGUMENT**

**1. BERUBE HAS NOT SHOWN THAT THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.**

Berube claims that the prosecutor repeatedly committed misconduct during closing argument. None of the challenged arguments were objected to at trial. This is not surprising because any fair consideration of them reveals that they were not improper. Due to the lack of any objection, Berube now bears the burden of showing that the prosecutor's challenged remarks were not only improper, but so flagrant and ill-intentioned that they could not be cured by an appropriate instruction to the jury. Berube has not shown that any of the remarks meet this standard, and this Court should reject his claim of prosecutorial misconduct.

**a. The Standards Governing Berube's Prosecutorial Misconduct Claim.**

The law governing Berube's claim is well-settled. When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). To establish prejudice, the defendant must

show a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

"Where the defense fails to object to an improper comment, the error is considered waived 'unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" McKenzie, 157 Wn.2d at 52 (quoting Brown, 132 Wn.2d at 561). Defense counsel's failure to object to the remarks at the time that they are made strongly suggests to a court that the argument in question did not appear critically prejudicial to the defendant in the context of the trial. 157 Wn.2d at 53 n.2.

Berube argues that a constitutional harmless error analysis standard should apply to his claims of misconduct, citing State v.

Monday, 171 Wn.2d 667, 257 P.3d 551 (2011). However, the court in Monday restricted this standard to "when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence." Id. at 680. In only one of his challenges to the closing argument does Berube claim the prosecutor attempted to appeal to racial bias, and that claim is utterly without merit. This Court should apply the well-settled standards for evaluating claims of misconduct.

b. Berube's Claim That The Prosecutor Injected Racial Prejudice Into The Trial Is Without Merit.

Citing Monday, supra, Berube claims that the prosecutor injected racial prejudice into the deliberations by discussing a code against snitching. However, in her closing argument, the prosecutor never discussed race nor did she suggest that an anti-snitch code was unique to African-Americans. The videotape of the crime showed many possible witnesses to the shooting, and the trial testimony established that these witnesses did not want to cooperate with the police. The prosecutor's argument about the reluctance to snitch was completely proper and was based upon

the testimony and evidence at trial. Not only did defense counsel not object, but he solicited testimony that there was a "group of society" that did not cooperate with police, and then argued in closing how this behavior affected the investigation of the case.

The videotape admitted at trial established that there were many potential witnesses to the shooting. Ex. 20. However, a detective testified that no one came forward and indicated that they had witnessed the shooting. 6RP 95. One known witness, Alysha Johnson, who had driven Barquet to the scene of the shooting, would not cooperate with the police in their investigation. 6RP 40, 68-71. At one point, Barquet refused to cooperate with the prosecution and she was arrested on a material witness warrant. 4RP 58-59. As a condition of release, she was required to check in with the detective every day. 4RP 59. When he was arrested, Berube acknowledged that he knew that the police had witnesses, but he doubted that they would be willing to testify against him and his brother at trial. 6RP 54-55.

Defense counsel questioned Detective Cooper about the fact that numerous witnesses were not willing to talk to the police:

DEFENSE COUNSEL: In your experience as a detective, it's not unusual that people from this group of society don't want to talk to the police, is it? It's not

unusual that when you look -- when you look at the Waid's video and you see people in the video, it's not surprising to you based on your experience that the people from this social group don't want to talk to the police, correct?

DETECTIVE COOPER: That's correct.

DEFENSE COUNSEL: Because some people -- just depending on the environments that you go to, some people are happy to talk to you, right?

DETECTIVE COOPER: That's correct.

DEFENSE COUNSEL: And this is not one of those environments, is it?

DETECTIVE COOPER: No.

6RP 70-71.

During closing argument, the prosecutor argued that Berube committed the crime in front of many other people knowing that they would not testify against him:

And he knew that all of the other people who were there and witnessed this would not come to court to testify against him. He told you: Everyone knows me. He knew they weren't going to come to court to testify because there is a code. And that code is: Don't snitch. Don't get the police involved. Don't help the police. Don't assist the police in bringing someone down. We will handle it ourselves. We will execute street justice.

Now, people live by this code for a number of reasons. Some live by it to protect their friends and associates. Some live by it to frustrate the system. Some live by it because the system doesn't work very

well for them. And some live by it because they have to in order to survive where they live.

The code does not seek justice. It enables the individual who is committing the crime. It doesn't seek justice because not only does it prevent those witnesses from coming to court; it perpetuates the chaos and lawlessness of the streets.

Ivory Berube was enabled by the code. And he told you as much in his words to Detective Cooper. You may have witnesses now, but we'll see if they follow through and come to court.

When you know that people are not going to testify against you, you can do whatever you want. And you can execute street justice, and you can shoot people.

Tanisha Barquet understands that code. And you learned in the course of her testimony that after her initial cooperation with the police in providing a statement, she decided that it was better for her, for her family, if she didn't cooperate. And that resulted in her getting arrested and having some conditions placed upon her.

Now, she didn't not cooperate because she didn't want to hold him accountable or because she wanted him to get away with what he had done. She told you tearfully on the stand that she was afraid for herself and for her family. Because when you break the code, there are consequences to breaking the code, and Tanisha understands that.

9RP 7-9. There was no objection to this argument. Instead, defense counsel also addressed this subject:

I understand and I can understand the feeling of the jury to not relate with the witness in this case. You can feel it. You can feel that the jurors don't know the

society with which this incident happened. They don't know the people. They don't know their customs. They are not familiar with people that will not talk to the police, refuse to talk to the police, and don't like to talk to the police. That is what's going on with this case.

It's a bit of a contradiction that a jury of 12 will sit and examine evidence for a society that not only do they not want to be a part of, they would never be a part of and would not feel comfortable in that.... I understand that nobody here goes down to 12th and Jefferson at 1:00 in the morning and hangs out. But that's where we are.

Another oddity of this case is the people that don't want to name names. That is part of the society for everybody that's in this Waid's videotape. It is the way they work. And that is the difficulties in this case. It's the difficulties in the defense of this case.

What's easy in this case is that you won't necessarily believe anybody that testified in this case. And that's the conundrum.

9RP 28-29.

As this record demonstrates, Berube's claim that the prosecutor's argument injected racial prejudice into the trial is utterly without merit. The prosecutor made no mention of race in her closing argument and she never suggested that there was any racial element to the code against snitching. In contrast, in Monday, the prosecutor explicitly referred to race and characterized the code against snitching as "black folks don't testify against black

folks." 171 Wn.2d at 674. The Washington Supreme Court concluded that the prosecutor's arguments were an improper appeal to racial bias and explained:

[T]he State committed improper conduct by injecting racial prejudice into the trial proceedings. The State repeatedly invoked an alleged African American anti-snitch code to discount the credibility of his own witnesses. First, we find no support or justification in the record to attribute this code to "black folk" only. Commentators suggest the "no snitching" movement is very broad. Prosecutor Konat intentionally and improperly imputed this antisnitch code to black persons only. Second, this functioned as an attempt to discount several witnesses' testimony on the basis of race alone.

Id. at 678.<sup>9</sup>

Berube acknowledges that the prosecutor made no mention of race, but asks this Court to interpret the prosecutor's argument as racist because "[t]he group of witnesses in front of Waid's were African Americans and no juror could have failed to recognize that fact." Brief of Appellant at 25. It is an extraordinary leap to argue that because witnesses are of a certain race, an attorney's argument should be understood as an appeal to racial prejudice. No one ever suggested or argued that race played a part in any of

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<sup>9</sup> The court noted that the appeal to racism was not an isolated incident in the Monday trial. 171 Wn.2d at 679.

the witnesses' willingness to participate in the prosecution of the case. Berube's reliance on Monday is completely misplaced.

Moreover, Berube's claim is premised on the notion that all of the possible witnesses at Waid's were African-American. No testimony supports this assertion. The videotape shows a number of individuals present, but due to distance and the grainy images, one cannot conclusively determine the race of all persons on the street that night. Ex. 20.

In addition, Berube cannot show that the prosecutor's remarks were flagrant and ill-intentioned. As this record demonstrates, Berube's attorney deliberately elicited the testimony that members of a certain "social group" did not want to talk to the police. Berube then relied upon this testimony in his closing argument in order to argue that the jury should not believe anyone who testified in the case. He cannot claim that the prosecutor's comments on the same subject were somehow improper.

Finally, Berube asserts the prosecutor's argument "is in some ways worse" than the argument in Monday because it lacked evidentiary support. Brief of Appellant at 25. He is incorrect. A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such

inferences to the jury. Stenson, 132 Wn.2d at 727. There was considerable testimony about the reluctance of witnesses to cooperate with investigation and prosecution of the case. None of the witnesses shown in the video came forward and cooperated with the investigation. Berube's attorney elicited testimony about the reluctance of witnesses to talk to the police. When interviewed by the police Berube questioned whether the witnesses would ultimately be willing to testify at trial. The prosecution's argument had a proper basis in the evidence admitted at trial.

c. The Prosecutor Did Not Make An Improper Tailoring Argument.

Citing the recent decision in State v. Martin, 171 Wn.2d 521, 252 P.3d 872 (2011), Berube claims that the prosecutor made an improper generic tailoring argument. However, Berube has not shown that this argument was improper, let alone flagrant or ill-intentioned. Martin was not decided until nearly two years after this trial, and the caselaw at the time of trial clearly permitted the prosecutor's argument. Moreover, under Martin, the argument was proper because it was not a *generic* tailoring argument, unmoored to the evidence at trial. Instead, the argument discussed specific

testimony at trial; the prosecutor argued that Berube had tailored his testimony about having drinks with Barquet to fit the testimony of his mother. This argument is allowed under Martin.

In the challenged remarks, the prosecutor discussed Berube's testimony and stated:

And what does he do then when he takes the stand about that conversation, he who has sat here throughout the entire trial and listened to everything that everyone testifies about? He has to make his version of his events conform with what he has heard his mother testify about. So he tells you that Kyla and Tanisha had a drink and that he stood there and sipped his vodka drink with them. If that had happened, Tanisha would have told you that that happened because that would only strengthen her identification of him as the shooter.

9RP 24.

There was no objection to this argument, and on appeal, Berube does not explain how it can be considered flagrant and ill-intentioned when it was clearly allowed by controlling caselaw at the time of this trial. The Martin case, cited by Berube, was issued nearly two years after the closing argument in this case.<sup>10</sup> In Portuondo v. Agard, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), the United States Supreme Court held that a prosecutor

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<sup>10</sup> The Martin court noted that the State had not argued that the issue was waived by Martin's failure to raise it at trial. 171 Wn.2d at 527 n.1.

could properly draw attention, during argument, to the fact that the defendant had an opportunity to hear the testimony of the witnesses and to tailor his own testimony accordingly.

Subsequently, this Court confirmed that the rule in Portuondo applied in Washington. State v. Miller, 110 Wn. App. 283, 285, 40 P.3d 692 (2002), aff'd, 171 Wn.2d 521, 252 P.3d 872 (2011).

The prosecutor's argument cannot be considered flagrant and ill-intentioned given that Portuondo and Miller were the controlling caselaw at the time of trial.

Moreover, the prosecutor's argument was not improper under Martin because it was not a *generic* tailoring argument. At issue in Martin was whether the Washington Constitution was violated when a prosecutor cross-examined a defendant in a manner that suggested the defendant's testimony was tailored to meet the evidence presented at trial. 171 Wn.2d at 524-25. The Martin majority concluded that article I, section 22 provided greater protection than the Sixth Amendment in this context. Id. at 528-33. After discussing the Portuondo decision and adopting the reasoning of Justice Ginsburg's dissent in Portuondo, the Court concluded that cross-examination in Martin's case was permissible. Id. at 535-36.

The Martin court addressed a challenge to cross-examination and did not consider the propriety of a closing argument in which the prosecutor made a tailoring argument. However, Justice Ginsburg's Portuondo dissent addressed that issue. Justice Ginsburg opined that a *generic* closing argument unrelated to the defendant's trial testimony was improper. 529 U.S. at 76-79. Generic tailoring comments occur when the prosecutor uses "the mere fact of the defendant's presence at his trial as the basis for impugning his credibility." Id. at 78. However, under Justice Ginsburg's dissent, a prosecutor has leave "at any stage of the trial to accuse a defendant of tailoring specific elements of his testimony to fit with particular testimony given by other witnesses[.]" Id.

Here, the prosecutor's argument was proper under Martin and Justice Ginsburg's dissent in Portuondo. The prosecutor did not make a generic closing argument that simply accused Berube of tailoring his testimony. Instead, she argued that Berube had tailored specific elements of his testimony, i.e., that he had drinks with Barquet on the night of the shooting, in order to fit his mother's testimony. This was proper argument. See State v. Mattson, 226 P.3d 482, 497 (Haw. 2010) (adopting the rationale of Justice

Ginsburg's dissent in Portuondo and holding that prosecutor's tailoring argument was not improper because it referred to specific evidence presented at trial).

Finally, to the extent that this argument can be considered improper, Berube has not established that he was prejudiced. In his trial testimony, he repeatedly acknowledged that he had listened to the evidence at trial and he responded to some of that evidence. He testified that he had watched the video from Waid's and claimed that he was not in it. CP 103. He testified that his voice was on the recorded jail telephone calls, which had been played for the jury, and attempted to explain away statements that he had made on the recording. Id. He discussed Detective Cooper's testimony and denied that he made various statements described by the detective. CP 104. Accordingly, it would have been readily apparent to the jury that Berube had heard his mother's testimony and had an opportunity to tailor his own testimony. Berube has not shown a substantial likelihood that the allegedly improper comments affected the jury's verdict.

d. The Prosecutor Properly Discussed Berube's Refusal To Identify Witnesses To The Shooting.

Berube claims that the prosecutor shifted the burden of proof by making an improper missing witness argument. In fact, the subject of the prosecutor's argument was entirely appropriate. Berube testified that he knew the names of other witnesses to the shooting and he repeatedly refused to divulge them. The prosecutor was entitled to discuss the credibility of Berube's testimony, including his refusal to identify any of the people present during the shooting.

During his testimony, Berube admitted that he knew the other people who were present during the shooting, but refused to provide their names. CP 105. He asked the court whether he had to provide their names and tried to assert the "Fifth Amendment." Id. He refused to provide the names of anyone who was present during the shooting and also refused to state the name of the person who picked him up and drove him home that night. Id.

In rebuttal argument, the prosecutor discussed Berube's testimony:

The defendant is presumed innocent in this case. He is not presumed credible. And when he takes the stand, you have to evaluate his credibility as you

evaluate the credibility of any other witness in this case. And I'm not going to reiterate what he said because you saw that as recently as yesterday.

But I ask you to ask yourself a series of questions: Did his version of events make sense to you? Was he consistent throughout when he provided testimony? Could he provide you with the detail that you wanted? Or did he appear to have a selective memory about what happened? And why wouldn't he provide you with the names of any of the people that he was with who could corroborate his version of these events, the people who could help him out and say that he did what he told you he did?

The code that's out there does not override common sense. And when you're accused of a crime as he is accused of a crime, you do not remain silent and take the hit for someone else. You talk in that situation. And when there are others who can help you out, you provide the names of those others. And you need to ask yourself: Is Ivory Berube so self-sacrificing and is he protecting others with this code or is it because there is no one who can corroborate his version of events?

9RP 43-44.

A prosecutor is entitled to challenge the credibility of a defendant's testimony in closing argument. State v. Copeland, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996). A defendant's testimony is not immune from such challenge simply because it mentions other potential witnesses. Here, the prosecutor was entitled to discuss whether Berube's testimony was credible. Berube testified that he had not committed the shooting, stated that

he knew the names of other witnesses to the shooting, but refused to identify these witnesses. The prosecutor could ask the jury whether it was plausible that, if he were innocent, Berube would not reveal the names of other people present during the shooting. Read in context, there can be no doubt that the prosecutor's argument was a proper discussion of the credibility of Berube's testimony.

Berube's claim that this argument is governed by the "missing witness" doctrine should be rejected. Under the "missing witness" doctrine, "where a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party." State v. Gregory, 158 Wn.2d 759, 845-46, 147 P.3d 1201 (2006); see also State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). When the doctrine applies, the jury is instructed that they may infer that the missing witness' testimony would have been unfavorable to the party who failed to call the witness. WPIC 5.20. Here, the prosecutor did not seek such an instruction nor did she direct the jury's attention to Berube's failure to call any witnesses.

Her argument was directed to addressing the credibility of his testimony.

In any event, the prosecutor's argument would have been proper under the missing witness doctrine, as the facts of Blair demonstrate. Blair was charged with delivery of a controlled substance, and the State introduced "crib" sheets, found in Blair's room, containing lists of people, generally first names only, with numbers across from the names. 117 Wn.2d at 482. Blair testified, claiming that most of the names and numbers on the sheets of paper represented personal loans and amounts owed him from card games. Id. at 482-83. In closing argument, the prosecutor argued that the jury could assume that Blair did not call these individuals to testify because they bought cocaine from him. Id. at 483-84. The Supreme Court rejected the claim that this argument was improper, finding that the missing witness doctrine was properly applied. Id. at 485-91. The court observed that the people on the list were particularly available to the defendant given that there were only first names on the sheets. Id. at 490.

Similarly, here, the videotape revealed numerous people present during the shooting, and Berube admitted that he knew who they were. As in Blair, these potential witnesses were uniquely

available to him; he admitted he was present during the shooting and knew their names. These witnesses did not come forward to the police, as Berube's counsel acknowledged.<sup>11</sup> 6RP 95. The missing witness doctrine was satisfied by Berube's testimony in this case.

Finally, given the lack of an objection, Berube's claim should be rejected. The Supreme Court has recognized that an improper missing witness argument is not so flagrant and ill-intentioned that it cannot be cured with an appropriate instruction. Gregory, 158 Wn.2d at 846.

e. The Prosecutor Did Not Appeal To The Jury's Passion And Prejudice.

Berube next claims that the prosecutor argued facts not in evidence and appealed to the jury's passion and prejudice when she discussed Berube's flight to his mother's house. This argument was entirely proper and based upon the evidence at trial.

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<sup>11</sup> Berube notes that the police did know about Charles Justice. It is not clear that Charles Justice was at the scene when the shooting occurred; the evidence was only that his car had come from that location sometime afterwards. CP 108. Moreover, there were obviously many more witnesses present than Justice, and the prosecutor never suggested that Berube should have called Justice to testify.

During the defense case, Berube denied that he had fled to his mother's house in Massachusetts in order to avoid being arrested. Rather, he testified that, even after his brother Emory was arrested, he did not think that he himself was a suspect. CP 103. Instead, he claimed that the trip to his mother's had been previously planned. CP 103. Berube's mother also testified that, months before the shooting, she had spoken with him about coming to visit. 7RP 7. She acknowledged that she had not seen her son for 13 years. Id.

On appeal, Berube challenges the italicized section of the prosecutor's argument:

And when you have not been to see your mother in 13 years and you're talking to your sibling and your brother, you don't say, I'm in the wind, I'm gone tonight. You say, I'm going to visit mom. But he can't say I'm going to visit mom because he knows that people are potentially going to listen to this phone call, and his goal is to not be found. So he says, I'm in the wind.

Let's listen to these calls one more time....

(Audio recording played in open court.)

"I don't wanna to talk over the phone." There's no explanation for changing his identification in the conversation regarding that other than knowing that the police are looking for him and he's trying to get out of town. And this unplanned trip didn't just happen as a coincidence right after his brother was arrested.

*How sad is it that a mother and a son would go for 13 years without seeing each other? And how happy his mother must have been when he came to see her. And how disappointed must she have been when she learned that he came because he was running from the law?*

There were numerous reasons for him to go visit his mother in the time preceding this arrest, and you don't choose the day your brother is arrested for the incident that you were involved in to choose to leave town and go visit your mother.

9RP 21-23.

Berube claims that this argument was improper because there was no evidence that his mother was sad that she had not seen him for 13 years. In fact, the prosecutor did not state that Berube's mother was sad, but that it was a sad situation for a mother and son not to see each other for that period of time. This was a reasonable inference from the evidence; Berube's mother testified that she loved him. 7RP 44. The evidence supported the prosecutor's statement.

Moreover, contrary to Berube's claim, this argument did not improperly appeal to the jury's passion and prejudice. Rather, read in context, the argument was a proper response to testimony of defense witnesses claiming that it was purely coincidental that Berube left Washington State at the same time the Seattle police

were looking to arrest him for shooting Barquet. This argument was proper.

Even if some component of the argument was objectionable, Berube does not explain how it was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative instruction. Any possible claim is waived.

f. The Prosecutor Did Not Mischaracterize The Burden Of Proof.

Finally, Berube claims that the prosecutor improperly trivialized the burden of proof in her rebuttal argument when she asked the jury to search for the truth and made reference to a puzzle. Relevant caselaw establishes that these challenged remarks were not improper. In any event, Berube has not shown that the argument was so flagrant and ill-intentioned as to justify reversal of his conviction.

In rebuttal argument, the prosecutor stated:

This is like a puzzle that you need to put together when you go back into that room. And all the pieces of this puzzle fit together. And this is not a thousand-piece puzzle where everything is a shade of blue when you're trying to make it all fit together. This

is a kid's puzzle, and the pieces in this puzzle are very big, and they all fit together.

Mr. Jensen said he wanted a fair trial in this process. Mr. Ivory Berube has received a fair trial. He has the right to confront the witnesses against him. He has the right to call witnesses on his behalf. The burden is all mine.

The word verdict means to speak the truth. And I ask that you search for the truth. When you go back into that jury room, you search for the truth, not a search for reasonable doubt. And I ask that you find him guilty. Thank you.

9RP 48.

Berube now challenges the prosecutor's statement that the jury should search for the truth, not for reasonable doubt. However, it is proper for a prosecutor to ask the jury to search for the truth. See State v. Curtiss, 161 Wn. App. 673, 701-02, 250 P.3d 496, rev. denied, 172 Wn.2d 1012 (2011). The Seventh Circuit recently rejected a defendant's challenge to a virtually identical argument. In United States v. Harper, 662 F.3d 958, 960 (7th Cir. 2011), the prosecutor argued that "[a] trial is the search for the truth,' not a 'search for doubt.'" Dismissing the claim that this argument was improper, the court explained:

We do not find any error in the attorneys' closing statements, much less plain error. There was nothing wrong with referring to trials as "searches for truth": As we commented at oral argument, trials are

searches for the truth; the burden of proof is just a device to allocate the risk of error between the parties. Indeed, both the Supreme Court and this court have repeatedly noted that criminal jury trials serve an important "truth-seeking" function. E.g., United States v. Mezzanatto, 513 U.S. 196, 204–05, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995); Jones v. Basinger, 635 F.3d 1030, 1040-41 (7th Cir.2011). The attorneys here did no more than to repeat that uncontroversial proposition.

Nor did the attorneys' remarks restate the government's burden of proof. To the contrary, both attorneys emphasized that the prosecution was required to prove its case beyond a reasonable doubt. For example, the government argued in rebuttal that it had "proven ... beyond a reasonable doubt what the truth is." In total, counsel for both sides referred to the reasonable doubt standard no less than eleven times during their opening and closing statements.

Most importantly, Harper is wrong to equate arguments of counsel with instructions from the court. It is telling that he offers no criticism of the judge's handling of the reasonable doubt burden. After the attorneys gave their closing arguments, the court issued a proper jury instruction on the reasonable doubt standard. Such instructions from the court carry more weight with jurors than do arguments made by attorneys, Boyde v. California, 494 U.S. 370, 384, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), and here, we presume that the court's proper instruction ensured that the jury applied the correct standard.

Id. at 961; see also State v. Bailey, 677 N.W.2d 380, 403 (Minn. 2004) (rejecting challenge to prosecutor's argument that the jury should search for the truth, not search for reasonable doubt).

Berube cites State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), rev. denied, 170 Wn.2d 1002 (2010), for the proposition that it is improper to tell the jury that their verdict will declare the truth. Here, the prosecutor did not make such an argument. There is a difference between telling the jury that their verdict will constitute the truth of what happened and arguing that the jury should attempt to determine the truth during their deliberations. The problem with former argument is that a verdict is ultimately a determination by the jury of whether the State proved the elements of the crime beyond a reasonable doubt. The latter argument, urging the jury to attempt to determine the truth during their deliberations, is an appropriate description of how the jury should attempt to reach their verdict. Such an argument should be, as the Seventh Circuit observed, an uncontroversial proposition.

The cases cited by Berube indicate that, even if the argument could be deemed questionable or improper, it was not so flagrant and ill-intentioned that it could be challenged for the first time on appeal. For example, in United States v. Wilson, 160 F.3d 732, 747 (D.C. Cir. 1998), the court held that the defendant could not challenge, for the first time on appeal, an instruction informing the jury that it should “determine where the truth lies.” The court

observed that the "truth" instruction alone did not impermissibly shift the burden of proof to the defendant. Id. Similarly, in United States v. Pine, 609 F.2d 106, 109 (3d Cir. 1979), the court held that a similar instruction did not warrant reversal of the case. Again, in People v. Chang, 129 A.D.2d 722, 723, 514 N.Y.S.2d 484 (1987), the court held that the prosecutor's statement that the trial was "a search for the truth... not a search for reasonable doubt" was improper, yet concluded that because there was no objection at trial, the issue could not be raised on appeal.

Similarly, the Washington Supreme Court's decision in State v. Warren, supra, demonstrates that the prosecutor's challenged comments were not so flagrant and ill-intentioned that an instruction could not have cured any prejudice. In Warren, the prosecutor repeatedly argued that "reasonable doubt... doesn't mean, as the defense wants you to believe, that you give the defendant the benefit of the doubt." 165 Wn.2d at 24-25. After Warren objected, the trial court gave a curative instruction, restating the reasonable doubt standard and explaining that the jury should give the benefit of the doubt to the defendant. Id. On appeal, the Washington Supreme Court held that the prosecutor's comments sought to undermine the State's burden of proof and were flagrantly improper.

Id. at 27. However, the court affirmed Warren's convictions, concluding that the improper argument was cured by the trial court's supplemental instruction. Id. at 28.

The prosecutor's comments in Warren were clearly more egregious than Berube's characterization of the argument in this case.<sup>12</sup> If a curative instruction was capable of curing the prejudice in Warren, such an instruction certainly would have cured any possible prejudice caused by the comments at issue in this case. Because Berube failed to object, he has waived his claim of prosecutorial misconduct.

Berube next argues that the prosecutor's reference to a puzzle during a closing argument was improper, citing State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), rev. denied, 171 Wn.2d 1013 (2011). In Johnson, the prosecutor used an example of a puzzle to explain the reasonable doubt standard, suggesting that even with pieces missing, one could conclude beyond a reasonable doubt that the puzzle was a picture of Tacoma. Id. at 682. Division II held that this argument and several

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<sup>12</sup> Berube implies that in Warren, the Supreme Court disapproved of an argument similar to the one challenged here. Brief of Appellant at 35. In fact, while the prosecutor in Warren made a similar argument, the opinion does not address it. 165 Wn.2d at 25-31.

other comments were improper. With respect to the puzzle argument, the court explained that "the prosecutor's arguments discussing the reasonable doubt standard in the context of making an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so." Id. at 685.

Johnson is inapposite. Here, the prosecutor did not use the analogy of a *partially completed* puzzle to discuss the reasonable doubt standard. Instead, she briefly argued that the case was "like a puzzle" and that "all the pieces of this puzzle fit together." 9RP 48. She did not even suggest that any pieces were missing, much less that the jury should fill in the missing pieces and convict the defendant. Berube does not explain how simply referring to the case as a puzzle undermined the burden of proof. In fact, during opening statement, Berube's attorney used a puzzle analogy when discussing the evidence in the case. RP(opening) 20.

Moreover, Division II has recently retreated from the notion that the partially completed puzzle analogy used in Johnson is improper. In Curtiss, supra, the prosecutor made a similar

argument to that in Johnson:

[R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.

172 Wn.2d at 700. The court rejected the challenge to this argument, made for the first time on appeal. "[T]he State used an analogy to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof. The arguments did not shift the burden nor were they flagrant or ill intentioned." Id.

The prosecutor did not minimize or trivialize the burden of proof in closing argument. Berube's convictions should be affirmed.

**2. THE COURT SHOULD REJECT BERUBE'S CHALLENGE TO THE FIREARM INSTRUCTION.**

Berube, citing State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), challenges his firearm enhancement, arguing that the instruction erroneously told the jury that it had to be unanimous in order to answer "no." This claim fails for several reasons. First, Berube has failed to preserve this issue because he did not object

to the instruction. Second, the instruction in this case correctly stated the need for jury unanimity; the Supreme Court is currently reconsidering its holding in Bashaw. Finally, any error is clearly harmless because, before considering the firearm special verdict, the jurors unanimously found that Berube was armed with a firearm and convicted him of first-degree assault with a firearm and unlawful possession of a firearm.

a. Berube May Not Challenge The Instruction Because He Did Not Object To It At Trial.

The instruction for the firearm special verdict stated in pertinent part:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 50. Berube did not object to this instruction at trial. 8RP 4-5.

Berube, citing Bashaw, challenges his firearm enhancement, arguing that the jury instruction erroneously told the jury that it had to be unanimous in order to answer "no." However, Berube may

not challenge the jury instructions because he did not object to them at trial.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

In Bashaw, the Supreme Court held that an instruction was erroneous because it told the jury that it had to be unanimous to answer "no." 169 Wn.2d at 145-47. However, the court further stated that the right to a nonunanimous "no" special verdict was not of constitutional dimension, but came from common law precedent.

The court explained:

This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg.

169 Wn.2d at 146 n.7.

Currently, there is a split of authority in the Court of Appeals as to whether a Bashaw claim presents a constitutional issue that can be raised for the first time on appeal. Divisions II and III have held that a defendant may not assert a Bashaw claim for the first time on appeal. State v. Bertrand, 2011 WL 6097718 (No. 40403-6-II, filed Dec. 8, 2011); State v. Nunez, 160 Wn. App. 150, 157-63, 248 P.3d 103, rev. granted, 172 Wn.2d 1004 (2011). Judges in Division I are split on the issue. State v. Morgan, 163 Wn. App. 341, 350, 261 P.3d 167 (2011); State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011). The Washington Supreme Court has accepted review of Nunez and Ryan, consolidated the two cases, and will likely resolve this split of authority. In the meantime, this Court should hold that Berube cannot raise this issue for the first time on appeal.

b. The Instruction Was A Correct Statement Of The Law.

"Washington requires unanimous jury verdicts in criminal cases." State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). The requirement for jury unanimity derives from the state constitutional right to jury trial in criminal matters set forth in Const.

art. I, § § 21 and 22. State v. Depaz, 165 Wn.2d 842, 853, 204 P.3d 217 (2009); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

Other than Bashaw and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the State is unaware of any authority, nationwide, supporting a rule that the court can require a deadlocked jury to answer "no" on a special verdict for a sentence enhancement. Sentence enhancements and aggravating circumstances were created by the legislature, and there is no suggestion anywhere in the Sentencing Reform Act ("SRA") that anything other than a unanimous verdict is required. Given that the fixing of legal punishments for criminal offenses is a legislative function,<sup>13</sup> it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect. In Nunez and Ryan, the State has requested that the Supreme Court reconsider

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<sup>13</sup> State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986).

its holding in Bashaw and hold that the instruction given in this case is a correct statement of the law.

c. Any Error Was Harmless.

Even if the issue is not waived, this Court should hold that any error in the instruction was harmless. An instructional error is harmless if the court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Bashaw, 169 Wn.2d at 147. In Bashaw, the instructional error was not harmless because it resulted in a "flawed deliberative process" based on the court's erroneous instruction to the jury that it had to be unanimous to acquit on the special verdict. Id. at 147. The special verdict in Bashaw required the jury to determine whether the defendant delivered a controlled substance within 1,000 feet of a school bus stop. Id. at 137. The defendant objected to the State's measurements and there was conflicting evidence about the distance involved in one of the drug transactions. Id. at 138, 144.

In contrast, in this case, any error is clearly harmless. The fact that the crimes were committed by someone armed with a firearm was not in dispute. The only issue was the identity of the shooter. Before even turning to the firearm special verdict, the jury

unanimously found that Berube committed first-degree assault with a firearm and had unlawfully possessed a firearm. CP 43, 47, 52-53. Unlike the jury in Bashaw, which had to resolve a contested factual issue for the first time during special verdict deliberations, this jury necessarily found the firearm enhancement when finding that Berube committed the assault. This Court can conclude beyond a reasonable doubt, in light of these circumstances, that the alleged error did not impact the jury's special verdict.

d. The Remedy For The Alleged Error Is Retrial On The Enhancement.

Berube assumes that he is entitled to resentencing without the enhancement. This is incorrect. In a recent decision, this Court held that the proper remedy for Bashaw error is to remand for retrial on the enhancement. State v. Reyes-Brooks, 2011 WL 6016155 (No. 64012-7-I, filed December 5, 2011). Should this Court conclude that Berube is entitled to relief, the Court should remand for retrial on the enhancement.

D. CONCLUSION

This Court should affirm Berube's convictions and sentence.

DATED this 30<sup>th</sup> day of January, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
BRIAN M. McDONALD, WSBA #19986  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. IVORY BERUBE, Cause No. 63579-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame  
Name  
Done in Seattle, Washington

1/31/12  
Date