

No. 29545-1-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TIMOTHY LUCIOUS,

Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Annette S. Plese

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court instructed the jury regarding counts three through six on two alternative means for the commission of second degree assault that were not both supported by the evidence and thereby denied Mr. Lucious his right to trial by unanimous jury.

2. The trial court erred in instructing the jury it had to be unanimous to answer “no” to the special verdicts.

3. The court erred by finding Mr. Lucious had previously been convicted of two "most serious" offenses.

4. The court erred by sentencing Mr. Lucious to life in prison without the possibility of release.

5. Mr. Lucious’ life sentence without possibility of release is unconstitutional.

Issues pertaining to assignments of error.

1. Does the State’s failure to elect and prove one of the two alternative means presented to the jury on counts three through six regarding second degree assault require reversal and remand for a new trial on those counts?¹

¹ Assignment of Error 1.

2. Should the special verdicts be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts?²

3. Under the POAA, the court imposed a sentence of life in prison without parole based on prior convictions not proved to a jury beyond a reasonable doubt. Does Mr. Lucious’ sentence violate the Sixth and Fourteenth Amendments?³⁴

B. STATEMENT OF THE CASE

Timothy Lucious was found guilty after a jury trial of six counts of assault in the second degree and one count of drive-by shooting. CP 262–63, 128–29, 131, 133, 135, 137, 139. By affirmative special verdicts, the jury found that Mr. Lucious was armed with a firearm at the time of the commission of the assaults. CP 130, 132, 134, 136, 138, 140. At sentencing, the court found that Mr. Lucious had suffered two prior offenses that constituted most serious offenses and found Mr. Lucious to be a persistent offender under RCW 9.94A.030(36)(a)(i), (ii). RP 618–19;

² Assignment of Error 2.

³ Assignment of Error 3, 4 and 5.

⁴ Our state Supreme Court has held there is no right under our either our state constitution or the federal constitution to a jury determination of prior convictions at sentencing. State v. Smith, 150 Wn.2d 135, 156, 75 P.3d 934 (2003), cert. denied, 541 U.S. 909 (2004). To preserve the issue for federal review in the event the law changes, however, Mr. Lucious raises the issue herein.

CP 263, 265. Mr. Lucious was sentenced to a term of life imprisonment without the possibility of parole under RCW 9.94A.570. CP 267.

This appeal followed. CP 273, 316–17.

C. ARGUMENT

1. The State failed to prove one of the two alternative means presented to the jury on Counts 3 through 6 regarding second degree assault, requiring reversal and remand for a new trial on those counts.

Criminal assault is an alternate means crime. State v. Smith, 159 Wn.2d 778, 784, 155 P.3d 873 (2007). “As promulgated by the legislature, the second degree criminal assault statute articulates a single criminal offense and then provides six separate subsections by which the offense may be committed. RCW 9A.36.021(1)(a)-(f). Each of these six subsections represents an alternative means of committing the crime of second degree assault.” Smith, 159 Wn.2d at 784, 786. *Accord*, State v. Linehan, 147 Wn.2d 638, 647, 56 P.3d 542 (2002) (alternative means of committing criminal assault are not provided for in the common law definitions, but rather “are provided in the statutes delineating the degree of assault.”).

a. There must be substantial evidence supporting each alternative means of committing a charged offense. Due process requires the prosecution to prove, beyond a reasonable doubt, all essential elements of a crime for a conviction to stand. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 21, 22. In Washington, the state constitutional right to a trial by jury "provides greater protection for jury trials than the federal constitution." State v. Williams-Walker, 167 Wn.2d 887, 695-96, 225 P.3d 913 (2010); Wash. Const. art. I, §§ 21, 22.

In a criminal case, the jury must unanimously find the prosecution proved every necessary element of the crime charged. Williams-Walker, 167 Wn.2d at 698; Smith, 159 Wn.2d at 783. The right to a unanimous jury verdict includes the right to express jury unanimity on the means by which the defendant committed the crime when alternative means are alleged. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When one element may be established by alternative means, the requirement of unanimity is satisfied so long as substantial evidence supports each alternative means. Smith, 159 Wn.2d at 783; State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). An allegation

included in the "to convict" instruction becomes the law of the case and must be proved by the State beyond a reasonable doubt like any other element. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998); State v. Lillard, 122 Wn .App. 422, 434-35, 93 P.3d 969 (2004), *rev. denied*, 152 Wn.2d 1002 (2005).

If one of the alternative means presented to the jury is not supported by substantial evidence, the verdict must be vacated unless the reviewing court finds that the verdict must have been based on one alternative that was supported by substantial evidence. State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999), *disapproved on other grounds*, Smith, 159 Wn.2d at 787. When there is only a general verdict, the reviewing court presumes the error requires reversal. Id. at 353.

b. There was no evidence supporting one alternative means for second degree assault. Here, as to counts three, four, five and six, the jury was instructed with the statutorily defined alternate means of committing assault: with either a deadly weapon or by the reckless infliction of

substantial bodily injury. RCW 9A.36.021(1)(a) and (c); Jury Instruction Nos. 29⁵, 30, 31 and 32 at CP 102–05.

The state did not unambiguously elect which means of assault it would rely on to establish the lesser included crime of second degree assault, nor did it declare to the jury that its verdict must rest upon only a single specific alternative. The court did not provide a unanimity instruction. Instead, the jurors were instructed they “need not be unanimous as to which of [the two alternative means] has been proved beyond a reasonable doubt, as long as each juror finds that either [one or the other alternative means] has been proved beyond a reasonable doubt.” Jury Instruction Nos. 29, 30, 31 and 32 at CP 102–05 (bracketed material

⁵ The challenged instructions are identical except for the referenced count and name of the victim. Jury Instruction No. 29, at CP 102, reads as follows:

To convict the defendant of the crime of assault in the second degree, as a lesser included to Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 24th day July, 2009, the defendant, or one with whom he was an accomplice:
 - (a) intentionally assaulted MARQUETTA SCALES and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted MARQUETTA SCALES with a deadly weapon; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that element (2) and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty.

substituted). Consequently, the convictions can only stand if each alternative is supported by substantial evidence. Lillard, 122 Wn .App. at 434.

There was evidence which could conceivably show that the four victims in counts three, four, five and six were assaulted with a deadly weapon by Mr. Lucious or one with whom he was an accomplice. However, there was insufficient evidence to support the means of assault by reckless infliction of substantial bodily harm. "Substantial bodily harm" means 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). While the victim in count three said that she was "knocked out" by someone other than Mr. Lucious (RP 264), she was not treated at the hospital and there was no testimony establishing that the harm, if any, amounted to "substantial bodily harm". RP 259–73. There was no evidence the victims in counts four and six suffered any bodily injury (RP 276–95, 343–65) and the victim in count five testified she was not injured in any way. RP 249. Since there was constitutionally insufficient evidence to support the means of assault by reckless infliction of substantial bodily injury, the jury was

incorrectly instructed as to alternative means. State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987).

c. The remedy for a verdict based on unproven alternative means is reversal. The general verdict forms herein did not require the jury to agree on the particular alternative means it relied upon in finding guilt. CP 133 (Count 3)⁶, 135 (Count 4), 137 (Count 5), 139 (Count 6). A special verdict form may demonstrate the basis of the jury's verdict. See State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003); Rivas, 97 Wn. App. at 301–02. The jury here returned affirmative special verdicts that the defendant was armed with a firearm at the time of commission of the crimes. CP 134 (Count 3)⁷, 136 (Count 4), 138 (Count 5), 140 (Count 6).

⁶ The general verdict forms are identical except for the referenced count. Verdict Form C (Count 3), at CP 133, reads as follows:

We, the jury, having found the defendant, TIMOTHY LUCIOUS, not guilty of the alternative crime of FIRST DEGREE ASSAULT in Count III, or being unable to unanimously agree as to that charge, find the defendant, TIMOTHY LUCIOUS, "guilty" (handwritten in) of the lesser included crime of SECOND DEGREE ASSAULT.

⁷ The special verdict forms are identical except for the referenced count. Special Verdict Form (Count 3), at CP 134, , reads as follows:

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant, TIMOTHY LUCIOUS, armed with a firearm at the time of the commission of the crime or alternative crime or lesser included in Count III?

ANSWER: "yes" (handwritten in)

As discussed below, however, the special verdicts must be vacated due to instructional error. Absent a constitutionally valid special verdict, this Court must presume that the verdict could have rested on either of the alternatives. Nicholson, 119 Wn. App. at 860. A verdict issued based on more than one alternative means cannot stand when an alternative means is not supported by substantial evidence. State v. Kinchen, 92 Wn. App. 442, 452, 963 P.2d 928 (1998). Accordingly, the convictions for second degree assault regarding counts three, four, five and six must be reversed and remanded for a new trial only on the theories that were supported by sufficient evidence in Mr. Lucious' first trial. State v. Fernandez, 89 Wn. App. 292, 300, 948 P.2d 872 (1997).

2. The special verdicts should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict.

a. Unanimity is not required for the jury to answer “no” to the special verdict. A criminal defendant may not be convicted unless a twelve-person jury unanimously finds every element of the crime beyond a reasonable doubt. U.S. Const. amends. 6, 14; Const. art. I, §§ 21, 22; Williams-Walker, 167 Wn.2d at 895-97, Ortega-Martinez, 124 Wn.2d at 707; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for

aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer “no.” State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010); Goldberg, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” Id.

In Goldberg, the jury was given the following special verdict instruction:

In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

Id. Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. Goldberg, 149 Wn.2d at 894, 72 P.3d 1083.

In Bashaw, the Supreme Court vacated sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts similar to the one given in this case. Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195. In this case as well as in Bashaw, the jury was incorrectly instructed, “Since this is a criminal case, all twelve of you must

agree on the answer to the special verdict.” CP 41–42; Bashaw, 169

Wn.2d at 139, 234 P.3d 195. Citing Goldberg, the Bashaw court held:

Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see Goldberg, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147, 234 P.3d 195.

In the present case, the jurors were instructed even more specifically than in Bashaw, and were told they *must* be unanimous to return a “no” verdict:

You will also be given special verdict forms for the crimes charged in counts I-VI. If you find the defendant not guilty of these crimes do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree 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".*

Jury Instruction No. 39 at CP 113 (bracketed punctuation substituted)

(emphasis added).

The instruction in the present case incorrectly requires jury unanimity for the jury to answer “no” to the special verdict, contrary to

Bashaw and Goldberg. Since this instruction misstates the law, the special verdicts must be vacated. Goldberg, 149 Wn.2d at 894; Bashaw, 169 Wn.2d at 147.

b. The instructional error may be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court. Recently, in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011)⁸, the Court of Appeals found the trial court erred when it required the jury to be unanimous to find the State had not proven the special allegation. However, the Court ruled the error was not a manifest constitutional error and thus could not be raised for the first time on appeal. Nunez, 160 Wn. App. at 159–65. The decision in Nunez directly conflicts with other decisions from the Washington Supreme Court and Division One of the court of Appeals. Those courts found such an error is manifest constitutional error and can be raised for the first time on appeal. Bashaw, 169 Wn.2d at 146-47; Goldberg, 149 Wn.2d at 892-94; *accord* State v. Ryan, No. 64726-1-I, 2011 WL 1239796 at *2 (Apr. 4, 2011). A decision by the Supreme Court is binding on all lower courts in the state. 1000 Virginia P’ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). In Bashaw, the defendant did not object to the flawed special

⁸ A petition for review has been filed and is set for consideration by the WA Supreme Court on July 12, 2011. State v. Nunez (85789-0).

verdict instruction⁹ but the Supreme Court still reversed after applying the harmless error test applicable to constitutional error. *Bashaw*, 169 Wn.2d at 147–48. This Court should follow *Bashaw*.

Both the Washington Constitution and United States Constitution guarantee the right to a fair and impartial jury trial. U.S. Const. amend. 5, 6; Wash. Const. art. 1, §§ 3, 22. Only a fair trial is a constitutional trial. *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). The failure to provide a fair trial violates minimal standards of due process. *State v. Jackson*, 75 Wn. App. 537, 543, 879 P.2d 307 (1994); U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

“[M]anifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right.” *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). It is “well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal.” *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law. *State v. O’Hara*, 167 Wn.2d

⁹ *State v. Bashaw*, 144 Wn. App. 196, 199, 182 P.3d 452 (2008), *reversed*, 169 Wn.2d 133, 234 P.3d 195 (2010).

91, 105, 217 P.3d 756 (2009). The applicable law here is that the jury need not be unanimous to return a special verdict of “no”.

The right to a jury trial embodies the right to have each juror reach his or her verdict by means of “the court’s proper instructions.” State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978) (reversal required where judge’s questioning suggested need for holdout jurors to come to an agreement on special verdict). Goldberg, which held the trial court erred by instructing a non-unanimous jury to reach unanimity on the special verdict, cited Boogaard and the right to a jury trial as authority for its decision. Goldberg, 149 Wn.2d at 892 015093.

The incorrect instruction on unanimity results in a flawed deliberative process. Bashaw, 169 Wn.2d at 147. This Court in Nunez does not explain how a jury instruction that causes a flawed deliberative process somehow avoids a due process violation. Division One in Ryan properly recognized the due process violation. Ryan, 2011 WL 1239796 at *2. The integrity of the fact-finding process is a basic component of due process. Parker v. United Airlines, Inc., 32 Wn. App. 722, 728, 649 P.2d 181 (1982). “To require the jury to be unanimous about the negative—to be unanimous that the State has not met its burden—is to leave the jury without a way to express a reasonable doubt on the part of some jurors.”

Ryan, 2011 WL 1239796 at *2. The instructional error here is constitutional in nature because it violates the constitutional right to a fair jury trial and due process. The error is properly raised on appeal under RAP 2.5(a)(3). Moreover, RAP 2.5(a) “never operates as an absolute bar to review.” Ford, 137 Wn.2d at 477. This Court may review an issue raised for the first time on appeal in the interest of justice. RAP 1.2(a); State v. Lee, 96 Wn. App. 336, 338 n.4, 979 P.2d 458 (1999).

c. The invalid special verdict was not harmless error. In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " Bashaw, 169 Wn.2d at 147, 234 P.3d 195 (citing State v. Brown, 147 Wash.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))). The Bashaw court found the erroneous special verdict instruction was an incorrect statement of the law. Bashaw, 169 Wn.2d at 147, 234 P.3d 195. A clear misstatement of the law is presumed to be prejudicial. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

In finding the instructional error not harmless the Bashaw court stated the following:

The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In Goldberg, the error reversed by this court was the trial court's instruction to a non-unanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. Goldberg is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." Id. at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195.

The situation in the present case is indistinguishable from Bashaw.

It is impossible to speculate about what the jury would have decided if it had been given the correct instruction. Therefore, the error was not harmless.

d. The special verdicts must be vacated. The instructions in the present case incorrectly required jury unanimity for the jury to answer “no” to the special verdict, contrary to Bashaw and Goldberg. The remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. Williams-Walker, 167 Wn.2d at 899-900; State v. Recuenco, 163 Wn.2d 428, 434, 441-42, 180 P.3d 1276 (2008).

3. The persistent offender sentence violates Mr. Lucious’ rights to a jury trial and due process.

A jury must determine any fact, other than the fact of a prior conviction, which increases the penalty beyond the standard range. U. S. Const. amends. 6, 14; Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Life without possibility of parole is a penalty beyond the statutory maximum for the crime of second degree assault. The State did not prove Mr. Lucious’ prior convictions or his identity beyond a reasonable doubt to a jury. Nonetheless, the court sentenced him as a persistent offender to life without parole based on judicially determined facts. Therefore, that sentence is invalid because it violates Mr. Lucious’ Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process.

In applying Apprendi to the Persistent Offender Accountability Act (POAA), the Washington Supreme Court has held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. In re Personal Restraint of Lavery, 154 Wn.2d 249, 256, 111 P.3d 837 (2005); State v. Smith, 150 Wn.2d 135, 141-43, 75 P.3d 934 (2003); *accord* Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). All a sentencing court needs to do is find that the prior conviction exists. State v. Wheeler, 145 Wn.2d 116, 121, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996 (2002). No additional safeguards are required because a certified copy of a prior judgment and sentence is highly reliable evidence. Smith, 150 Wn.2d at 143, 75 P.3d 934.

Our Supreme Court's position on this issue is premised on the viability of Almendarez-Torres, wherein the United States Supreme Court, in a 5-4 decision, held the fact of the prior conviction constituted a sentence enhancement rather than an element of the crime of being a persistent offender, and therefore, need not be proved beyond a reasonable doubt to a jury. The Almendarez-Torres decision has since been criticized by a majority of the United States Supreme Court. *See* Shepard v. United States, 544 U.S. 13, 27, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)

(Thomas, J., concurring) ("[A] majority of the Court now recognizes that Almendarez-Torres was wrongly decided."); Apprendi, 530 U.S. at 490; Wheeler, 145 Wn.2d at 124-37 (Sanders, 1., dissenting).

The Apprendi Court did not overturn Almendarez-Torres because its holding was not directly at issue:

Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, [Petitioner] does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset.

Apprendi, 530 U.S. at 489-90, 120 S.Ct. 2348.

Our Supreme Court in Wheeler, noting the Apprendi Court's suggestion that Almendarez-Torres might have been incorrectly decided, explicitly declined to reach the issue. Instead, it confined its decision to factors other than recidivism. Wheeler, 145 Wn.2d at 123, 34 P.3d 799.

The Wheeler Court noted:

The phrase "[o]ther than the fact of a prior conviction" may, in isolation, be read to establish as a matter of law that prior convictions need not be charged and proved to the jury. However, given the [Apprendi] Court's explicit determination that it did not reach the issue of recidivism, the issue is undecided. When and if Almendarez-Torres is revisited, the Court may decide the fact of prior convictions, like the fact a death resulted, must be charged and proved like an element of the crime. Justice Thomas clearly signaled he was rethinking his vote in Almendarez-Torres. In his Apprendi concurrence, Justice Thomas (who provided the fifth

vote in Apprendi) wrote he now believes that the fact of a prior conviction is an element under a recidivism statute, and not merely a sentence enhancement. He concluded Almendarez-Torres treated recidivism differently because of concern that juries would be prejudiced if informed of prior convictions. But this concern "does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction." Apprendi, 530 U.S. at 521, 120 S.Ct. 2348 (Thomas, J., concurring). Therefore, Justice Thomas seems to be in agreement with Justice Scalia (who dissented in Almendarez-Torres but was part of the majority in Apprendi) that prior convictions are an element that must be proved beyond a reasonable doubt to a jury. Without Justice Thomas's vote, the holding in Almendarez-Torres would have been different.

Wheeler, 145 Wn.2d at 123.

What all this means is that the U.S. and Washington Supreme Courts recognize that Almendarez-Torres is clearly in jeopardy. When it is eventually overturned, proof of prior convictions under the POAA to impose a life sentence will most likely have to be proved beyond a reasonable doubt to a jury.

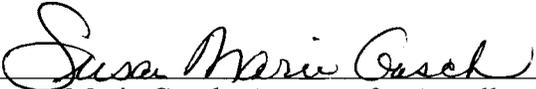
Herein, the trial court made the correct ruling under existing Washington law that Mr. Lucious' two prior most serious offenses need only be proved by a preponderance of the evidence to the court. However, as indicated above, that law could change any day, even while this appeal is still pending. Therefore, the issue is raised for preservation should that change occur. Because the Almendarez-Torres exception should be rejected, the sentencing court lacked authority to impose a persistent

offender sentence without a jury finding that Mr. Lucious had constitutionally valid prior "strikes." Mr. Lucious' persistent offender sentence therefore should be vacated and the matter remanded for entry of a standard range sentence.

D. CONCLUSION

For the reasons stated, the convictions on counts three, four, five and six must be reversed and the matter remanded for new trial, all of the special verdicts should be vacated and the remaining convictions remanded for entry of a standard range sentence.

Respectfully submitted July 7, 2011.


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