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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MAR 14 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

No.  
COA No. 28259-7-III

**85789-0**

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STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE GUZMAN NUNEZ,

Petitioner.

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

The Honorable John Hotchkiss

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Enrique Nunez asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the partially published Court of Appeals decision in *State v. Enrique Guzman Nunez*, \_\_\_ Wn.App. \_\_\_, 2011 WL 505335 (No. 28259-7-III, February 24, 2011), finding *Bashaw* error could not be raised for the first time on appeal. A copy of the ruling is in the Appendix at pages A-1 to A-27.

C. ISSUES PRESENTED FOR REVIEW

1. A jury instruction that requires the jury be unanimous to find the State had not proven the special verdict beyond a reasonable doubt is erroneous and the imposition of the resulting sentence is based upon an invalid verdict. May this issue be raised for the first time on appeal where the challenge is to the imposition of an illegal sentence?

2. Does the Court of Appeals decision directly conflict with this Court's decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d

195 (2010), which reversed an illegal sentence based upon a similar improper instruction?

D. STATEMENT OF THE CASE

Enrique Nunez was convicted of delivery of cocaine (Count 1) and possession of cocaine with intent to deliver (Count 2). 7/1/09 RP 282-83. On each count, the jury was instructed to consider a special allegation that the offenses took place within 1000 feet of a school bus route zone.

The jury in was instructed concerning the special allegation:

You will also be given special verdict forms for the crimes charged in Count I and Count II. 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.* 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 30 (emphasis added); 7/1/09RP 256. The jury subsequently found the special allegation to be true. CP 35-36; 7/1/09RP 283-84. The court imposed an additional 24-months for the sentence enhancements. CP 42; 7/13/09RP 297-98.

On appeal, Mr. Nunez contended the court erred in imposing the sentence enhancements because of the erroneous instruction regarding the special allegation. The Court of Appeals disagreed, finding the issue could not be raised for the first time on appeal.

Decision at 5-16.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

THE IMPOSITION OF AN ILLEGAL SENTENCE  
ENHANCEMENT BASED UPON AN INVALID JURY  
VERDICT MAY BE RAISED FOR THE FIRST TIME  
ON APPEAL

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. VI, XIV; Const. art. I, §§ 21, 22; *State v. Williams-Walker*, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 213 (1994). The jury was thus required to unanimously find the State had proved Mr. Nunez had delivered and/or possessed a controlled substance with intent to deliver within 1000 feet of a school bus route stop in order to answer "yes" to either of the special verdict forms. Unanimity, however, was not required for a "no" answer. *State v. Bashaw*, 169 Wn.2d 133, 146-47, 234 P.3d

195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 892-94, 72 P.3d 1083 (2003).

The Court of Appeals, while implicitly finding the trial court erred when it required the jury to be unanimous to find the State had not proven the special allegation, ruled that any error notwithstanding, was not a manifest constitutional error, thus it could not be raised for the first time on appeal. Decision at 13-16. The Court of Appeals' ruling directly conflicts with rulings from this Court which found such an error can be raised for the first time on appeal. *Bashaw*, 169 Wn.2d at 146-47; *Goldberg*, 149 Wn.2d at 892-94.

"[I]llegal or erroneous sentences may be challenged for the first time on appeal," regardless of whether defense counsel registered a proper objection before the trial court. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The error here occurred not in the use of the invalid instruction, as the Court of Appeals presumably found, but when the trial court imposed the sentence enhancement based upon an invalid special verdict. A sentence enhancement must be authorized by a valid jury special verdict. *Williams-Walker*, 167 Wn.2d at 900. Error occurs when

the trial court imposes a sentence enhancement not authorized by a valid jury verdict. See *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon occurred during sentencing, not in the jury's determination of guilt). 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; *Recuenco*, 163 Wn.2d at 441-42.

Thus, contrary to the Court of Appeals ruling, Mr. Nunez could raise this issue for the first time on appeal because it involved the imposition of an invalid sentence which was based upon an invalid verdict -- itself the product of an improper jury instruction. This Court should accept review of this issue because it directly conflicts with this Court's decisions in *Bashaw* and *Goldberg*, where this Court reversed the error where it had been raised for the first time on appeal. RAP 13.4(b)(1).

The Court of Appeals' decision also points to a notable issue concerning how to apply this Court's decision in *Bashaw*. Issues remain to be decided on the issue raised in the instant matter; whether the issue can be raised for the first time on appeal; also whether the error can be invited; and what the precise remedy for

an error may be. In addition, practitioners and the courts are wrestling with the inherent problems that resulted from this Court's ruling that the issue in *Bashaw* was not of constitutional dimension, yet this Court nevertheless used a constitutional harmless error test to determine whether the issue was harmless. As a consequence, this Court should accept review as this involves an issue of substantial public interest to the legal community that must be determined by this Court. RAP 13.4(b)(4).

F. CONCLUSION

For the reasons stated, this Court must grant review, find the error may be raised for the first time on appeal, and strike the sentences imposed for the sentence enhancement.

DATED this 11th day of March 2011.

Respectfully submitted,



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28259-7-III

Respondent,

Division Three

v.

ENRIQUE GUZMAN NUNEZ,

OPINION PUBLISHED  
IN PART

Appellant.

Siddoway, J. — Enrique Nunez appeals following his conviction of possession and delivery of a controlled substance and the imposition of a 24-month sentencing enhancement based on a jury finding that he committed his crimes within 1,000 feet of a school bus route stop. He asks us to vacate the school zone enhancement in light of *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) because the jury in his case was instructed that unanimity was required to acquit him of the aggravating factor—the same type of instruction given in *Bashaw*. He also assigns error to the trial court’s refusal to dismiss charges against him for violation of his CrR 3.3 speedy trial rights and, in a statement of additional grounds, asserts a number of additional challenges to proceedings

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below. We refuse to review Mr. Nunez's challenge to the jury instruction under RAP 2.5(a) because he failed to object to the instruction in the trial court and we are satisfied that any error is not manifest constitutional error. We also reject his other claims of error and therefore affirm.

#### FACTS AND PROCEDURAL HISTORY

On March 10, 2009, the State charged Mr. Nunez with delivery of a controlled substance and possession of a controlled substance. He was detained on the charges and arraigned on March 23. In May, the State amended the information to add a special allegation that each of the crimes took place within 1,000 feet of a school bus zone or school.

At arraignment, the court noted that speedy trial expired on May 22, 2009. On April 22, the court set the trial date for May 28 based on a defense request for a continuance. The court recalculated speedy trial at June 29, 2009. On May 26, the parties indicated they were ready for trial on May 28.

The trial did not begin on May 28. On June 3, the court reset the trial for June 11. On June 8, the parties informed the court they were ready for trial on June 11. On June 18, trial was continued to June 25.

The trial did not occur on June 25. There is no record of a hearing on that date. However, minutes from a June 29 hearing indicate that the case was continued due to the

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State's involvement in another trial. Clerk's Papers (CP) at 78. In its motion for a continuance, the prosecutor explained:

The State was involved in a trial last week, which I indicate[d] ultimately settled, but it didn't settle until the jury was here. . . . I've been handling the prosecution throughout in that case, and so this matter had to have been bumped as a result of my schedule conflict.

Report of Proceedings (RP) (June 29, 2009) at 3.

Over Mr. Nunez's objection, the court continued the trial to July 1, stating:

[T]he Court believes that as the prosecution was involved in a trial last Thursday when Mr. Nunez was scheduled to go to trial, that case had been pending for about a year. . . . [I]t was the type of case that, by statute, the Court can't continue as a result of the child victim, and Mr. Biggar, who's the Prosecutor in both cases, was involved. So, under the circumstances, the Court believes that there is good cause to continue a minimal time, which is [the] day after tomorrow, his speedy trial into Wednesday.

*Id.* at 3-4.

When defense counsel asked the court to calculate the new speedy trial date, the judge responded:

Well, I'm not sure. As I understand the statute, as he's incarcerated, the Court has another 14 days under [ER] 3.3(g). And, candidly, I haven't even really looked at his file to see if there's other reasons to continue under 3.3(e), but under 3.3(g), the Court has 14 days.

*Id.* at 4.

On July 1, the day of trial, defense counsel again objected to the continuance based on a speedy trial expiration date of June 29. RP (July 1, 2009) at 47. The court

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overruled the objection and the case proceeded to trial. *Id.* A jury found Mr. Nunez guilty of both charges as well as the special verdicts. At sentencing, the court dismissed the special verdict on count 1.

After this appeal had been fully briefed, the Washington Supreme Court issued its decision in *Bashaw*, holding that it was error to instruct a jury that its decision as to the existence of an aggravating sentencing factor must be unanimously “yes” or “no.” Because a similar instruction had been given with respect to the school bus route stop enhancements imposed in this case, Mr. Nunez moved to supplement his brief in order to raise this additional assignment of error. The motion was granted.

## ANALYSIS

### I. Alleged Instructional Error

Mr. Nunez asks us to vacate his sentencing enhancement based on the Supreme Court’s decision in *Bashaw*, 169 Wn.2d 133.

*Bashaw* reversed this court’s decision in *State v. Bashaw*, 144 Wn. App. 196, 201, 182 P.3d 451 (2008), in which we addressed a challenge to a concluding instruction directing the jury that in deciding whether the defendant committed the aggravating factor of selling a controlled substance within 1,000 feet of a school bus route stop, “‘all twelve of you must agree on the answer to the special verdict’”—an instruction that Ms. Bashaw contended wrongly required unanimous agreement in order to answer “no,” contrary to

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*State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). We held that the instruction in Ms. Bashaw's case, like the pattern instruction then in use, correctly required unanimity to convict or acquit a defendant of an aggravating factor, clarifying *Goldberg* as we understood it; alternatively, we held that the error was harmless. The Supreme Court accepted review and reversed, stating the rule of *Goldberg* as follows:

[A] unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A nonunanimous jury decision is a final determination that the State had not proved the special finding beyond a reasonable doubt.

*Bashaw*, 169 Wn.2d at 146.

The concluding instruction in Mr. Nunez's case, like the instruction in *Bashaw*, erroneously required unanimity to acquit Mr. Nunez of the aggravating factors of possessing and delivering a controlled substance within 1,000 feet of a school bus route stop.<sup>1</sup> But Mr. Nunez did not object to the concluding instruction given by the trial court. RP (July 1, 2009) at 241-43.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in

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<sup>1</sup> Instruction 15 explained that the jury would be given special verdict forms, to be completed if it found Mr. Nunez guilty of the crimes charged and 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 at 30.

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the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). As pointed out in *Scott*, the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” *Id.* at 686 (quoting *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)).

Mr. Nunez does not suggest an exception to RAP 2.5(a) that warrants raising the form of special verdict in his case for the first time on appeal. He generally cites Washington Const. art. I, §§ 21 and 22 in support of his assignment of error, however. In addition, the Supreme Court’s decision in *Bashaw* applied constitutional harmless error analysis, a matter we discuss below. “[M]anifest error affecting a constitutional right” is one of the exceptions that can be raised for the first time on appeal. RAP 2.5(a)(3). We therefore consider whether the giving of an instruction that requires a jury to deliberate to unanimity in order to acquit a defendant of an aggravating factor constitutes manifest constitutional error.

To demonstrate that an error qualifies as manifest constitutional error an appellant must “identify a constitutional error and show how the alleged error actually affected the [appellant’s] rights at trial.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)

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(alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). We do not assume that an error is of constitutional magnitude. *Id.* (citing *Scott*, 110 Wn.2d at 687). We look to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. *See id.*

If the claimed error is of constitutional magnitude, we determine whether the error is manifest. “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” *Id.* at 99 (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). To demonstrate actual prejudice there must be a “‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’” *Id.* (internal quotation marks omitted) (quoting *Kirkman*, 159 Wn.2d at 935). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *Id.* “‘If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.’” *Id.* (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

The determination whether the error is manifest and actual prejudice has been shown is a different question from whether the error was harmless; harmless error analysis takes place only after it has been determined that the trial court committed manifest constitutional error. As explained in *O’Hara*:

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error.

*Id.* at 99-100 (citations and footnote omitted).

We first look at Mr. Nunez's asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error. His claim is that the trial court's giving of the challenged instruction denied him the chance that the jury would refuse to find the aggravating factors had it suspended its deliberations short of reaching unanimous agreement.

Instructional error is not automatically constitutional error. In *O'Hara*, the Supreme Court held that the failure of the trial court to provide a complete definition of "malice"—with the trial court excluding the aspect of malice arguably most supportive of Mr. O'Hara's theory of self-defense (*see id.* at 110 (Sanders, J., dissenting))—did not constitute an error of constitutional dimension. *Id.* at 105. Mr. O'Hara did not point to an explicit constitutional provision. *Id.* He argued that the instruction generally violated his due process rights by relieving the State of its burden of proof, but the court observed

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that “the constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.” *Id.* (quoting *State v. Fowler*, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990) (citing *Scott*, 110 Wn.2d at 689), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)).

The trial court’s failure to instruct the jury that it could acquit Mr. Nunez of the aggravating factor nonunanimously is likewise not an error of constitutional dimension. Mr. Nunez has not identified a constitutional provision violated by the trial court’s use of the concluding instruction. While he makes a general reference to Washington Const. art. I, §§ 21 and 22, there is no textual support in either provision for a right to nonunanimous acquittal of any criminal charge or consequence. Washington Const. art. I, § 21, providing that “[t]he right of trial by jury shall remain inviolate,” preserves the right to a jury trial as it existed at common law when section 21 was adopted, which includes, in criminal cases, a right to a unanimous jury verdict in order to convict. *See, e.g., State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Washington Const. art. I, § 22 is comparable to the Sixth Amendment of the United States Constitution and adds nothing with respect to the extent of agreement required for acquittal, providing with respect to jury trial only that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is

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charged to have been committed.”

No constitutional issue is raised under the Sixth or Fourteenth Amendments to the United States Constitution. *See Johnson v. Louisiana*, 406 U.S. 356, 363, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (noting that when a jury in a federal court, which operates under a unanimity rule, cannot agree unanimously upon a verdict the defendant is not acquitted—which he would be, if nonunanimity could operate as acquittal—but is given a new trial); *id.* at 395 (Brennan, J., dissenting) (expressing concern about nonunanimous decisions, where jurors often enter deliberations with strong opinions on the merits and “[i]f at that time a sufficient majority is available to reach a verdict, those jurors in the majority will have nothing but their own common sense to restrain them from returning a verdict before they have fairly considered the positions of jurors who would reach a different conclusion”).

Our Supreme Court did not cite a constitutional basis for its decision in *Bashaw*, 169 Wn.2d 133; to the contrary, both *Bashaw* and the court’s earlier decision in *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991) recognize that it is common law rule, not the constitution, that permits Washington juries to reject sentence enhancements or higher degree offenses less than unanimously. *Labanowski* involved a choice as to the procedure to be followed by juries considering lesser included or lesser degrees of charged crimes: How should a trial judge instruct a jury regarding its ability to render a

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verdict on a lesser offense when it is unable after due deliberation to agree on a verdict for the greater offense? 117 Wn.2d at 418. The court considered two predominant forms of instruction given in other jurisdictions: the “acquittal first” instruction, by which a jury is required to reach unanimous agreement on the charged crime before considering a lesser crime as an alternative, and the “unable to agree” instruction, by which a jury, after full and careful consideration, is allowed to quit deliberating toward unanimity on the charged crime and proceed to agreement on the lesser offense. *Id.* at 418-20.

The defendants in the consolidated cases decided in *Labanowski* argued that an “acquittal first” instruction “has a significant impact on a defendant’s right to trial by jury and on the reasonable doubt standard,” and the court ultimately rejected “acquittal first” instruction, concluding that the “unable to agree” type of instruction correctly stated the law in Washington and should be used in the future. *Id.* at 423. The court nonetheless rejected defense arguments that an “acquittal first” instruction violated any constitutional right. It noted that “[n]umerous cases . . . have held that the ‘acquittal first’ instruction does not impinge on a defendant’s constitutional rights.” *Id.* It concluded that each instruction had potential advantages and disadvantages and that neither was wrong as a matter of law. *Id.* at 424.<sup>2</sup>

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<sup>2</sup> Federal courts have similarly and consistently held that any error in instructing a jury to deliberate to unanimity on a greater offense before moving on to a lesser offense is not of constitutional dimension; it is therefore not subject to appeal unless it was timely objected to in the trial court. *See Catches v. United States*, 582 F.2d 453, 459 (8th Cir.

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*Bashaw* did not identify a constitutional provision violated by the concluding instruction challenged in that case. Rather, it noted that the rule that a jury can reject an aggravating factor less than unanimously is not compelled by constitutional provisions against double jeopardy, “but rather by the common law precedent of this court, as articulated in *Goldberg*.” 169 Wn.2d at 146 n.7. The court characterized the rule adopted in *Goldberg* and reinforced in *Bashaw* as serving policies of judicial economy and finality, as with the procedural instruction for the jury arrived at in *Labanowski*. *Id.* at 146-47.

As we reviewed the decisions for any constitutional mooring for the rule announced in *Goldberg*, we find, at most, the statement in *Goldberg* that “[t]he right to a jury trial includes the right to have each juror reach his or her own verdict ‘uninfluenced by factors outside the evidence, the court’s proper instructions, and the arguments of counsel,’” *Goldberg*, 149 Wn.2d at 892 (quoting *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978)), and the statement in *Bashaw* that the court has “recognized a defendant’s “valued right” to have the charges resolved by a particular tribunal.”” *Bashaw*, 169 Wn.2d at 146 (quoting *State v. Wright*, 165 Wn.2d 783, 792-93, 203 P.3d

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1978); *United States v. Harvey*, 701 F.2d 800, 806 (9th Cir. 1983), *overruled on other grounds by United States v. Chapel*, 55 F.3d 1416 (9th Cir. 1995); *United States v. Cardinal*, 782 F.2d 34, 36-37 (6th Cir.), *cert. denied*, 476 U.S. 1161 (1986); *Zuern v. Tate*, 101 F. Supp. 2d 948, 985 (S.D. Ohio 2000), *rev’d in part on other grounds*, 336 F.3d 478 (6th Cir. 2003), *cert. denied*, 540 U.S. 1198 (2004).

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1027 (2009) (quoting *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978))). But *Goldberg* and *Bashaw* explicitly did not turn on any finding of jury coercion. *Bashaw*, 169 Wn.2d at 146 (“In resolving the appeal in *Goldberg*, we rejected the parties’ framing of the issue as one of jury coercion.” (citing *Goldberg*, 149 Wn.2d at 893)). They turned on a policy choice that the court acknowledged could be reasonably resolved either way. In short, the aggravating factors in Mr. Nunez’s case were imposed following a deliberative procedure to which he did not object; which no court, state or federal, has found to be unconstitutional or unfair; which has been acknowledged to have procedural advantages; and which, in the lesser included crime context, is preferred by a number of jurists and courts.<sup>3</sup> This is not constitutional error.

Were the error constitutional, it would not be manifest constitutional error. Instructional errors do not automatically constitute manifest constitutional error. In *O’Hara*, the Supreme Court identified the following instructional errors as examples of manifest constitutional error: directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and omitting an element of the crime charged. 167 Wn.2d at 103. It contrasted these with instructional errors that are not manifest constitutional error: failing

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<sup>3</sup> In the context of a jury’s deciding aggravating factors, we found no case outside of the *Bashaw* decisions in which the issue of whether jurors should or should not deliberate to unanimity in order to acquit has been considered.

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to instruct on a lesser included offense and failure to define individual terms. *Id.* It abrogated the suggestion in *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996), repeated in several decisions from the Court of Appeals, that error in instructing on self-defense is automatically manifest constitutional error. 167 Wn.2d at 101.<sup>4</sup>

The giving of the challenged instruction in Mr. Nunez's case had no practical and identifiable consequences on the record that should have been apparent to the trial court. The instruction used conformed, in material respects, to the pattern concluding instruction then recommended for deliberations on the aggravating factors for controlled substance crimes. *See* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 50.60, at 986 (3d ed. 2008). The jury was able to make all of the findings required, applying the proper burden of proof, under the instructions given. *See O'Hara*, 167 Wn.2d at 108. Without an affirmative showing of actual prejudice, an asserted error is not "manifest" and thus not reviewable under RAP 2.5(a)(3). *McFarland*, 127 Wn.2d at 334.

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<sup>4</sup> *O'Hara* reinforces confidence that the statement in *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000) that "[t]he proposition 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," was not intended to suggest that every claimed instructional error falls within the RAP 2.5(a)(3) exception. We understand the assertion in *Davis* as implicitly limited to challenges that are based upon apparent constitutional grounds, as was the case in *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996), which *Davis* cites for the proposition.

Finally, we recognize that it might be asked why, if this instructional error was not manifest constitutional error, the issue was reviewed in *Bashaw*<sup>5</sup> and subjected by the Supreme Court to constitutional harmless error analysis. With respect to the former, it is enough to note that Ms. Bashaw's appeal called into question a pattern instruction and thereby an issue of public interest. The application of RAP 2.5(a) (which provides that the appellate court "may" refuse to review any claim of error not raised in the trial court) is ultimately a matter of the reviewing court's discretion. *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). It was our prerogative to hear and resolve the issue in Ms. Bashaw's case notwithstanding her failure to preserve the error and the Supreme Court's prerogative to accept review and correct this court when we misapprehended *Goldberg*.

With respect to the constitutional harmless error analysis applied by the Supreme Court in *Bashaw*, we point out that the fact that constitutional harmless error analysis was applied—the fourth step in what is ordinarily a four-step analysis—is, in the end, no more compelling than the fact that the first three steps were not. *See State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).<sup>6</sup> We view our conclusion that any instructional

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<sup>5</sup> Ms. Bashaw had not objected to the instruction given in her case, either. *See* 144 Wn. App. at 199.

<sup>6</sup> Recommending the following four-step analysis: "First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is

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error is not constitutional error, and certainly not manifest constitutional error, as compellingly supported by the rationale of *Labanowski*, *Goldberg*, *Bashaw*, and the well-established meaning of RAP 2.5(a)(3). Therefore, while we have carefully considered that aspect of the court's decision, we are ultimately not deterred by the fact that constitutional harmless error analysis was applied, although arguably not required, in *Bashaw*, 169 Wn.2d 133.

Because we are satisfied that the claimed instructional error was not manifest constitutional error, we will not review it for the first time on appeal.

Mr. Nunez's judgment and sentence is affirmed.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

## II. Speedy Trial Issue

The issue is whether Mr. Nunez's right to a speedy trial was violated. The time for trial rule in superior court sets a specific number of days in which a criminal

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manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis." *Lynn*, 67 Wn. App. at 345.

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defendant must be brought to trial. When a defendant is in custody while awaiting trial, the time for trial is 60 days. CrR 3.3(b)(1). CrR 3.3(c)(1) establishes that the initial commencement date is the date of arraignment. The rule excludes certain periods from the computation of the 60-day period and provides that the last allowable time for trial is extended to 30 days beyond the end of any such period. CrR 3.3(b)(5), (e). If more than 60 days elapses after arraignment and there has been no excluded period or event resetting the commencement date, then time for trial is not timely under the rule and the charges must be dismissed with prejudice. CrR 3.3(h).

“The determination of whether a defendant’s time for trial deadline has passed requires an application of court rules to particular facts . . . and is reviewed de novo.” *State v. Swenson*, 150 Wn.2d 181, 186, 75 P.3d 513 (2003). The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court and will not be disturbed unless there is a clear showing it is based on untenable grounds or on untenable reasons. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005); *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004).

Mr. Nunez contends his right to a speedy trial was violated and the criminal charges therefore should have been dismissed. He argues the court improperly continued the case beyond the June 29 speedy trial expiration date under CrR 3.3(g) because it failed to make the required finding that he would not be prejudiced by the delay. He also

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argues the court erred in applying CrR 3.3(g) because this provision does not apply until after the time for trial has expired. Finally, Mr. Nunez maintains that none of the other provisions under CrR 3.3 apply here.

The State concedes that the court's reliance on CrR 3.3(g) was misplaced but contends the continuance from June 25 to July 1 was proper as an unavoidable circumstance under CrR 3.3(e)(8) or required under the administration of justice under CrR 3.3(f)(2).

The State correctly concedes the issue. CrR 3.3(g) provides in part:

**Cure Period.** The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense.

This provision gives the State a single opportunity to "cure" the expiration of a speedy trial period. It does not apply here because the speedy trial period had not expired when the State requested a continuance on June 29.

However, a trial court may be affirmed on any basis supported by the record and the law. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, *cert. denied*, 493 U.S. 814 (1989). We find the June 25 to July 1 continuance was proper under CrR 3.3(e)(8).

CrR 3.3(e)(8) permits a court to extend the time for trial if there are "unavoidable or unforeseen circumstances." Our courts have consistently held that the unavailability of

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counsel may constitute unforeseen or unavoidable circumstances to warrant a trial extension. *State v. Carson*, 128 Wn.2d 805, 814, 912 P.2d 1016 (1996) (citing cases); *see also State v. Cannon*, 130 Wn.2d 313, 326-27, 922 P.2d 1293 (1996) (holding two extensions proper where deputy prosecutor occupied in another trial); *State v. Heredia-Juarez*, 119 Wn. App. 150, 155, 79 P.3d 987 (2003) (valid continuance granted to accommodate prosecutor's reasonably scheduled vacation).

Here, although the conflict in trial dates may not have been unforeseen, the court had the discretion to grant the continuance based on the prosecutor's unavailability. Thus, when the prosecutor was unavailable for trial on June 25, the last available date for trial was July 25.<sup>7</sup> The trial date of July 1 was well within the speedy trial limit. Although the court should have granted the continuance under CrR 3.3(e)(8), it did not abuse its discretion in granting the continuance.

### III. Statement of Additional Grounds (SAG) Issues

#### 1. *Excessive Sentence*

In his pro se statement of additional grounds, Mr. Nunez first contends that his sentence, 44 months of confinement followed by 12 months of community custody,

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<sup>7</sup> As indicated above, CrR 3.3(b)(5) provides for a 30-day buffer period, such that whenever a period of time is excluded from computing the time for trial, the time for trial period "shall not expire earlier than 30 days after the end of that excluded period." *See Flinn*, 154 Wn.2d at 199 (explaining changes in time for trial rules).

exceeds the 20-month statutory maximum, which he maintains is the high end of the standard range.

The Sentencing Reform Act of 1981, chapter 9.94A RCW, prohibits a sentence wherein the combined terms of confinement and community custody exceed the statutory maximum allowable under the statute. RCW 9.94A.505(5); *State v. Zavala-Reynoso*, 127 Wn. App. 119, 124, 110 P.3d 827 (2005). Mr. Nunez's error is in assuming that the statutory maximum sentence is the top end of the standard range. In Washington, the maximum sentence remains that specified by the legislature in chapter 9A.20 RCW. *See State v. Toney*, 149 Wn. App. 787, 795-96, 205 P.3d 944 (2009) (listing cases and explaining that "statutory maximum" is not the high end of the presumptive standard range, but the maximums as provided in RCW 9A.20.021), *review denied*, 168 Wn.2d 1027 (2010).

The statutory maximum for delivery of a controlled substance, a class B felony, is 10 years. *See* RCW 9A.20.021(b) (providing no person convicted of a class B felony shall be punished in excess of 10 years' confinement in a state correctional facility); RCW 69.50.401(1), (2)(a) (defining delivery of a controlled substance as a class B felony). Here, the trial court was well within its discretion in imposing a sentence of 44 months' confinement, followed by 12 months' community custody.

## 2. *Evidence of Uncharged Crime*

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Next, Mr. Nunez argues that the trial court abused its discretion in admitting evidence of an uncharged crime. We cannot address this contention because Mr. Nunez fails to provide the court with any authority or argument about this alleged error.

RAP 10.10(c).

3. *Improper School Zone Enhancement*

Mr. Nunez contends the trial court erred when it denied his motion to dismiss one of the two school bus zone enhancements. Citing *State v. Clayton*, 84 Wn. App. 318, 927 P.2d 258 (1996), he contends the State failed to prove that the crime took place within 1,000 feet of a school bus route stop because “there was no measurement taken to the exact location where Mr. Nunez allegedly possessed controlled substances.” SAG at 4.

The State must prove each element of the enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). We review to see whether a rational trier of fact could have found the facts needed for the enhancement beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. *Id.*

RCW 69.50.435(1)(c) creates a sentencing enhancement for anyone who possesses cocaine “[w]ithin one thousand feet of a school bus route stop designated by the school district.” This requires a showing that the distance from the school bus route stop to the location of the drugs was less than 1,000 feet, according to some type of accurate,

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objective, and verifiable measuring device such as a map with a measuring scale, measuring tape, pacing, or other commonly accepted method. *Clayton*, 84 Wn. App. at 321; *Bashaw*, 169 Wn.2d at 142-43. It is not enough that the property on which a house is located was within 1,000 feet. *Clayton*, 84 Wn. App. at 321-22. Instead, the measurement must extend to the location of the offense. *Id.* at 322; *accord State v. Jones*, 140 Wn. App. 431, 437-38, 166 P.3d 782 (2007).

In *Clayton*, the officer measured from the school grounds perimeter to the edge of Clayton's property line and found the distance to be 962 feet and 4 inches, just 38 feet less than the statutorily required 1,000 feet for triggering the sentencing enhancement. *Clayton*, 84 Wn. App. at 322. This court reversed the school zone enhancement, noting it was possible that the crime occurred outside the 1,000-foot radius. *Id.* at 323.

Our facts are distinguishable from *Clayton*. The trial court found:

[T]he testimony was that the measurement was to the front porch or the front door, was 264 feet . . . . There's a whole lot of feet left in this house. The testimony was the house was about a 1,200 square foot house . . . . So, I'm certainly going to find in that particular case that there was evidence beyond a reasonable doubt that the enhancement applies to that.

RP (July 13, 2009) at 296.

An officer testified that he used a Rolotape to measure the distance between the school bus route stop and Mr. Nunez's residence. He stated that the distance from the bus stop to Mr. Nunez's front porch was 264 feet. The officer also testified that although

he did not measure the distance from the front door to the room where the controlled substance was found, he could estimate that the distance was 10 to 12 feet. Thus, in contrast to *Clayton*, it was not possible that the crime occurred outside the 1,000-foot radius. Here, the measured distance was 264 feet, leaving some 736 feet to cover the area in Mr. Nunez's residence in which the drugs were found. Viewing the evidence in the light most favorable to the State, there is no reasonable doubt that the crime occurred within 1,000 feet of a school bus route stop. We therefore uphold the enhancement.

4. *Prosecutorial Misconduct*

Mr. Nunez also contends that prosecutorial misconduct during closing arguments deprived him of a fair trial. He alleges that prejudicial misconduct occurred when the prosecutor asked the jury to disbelieve Mr. Nunez. Mr. Nunez objects to the following comment by the prosecutor, contending it was inherently prejudicial and elicited to inflame the jury:

[T]he Defendant's explanation to at least explain to you why he was with the confidential informant in this case, but when you analyze every aspect of it, it just doesn't make sense. It's just not credible.

RP (July 1, 2009) at 268.

A defendant claiming prosecutorial misconduct must establish the impropriety of the prosecution's comments and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments are prejudicial only where "there is a substantial

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likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). But a defendant who fails to object to an improper comment waives the error unless the comment is "so flagrant and ill-intentioned" that it causes an enduring prejudice that a curative instruction could not have neutralized. *Id.* Defense counsel's failure to object to a prosecutor's statement "suggests that it was of little moment in the trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993), *review denied*, 123 Wn.2d 1004 (1994). Furthermore, a defendant cannot remain silent, speculate on a favorable verdict, and when it is adverse, use the alleged misconduct to obtain a new trial on appeal. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Prosecutors may argue inferences from the evidence, and prejudicial error will not be found unless it is "clear and unmistakable" that counsel is expressing a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Additionally, prosecutors may argue inferences as to why the jury would want to believe one witness over another. The same rule has been applied as to credibility of a defendant. *State v. Copeland*, 130 Wn.2d 244, 290-91, 922 P.2d 1304 (1996); *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012 (1996). "[P]rejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal

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opinion.” *Swan*, 114 Wn.2d at 664.

In *Millante*, for example, the defendant initially lied to the police when questioned about his involvement in the victim’s death. *Millante*, 80 Wn. App. at 251. During closing arguments, the prosecutor argued that Millante’s prior untruthful behavior indicated he was not a credible witness and could have lied on the stand. *Id.* The court found no evidence of prosecutorial misconduct even though the prosecutor repeatedly used the word “lie” because, in context, the prosecutor was commenting on a witness’s credibility based on evidence in the record. *Id.*

Like *Millante*, the prosecutor in this case was commenting on Mr. Nunez’s credibility based on evidence in the record, not expressing an opinion about Mr. Nunez’s credibility. During closing arguments, the prosecutor summarized Mr. Nunez’s testimony as to why he was with a confidential informant and then, based on this testimony, stated that Mr. Nunez was not a credible witness. RP (July 1, 2009) at 267-68. In this context, it is not “clear and unmistakable” that the prosecutor was expressing an opinion about Mr. Nunez’s credibility.

In any event, credibility of the witnesses is precisely what a jury must consider. *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). The trial court instructed the jurors that they “are the sole judges of the credibility of each witness.” CP at 14. We presume that the jury follows the court’s instructions. *State v. Stein*, 144 Wn.2d 236,

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247, 27 P.3d 184 (2001).

Even if we were to find that the prosecutor's statement was improper, Mr. Nunez fails to demonstrate that the comment was flagrant and ill intentioned, or that a curative instruction could not have neutralized the prejudice. Thus, he fails to demonstrate reversible error.

5. *Trial Court Jurisdiction*

Mr. Nunez finally contends that a Kittitas County judge exceeded his jurisdictional authority in granting a search warrant to search property in Douglas County. We are unable to review this alleged error because Mr. Nunez fails to provide us with an adequate record for review and the issue appears to concern matters outside the trial record. *McFarland*, 127 Wn.2d at 338. Although a defendant is not required to cite to the record in his SAG, he must nevertheless "inform the court of the nature and occurrence of [the] alleged errors." RAP 10.10(c). When he fails to do so, we are not required to search the record to find support for his claims. *See State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

Mr. Nunez's judgment and sentence is affirmed.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Sweeney, J.

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, )

Respondent, )

v. )

ENRIQUE NUNEZ, )

Appellant. )

COA NO. 28259-7-III

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ERIC BIGGAR, DPA  
DOUGLAS COUNTY PROSECUTOR'S OFFICE  
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( ) HAND DELIVERY  
( ) \_\_\_\_\_

[X] ENRIQUE NUNEZ  
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COURT OF APPEALS - DIVISION THREE  
CLERK OF COURT

SIGNED IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF MARCH, 2011.

X \_\_\_\_\_ *gmr*

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