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NO. 65746-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D

APR 19 2011
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY L'HEUREUX,

Appellant.

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

The Honorable Jim Rogers, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct denied appellant a fair trial.
2. The trial court erred in instructing the jury that it must be unanimous to answer the special verdict forms.

Issues Pertaining to Assignments of Error

1. Prosecutors may not misstate the evidence or refer to facts outside the record during closing argument. At appellant's trial, the prosecuting attorney violated this prohibition, improperly portraying appellant as particularly violent. A defense objection was not sustained. Does this misconduct require a new trial?

2. It is reversible error to instruct jurors they must be unanimous in order to find the State has failed to satisfy the requirements of a sentencing enhancement. Appellant's jury received such an instruction. Must the special verdicts and appellant's exceptional sentence be vacated?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Jeffrey L'Heureux with three criminal offenses: (count 1) Burglary in the First Degree; (count 2) Felony Harassment; and (count 3) Interfering with Domestic Violence Reporting. CP 15-17.

Counts 1 and 2 each alleged an aggravating factor in support of an exceptional sentence: that the crime involved domestic violence and was part of “an ongoing pattern of psychological, physical or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time or the defendant manifested deliberate cruelty or intimidation of the victim[.]” CP 15-16; RCW 9.94A.535(3)(h)(i), (iii).

Jurors were provided instructions defining the State’s proof requirements for demonstrating the offenses in counts 1 and 2 were “aggravated domestic violence offenses.” CP 38, 46. They also received special verdict forms for counts 1 and 2 that asked, “Did the State prove, beyond a reasonable doubt that the offense . . . is an aggravated domestic violence offense?” CP 53-55. Moreover, they were instructed they had to be unanimous in answering the verdict forms:

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 51 (emphasis added).

Jurors convicted on all counts and answered “yes” on the special verdict forms. CP 52-56. The court imposed an exceptional 84-month sentence on count 1, 29 months on count 2, and 12 months on count 3. All sentences are concurrent. CP 59, 65. L’Heureux timely filed his Notice of Appeal. CP 71-83.

2. Substantive Facts

Jeffrey L’Heureux and Rhonda Curtis had a romantic relationship that began in the early 1990s. 5RP¹ 111-114; 6RP 86. At times, it was tumultuous – marked by periodic breakups, allegations of violence, and heavy use of drugs and alcohol. 5RP 114-135, 145; 6RP 86-87.

L’Heureux and Curtis lived together for most of the time they were a couple. 5RP 87. For a period, the couple shared an apartment – along with friend Benjamin Buls – at the Woodridge Apartments in Bellevue. 5RP 136; 6RP 86. L’Heureux worked maintenance at the apartment complex in lieu of paying rent. 6RP 86. By April 2009, however, L’Heureux and Curtis had an amicable

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breakup, moved out of the complex, and had gone their separate ways. 6RP 19, 21, 103-104.

The two did not see each other again until August 2009. Curtis' brother Troy, who also lived at the Woodridge complex, was in the process of packing up and moving out of his apartment. Curtis was staying with her brother at the time and helping him with the move. 5RP 38-39, 44. Troy is good friends with L'Heureux, who offered to help with the move. 5RP 42-43. Both L'Heureux Curtis were at Troy's apartment on August 16 and, by every account, it was a friendly gathering. 5RP 43-44, 137-138; 5RP 19-21, 104-107.

The charges against L'Heureux stemmed from Curtis' allegations regarding what occurred at the apartment two days later, on the afternoon of August 18, 2009. According to Curtis, her brother left to take a load of his belongings to a storage facility. Before doing so, he told her not to let anybody in. 5RP 139. While he was gone, L'Heureux knocked on the front door. According to Curtis, she told him he would have to wait until Troy returned before she could let him in, to which he responded he was going to come in anyway. 5RP 146-147.

According to Curtis, she shut and locked a back door and window to the back balcony of the apartment and then locked herself in a bedroom. 5RP 147-149. L'Heureux was able to get in to the apartment, however, and demanded that Curtis open the bedroom door. 5RP 149, 151. Instead, she braced herself against the door. L'Heureux then forced the door open. 5RP 151-152.

According to Curtis, once inside the bedroom, L'Heureux grabbed her head and slammed it against the wall. 5RP 152-153. She attempted to dial 911 on her cell phone, but ended up on the bed with L'Heureux on top of her. 5RP 153-154. Curtis was crying. L'Heureux put his knee on the back of her neck and covered her mouth, which made it difficult to breathe. He then told her he would kill her if she was not quiet. 5RP 154-155. After taking her phone, he got off of her and left the room. 5RP 156.

According to Curtis, she ran to the outside balcony, where she looked up and saw a roofer working on the roof of the building and looking back down at her. 5RP 157. One of Troy's friends arrived at the apartment and L'Heureux returned her phone to her before leaving the apartment. 5RP 157-161. While standing on the balcony, Curtis noticed a ladder leading up about 18 feet from the ground below to the balcony and that the glass pane had been

removed from the balcony window. 5RP 49, 150-151. Troy returned a short time later and called 911. 5RP 162.

At trial, Troy confirmed that when he left the apartment, he told Curtis to keep the door locked because the complex had a problem with thefts. 5RP 47. When he returned, his sister was hysterical and her neck was “reddish” and possibly swollen. 5RP 49-50. The bedroom door was off its hinges and had sustained some damage. 5RP 50, 57-60. Moreover, from the balcony, someone had removed bolts from the balcony window and removed the glass pane. 5RP 50-56, 72.

Aaron Woodhouse, a roofer working on the apartment building roof on the afternoon of August 18, also testified. 5RP 11-12. According to Woodhouse, he saw a man – whom he identified at trial as L’Heureux – carrying an aluminum ladder on the property. 5RP 17-20. A few minutes later, he saw a woman he identified as Curtis, standing on a balcony, crying and holding her face. 5RP 14-15, 18, 21-22. The ladder was now leaning up against the balcony on which she was standing. 5RP 18. According to Woodhouse, he watched as L’Heureux got on a bike and left the complex. He testified that he heard L’Heureux call Curtis a bitch and say

something to the effect of “you deserved it or that’s what you get.”
5RP 18-19.

The defense witnesses presented a very different set of events. L’Heureux testified that when he lived in the Woodridge apartments, he and Troy had an open door policy. He was constantly visiting Troy’s apartment and vice versa. 6RP 102. When L’Heureux moved out of the complex, he temporarily left some valuable tools in Troy’s living room. 6RP 103. He returned to the complex on August 16 to retrieve his tools and say hello to friends. 6RP 104. The visit was a good one and he spent several hours alone with Curtis before getting a ride home. 6RP 106-107.

According to L’Heureux, he accidentally left his backpack and identification in Troy’s apartment, so he returned to the apartment complex the following morning, August 17. 6RP 107. Troy was not home, so he borrowed the cell phone of his former roommate – Benjamin Buls – and called Troy seeking his permission to enter the apartment. Based on that telephone conversation, L’Heureux grabbed a ladder. 6RP 107-108, 136. He also informed the property manager, Don McDonald, what he was doing. McDonald watched as he climbed up to Troy’s balcony and gained entry to the

apartment by removing the glass pane. L'Heureux retrieved his property and left. 6RP 111.

He returned to the complex the following day, August 18, to help Troy move. 6RP 113. Contrary to Curtis' testimony, L'Heureux testified that Curtis let him into the apartment and the two had a glass of wine. 6RP 114, 137. The two were getting along fine until L'Heureux raised the topic of his DSHS benefits card. Money was missing from the account and L'Heureux asked Curtis if she knew anything about the matter. 6RP 116-117. Curtis became angry and upset, called L'Heureux names, and threatened to send him to prison. 6RP 117-119.

According to L'Heureux, he simply left the apartment in response to Curtis' threat. 6RP 118. He then visited with a former neighbor before leaving the complex. 6RP 122-123. He denied assaulting Curtis and knew nothing about any injuries she may have sustained on August 18. 6RP 118-120.

Benjamin Buls confirmed a portion of L'Heureux's testimony. He testified that the day before police were called, he allowed L'Heureux to borrow his phone. 6RP 72-74. After completing a call, L'Heureux asked for the ladder and placed it against Troy's deck. 6RP 74, 77-78. Although Buls was not present the next day when

police arrived, he saw the ladder that afternoon and it was still leaning against Troy's deck. 6RP 75.

In an attempt to prove Curtis' reasonable fear of L'Heureux, and to prove the aggravating factor, the prosecution presented evidence of "prior incidents" between L'Heureux and Curtis. See 3RP 42-51 (court's ruling under ER 404(b)); CP 5 (instruction limiting jury's consideration of evidence). Curtis testified to several incidents, from the 1990s to 2008, in which she claimed that L'Heureux either assaulted her or had unlawful contact with her. 5RP 114-135. L'Heureux disputed that these incidents involved violence. 6RP 87-100. Both Curtis and L'Heureux were impeached under ER 609 with prior convictions for crimes of dishonesty. 5RP 144; 6RP 121, 142.

3. Closing Argument

The State argued that L'Heureux unlawfully entered the apartment on August 18, threatened to kill Curtis, and prevented her from calling 911. 7RP 45-52. The State also asked jurors to find the aggravating factor based on a history of violence between L'Heureux and Curtis. 7RP 54-57.

The defense argued that Curtis let L'Heureux into the apartment on August 18, there was no violence between the two,

and Curtis had made up her story out of anger stemming from L'Heureux's accusation involving the DSHS card. 7RP 88. The defense also argued that the State had not established an ongoing pattern of abuse. 7RP 89-90. The defense emphasized Curtis' inability to remember details of the prior events and the absence of corroborating evidence, and argued she would have had a better memory if the events had truly happened as she claimed. 7RP 67-76.

In its rebuttal argument, the State felt the need to address Curtis' poor memory. Curtis testified that she did not have a good memory. 5RP 117. And throughout her testimony at trial, she did in fact have difficulty remembering the details of several older events in which it was alleged that L'Heureux had assaulted her. See, e.g., 5RP 114-115, 124-125, 128-130, 133-135, 187-188; 6RP 8-12. Curtis also conceded she was likely under the influence of drugs and/or alcohol during some of these prior events. 5RP 184; 6RP 11, 27-28.

Addressing Curtis' failed memory, the prosecutor blamed L'Heureux:

Which brings me to Rhonda Curtis' testimony. Defense counsel alleges that because she can't remember every single detail of what happened, because her

memory is, frankly, bad, given not just years of drug and alcohol abuse but years of physical abuse –

7RP 93 (emphasis added). Defense counsel objected that the prosecutor was arguing facts not in evidence. The court simply instructed jurors they would decide the facts and told the prosecutor to proceed. 7RP 93. The prosecutor then told jurors, “[h]er memory is not great. Maybe it’s because of a lot of different things. . . .” 7RP 93.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DENIED L’HEUREUX A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a “heated partisan.” State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). She may “strike hard blows, [but] [s]he is not at liberty to strike foul ones.” Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

Prosecutors may not refer to matters outside the evidence or argue facts unsupported by the record; nor may they appeal to jurors’

passions and prejudices because such arguments inspire verdicts based on emotion rather than evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Gibson, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970); State v. Huson, 73 Wn.2d at 662-63.

The parties spent two days presenting evidence and arguing over which of the prior incidents of alleged violence jurors would hear during L'Heureux's trial. See 1RP 54-151; 2RP 3-167. The court limited the presentation, excluding some of the State's proposed evidence. 3RP 42-51. Apparently not satisfied, the State decided to portray L'Heureux as even more violent – so physically abusive over the years that he had caused Curtis' memory problems.

There was no evidence to support the prosecutor's argument that Curtis' inability to recall events was related in any way to L'Heureux or physical violence exacted upon her. The State did not call an expert, or any other witness, to establish such a connection. And during the hearing on the prior incidents, Curtis indicated she could not attribute a cause to her memory loss. 1RP 69, 111. Thus, there was no good faith basis for the prosecutor's argument.

Reversal is required where there is a substantial likelihood the misconduct affected the jury's verdicts. State v. Russell, 125 Wn.2d

24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). There is a substantial likelihood here. By telling jurors Curtis suffered memory loss due to “years of physical abuse” at L’Heureux’s hands, the prosecutor improperly portrayed L’Heureux as particularly violent. Since the few prior episodes the prosecution was permitted to discuss would not have resulted in such memory loss, the prosecutor’s argument suggested the violence was far more extensive than jurors knew. This portrayal made it more likely jurors would believe L’Heureux was violent and therefore committed the current offenses. It also made it more likely jurors would find the aggravating factor satisfied, since it was based on multiple incidents of abuse over a prolonged period of time.

Unfortunately, the court’s response to defense counsel’s objection did nothing to mitigate this prejudice. Rather than sustain the objection, the court merely reminded jurors they should decide the facts. 7RP 93. The prosecutor did not retract the assertion and instead followed up with, “[h]er memory is not great. Maybe it’s because of a lot of different things. . . .” 7RP 93.

Based on the prosecutor’s misconduct during closing argument, this Court should vacate the jury’s verdicts, reverse L’Heureux’s convictions, and remand for a new trial.

2. THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICTS REQUIRES THAT L'HEUREUX'S EXCEPTIONAL SENTENCE BE VACATED.

Instruction 26, which stated all 12 jurors must agree on an answer to the special verdicts, was an incorrect statement of the law. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). An instruction containing the same improper requirement was given in Bashaw. Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). 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. Id. at 146-147 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

The State proposed this erroneous instruction. Supp CP ___ (sub no. 84, State's Instructions to the Jury, 4/16/10). Defense counsel did not object [see 7RP 25-35], but the issue can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). The defendant in Bashaw did not object to this

instruction, either,² but the Supreme Court still reversed after applying the harmless error test applicable to constitutional violations. Bashaw, 169 Wn.2d at 147-48.

Recently, in State v. Ryan, ___ P.3d ___, 2011 WL 1239796 (April 4, 2011), this Court expressly held this error can be raised for the first time on appeal. Ryan was charged with assault and harassment. As in L'Heureux's case, the State alleged an aggravating factor in support of an exceptional sentence and jurors were told they had to be unanimous in rejecting this factor. Slip op., at *1. Citing Bashaw, this Court concluded that this error was grounded in due process and could be raised for the first time on appeal.³ Slip op., at *2.

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In order to find an instructional error harmless, the reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the

² State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

³ This Court disagreed with Division Three's opinion in State v. Nunez, ___ Wn. App. ___, 248 P.3d 103 (2011).

error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. The deliberative process is different when the jury is properly given the option of not returning a unanimous verdict. "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." Id.

In Bashaw, the defendant was convicted of three counts of delivering a controlled substance. The jury entered special verdicts finding all three crimes occurred within 1,000 feet of a school bus route stop, increasing Bashaw's maximum sentence. Id. at 137-139. The verdict on one count was vacated based on the erroneous admission of certain evidence. Id. at 140-144. For the remaining counts, however, although *all* of the trial evidence indicated the sentencing enhancement had been proved, in light of the "flawed deliberative process," the court refused to find the error harmless. Id. at 138-139, 143-148.

The Bashaw court explained that given a proper special verdict instruction that did not require unanimity, the jury may have

returned a different special verdict. Bashaw, 169 Wn.2d at 147. "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." Id. at 147-48; see also Ryan, at *2 ("We are constrained to conclude that under *Bashaw*, the error . . . is not harmless.").

The same holds true here. On the special verdicts, one or more jurors may have entertained doubts whether the prosecution had proved beyond a reasonable doubt all requirements of the aggravating factor, particularly since L'Heureux contested Curtis' claims of prior abuse. However, given the unanimity requirement for answering "no," they may have abandoned their positions or failed to raise their concerns. Jurors may not have reached unanimity had they not been required to do so. Because the instructional error impacted the procedure jurors used, it is impossible to determine the "flawed deliberative process" had no impact whatsoever.

D. CONCLUSION

Based on prosecutorial misconduct, this Court should vacate L'Heureux's convictions and remand for a new trial. Under Bashaw, this Court should vacate the exceptional sentence imposed on count 1.

DATED this 19th day of April, 2011.

Respectfully Submitted,

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¹ This brief refers to the verbatim report of proceedings as follows: 1RP – April 12, 2010; 2RP – April 13, 2010; 3RP – April 14, 2010 and June 11, 2010; 4RP – April 15, 2010; 5RP – April 19, 2010; 6RP – April 20, 2010; 7RP – April 21, 2010; 8RP – June 25, 2010; 9RP – July 2, 2010.

breakup, moved out of the complex, and had gone their separate ways. 6RP 19, 21, 103-104.

The two did not see each other again until August 2009. Curtis' brother Troy, who also lived at the Woodridge complex, was in the process of packing up and moving out of his apartment. Curtis was staying with her brother at the time and helping him with the move. 5RP 38-39, 44. Troy is good friends with L'Heureux, who offered to help with the move. 5RP 42-43. Both L'Heureux Curtis were at Troy's apartment on August 16 and, by every account, it was a friendly gathering. 5RP 43-44, 137-138; 5RP 19-21, 104-107.

The charges against L'Heureux stemmed from Curtis' allegations regarding what occurred at the apartment two days later, on the afternoon of August 18, 2009. According to Curtis, her brother left to take a load of his belongings to a storage facility. Before doing so, he told her not to let anybody in. 5RP 139. While he was gone, L'Heureux knocked on the front door. According to Curtis, she told him he would have to wait until Troy returned before she could let him in, to which he responded he was going to come in anyway. 5RP 146-147.

According to Curtis, she shut and locked a back door and window to the back balcony of the apartment and then locked herself in a bedroom. 5RP 147-149. L'Heureux was able to get in to the apartment, however, and demanded that Curtis open the bedroom door. 5RP 149, 151. Instead, she braced herself against the door. L'Heureux then forced the door open. 5RP 151-152.

According to Curtis, once inside the bedroom, L'Heureux grabbed her head and slammed it against the wall. 5RP 152-153. She attempted to dial 911 on her cell phone, but ended up on the bed with L'Heureux on top of her. 5RP 153-154. Curtis was crying. L'Heureux put his knee on the back of her neck and covered her mouth, which made it difficult to breath. He then told her he would kill her if she was not quiet. 5RP 154-155. After taking her phone, he got off of her and left the room. 5RP 156.

According to Curtis, she ran to the outside balcony, where she looked up and saw a roofer working on the roof of the building and looking back down at her. 5RP 157. One of Troy's friends arrived at the apartment and L'Heureux returned her phone to her before leaving the apartment. 5RP 157-161. While standing on the balcony, Curtis noticed a ladder leading up about 18 feet from the ground below to the balcony and that the glass pane had been

removed from the balcony window. 5RP 49, 150-151. Troy returned a short time later and called 911. 5RP 162.

At trial, Troy confirmed that when he left the apartment, he told Curtis to keep the door locked because the complex had a problem with thefts. 5RP 47. When he returned, his sister was hysterical and her neck was “reddish” and possibly swollen. 5RP 49-50. The bedroom door was off its hinges and had sustained some damage. 5RP 50, 57-60. Moreover, from the balcony, someone had removed bolts from the balcony window and removed the glass pane. 5RP 50-56, 72.

Aaron Woodhouse, a roofer working on the apartment building roof on the afternoon of August 18, also testified. 5RP 11-12. According to Woodhouse, he saw a man – whom he identified at trial as L’Heureux – carrying an aluminum ladder on the property. 5RP 17-20. A few minutes later, he saw a woman he identified as Curtis, standing on a balcony, crying and holding her face. 5RP 14-15, 18, 21-22. The ladder was now leaning up against the balcony on which she was standing. 5RP 18. According to Woodhouse, he watched as L’Heureux got on a bike and left the complex. He testified that he heard L’Heureux call Curtis a bitch and say

something to the effect of "you deserved it or that's what you get."
5RP 18-19.

The defense witnesses presented a very different set of events. L'Heureux testified that when he lived in the Woodridge apartments, he and Troy had an open door policy. He was constantly visiting Troy's apartment and vice versa. 6RP 102. When L'Heureux moved out of the complex, he temporarily left some valuable tools in Troy's living room. 6RP 103. He returned to the complex on August 16 to retrieve his tools and say hello to friends. 6RP 104. The visit was a good one and he spent several hours alone with Curtis before getting a ride home. 6RP 106-107.

According to L'Heureux, he accidentally left his backpack and identification in Troy's apartment, so he returned to the apartment complex the following morning, August 17. 6RP 107. Troy was not home, so he borrowed the cell phone of his former roommate – Benjamin Buls – and called Troy seeking his permission to enter the apartment. Based on that telephone conversation, L'Heureux grabbed a ladder. 6RP 107-108, 136. He also informed the property manager, Don McDonald, what he was doing. McDonald watched as he climbed up to Troy's balcony and gained entry to the

apartment by removing the glass pane. L'Heureux retrieved his property and left. 6RP 111.

He returned to the complex the following day, August 18, to help Troy move. 6RP 113. Contrary to Curtis' testimony, L'Heureux testified that Curtis let him into the apartment and the two had a glass of wine. 6RP 114, 137. The two were getting along fine until L'Heureux raised the topic of his DSHS benefits card. Money was missing from the account and L'Heureux asked Curtis if she knew anything about the matter. 6RP 116-117. Curtis became angry and upset, called L'Heureux names, and threatened to send him to prison. 6RP 117-119.

According to L'Heureux, he simply left the apartment in response to Curtis' threat. 6RP 118. He then visited with a former neighbor before leaving the complex. 6RP 122-123. He denied assaulting Curtis and knew nothing about any injuries she may have sustained on August 18. 6RP 118-120.

Benjamin Buls confirmed a portion of L'Heureux's testimony. He testified that the day before police were called, he allowed L'Heureux to borrow his phone. 6RP 72-74. After completing a call, L'Heureux asked for the ladder and placed it against Troy's deck. 6RP 74, 77-78. Although Buls was not present the next day when

police arrived, he saw the ladder that afternoon and it was still leaning against Troy's deck. 6RP 75.

In an attempt to prove Curtis' reasonable fear of L'Heureux, and to prove the aggravating factor, the prosecution presented evidence of "prior incidents" between L'Heureux and Curtis. See 3RP 42-51 (court's ruling under ER 404(b)); CP 5 (instruction limiting jury's consideration of evidence). Curtis testified to several incidents, from the 1990s to 2008, in which she claimed that L'Heureux either assaulted her or had unlawful contact with her. 5RP 114-135. L'Heureux disputed that these incidents involved violence. 6RP 87-100. Both Curtis and L'Heureux were impeached under ER 609 with prior convictions for crimes of dishonesty. 5RP 144; 6RP 121, 142.

3. Closing Argument

The State argued that L'Heureux unlawfully entered the apartment on August 18, threatened to kill Curtis, and prevented her from calling 911. 7RP 45-52. The State also asked jurors to find the aggravating factor based on a history of violence between L'Heureux and Curtis. 7RP 54-57.

The defense argued that Curtis let L'Heureux into the apartment on August 18, there was no violence between the two,

and Curtis had made up her story out of anger stemming from L'Heureux's accusation involving the DSHS card. 7RP 88. The defense also argued that the State had not established an ongoing pattern of abuse. 7RP 89-90. The defense emphasized Curtis' inability to remember details of the prior events and the absence of corroborating evidence, and argued she would have had a better memory if the events had truly happened as she claimed. 7RP 67-76.

In its rebuttal argument, the State felt the need to address Curtis' poor memory. Curtis testified that she did not have a good memory. 5RP 117. And throughout her testimony at trial, she did in fact have difficulty remembering the details of several older events in which it was alleged that L'Heureux had assaulted her. See, e.g., 5RP 114-115, 124-125, 128-130, 133-135, 187-188; 6RP 8-12. Curtis also conceded she was likely under the influence of drugs and/or alcohol during some of these prior events. 5RP 184; 6RP 11, 27-28.

Addressing Curtis' failed memory, the prosecutor blamed L'Heureux:

Which brings me to Rhonda Curtis' testimony. Defense counsel alleges that because she can't remember every single detail of what happened, because her

memory is, frankly, bad, given not just years of drug and alcohol abuse but years of physical abuse –

7RP 93 (emphasis added). Defense counsel objected that the prosecutor was arguing facts not in evidence. The court simply instructed jurors they would decide the facts and told the prosecutor to proceed. 7RP 93. The prosecutor then told jurors, “[h]er memory is not great. Maybe it’s because of a lot of different things. . . .” 7RP 93.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT DENIED
L’HEUREUX A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a “heated partisan.” State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). She may “strike hard blows, [but] [s]he is not at liberty to strike foul ones.” Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

Prosecutors may not refer to matters outside the evidence or argue facts unsupported by the record; nor may they appeal to jurors’

passions and prejudices because such arguments inspire verdicts based on emotion rather than evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Gibson, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970); State v. Huson, 73 Wn.2d at 662-63.

The parties spent two days presenting evidence and arguing over which of the prior incidents of alleged violence jurors would hear during L'Heureux's trial. See 1RP 54-151; 2RP 3-167. The court limited the presentation, excluding some of the State's proposed evidence. 3RP 42-51. Apparently not satisfied, the State decided to portray L'Heureux as even more violent – so physically abusive over the years that he had caused Curtis' memory problems.

There was no evidence to support the prosecutor's argument that Curtis' inability to recall events was related in any way to L'Heureux or physical violence exacted upon her. The State did not call an expert, or any other witness, to establish such a connection. And during the hearing on the prior incidents, Curtis indicated she could not attribute a cause to her memory loss. 1RP 69, 111. Thus, there was no good faith basis for the prosecutor's argument.

Reversal is required where there is a substantial likelihood the misconduct affected the jury's verdicts. State v. Russell, 125 Wn.2d

24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). There is a substantial likelihood here. By telling jurors Curtis suffered memory loss due to “years of physical abuse” at L’Heureux’s hands, the prosecutor improperly portrayed L’Heureux as particularly violent. Since the few prior episodes the prosecution was permitted to discuss would not have resulted in such memory loss, the prosecutor’s argument suggested the violence was far more extensive than jurors knew. This portrayal made it more likely jurors would believe L’Heureux was violent and therefore committed the current offenses. It also made it more likely jurors would find the aggravating factor satisfied, since it was based on multiple incidents of abuse over a prolonged period of time.

Unfortunately, the court’s response to defense counsel’s objection did nothing to mitigate this prejudice. Rather than sustain the objection, the court merely reminded jurors they should decide the facts. 7RP 93. The prosecutor did not retract the assertion and instead followed up with, “[h]er memory is not great. Maybe it’s because of a lot of different things. . . .” 7RP 93.

Based on the prosecutor’s misconduct during closing argument, this Court should vacate the jury’s verdicts, reverse L’Heureux’s convictions, and remand for a new trial.

2. THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICTS REQUIRES THAT L'HEUREUX'S EXCEPTIONAL SENTENCE BE VACATED.

Instruction 26, which stated all 12 jurors must agree on an answer to the special verdicts, was an incorrect statement of the law. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). An instruction containing the same improper requirement was given in Bashaw. Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). 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. Id. at 146-147 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

The State proposed this erroneous instruction. Supp CP ____ (sub no. 84, State's Instructions to the Jury, 4/16/10). Defense counsel did not object [see 7RP 25-35], but the issue can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). The defendant in Bashaw did not object to this

instruction, either,² but the Supreme Court still reversed after applying the harmless error test applicable to constitutional violations. Bashaw, 169 Wn.2d at 147-48.

Recently, in State v. Ryan, ___ P.3d ___, 2011 WL 1239796 (April 4, 2011), this Court expressly held this error can be raised for the first time on appeal. Ryan was charged with assault and harassment. As in L'Heureux's case, the State alleged an aggravating factor in support of an exceptional sentence and jurors were told they had to be unanimous in rejecting this factor. Slip op., at *1. Citing Bashaw, this Court concluded that this error was grounded in due process and could be raised for the first time on appeal.³ Slip op., at *2.

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In order to find an instructional error harmless, the reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the

² State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

³ This Court disagreed with Division Three's opinion in State v. Nunez, ___ Wn. App. ___, 248 P.3d 103 (2011).

error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. The deliberative process is different when the jury is properly given the option of not returning a unanimous verdict. "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." Id.

In Bashaw, the defendant was convicted of three counts of delivering a controlled substance. The jury entered special verdicts finding all three crimes occurred within 1,000 feet of a school bus route stop, increasing Bashaw's maximum sentence. Id. at 137-139. The verdict on one count was vacated based on the erroneous admission of certain evidence. Id. at 140-144. For the remaining counts, however, although *all* of the trial evidence indicated the sentencing enhancement had been proved, in light of the "flawed deliberative process," the court refused to find the error harmless. Id. at 138-139, 143-148.

The Bashaw court explained that given a proper special verdict instruction that did not require unanimity, the jury may have

returned a different special verdict. Bashaw, 169 Wn.2d at 147. "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." Id. at 147-48; see also Ryan, at *2 ("We are constrained to conclude that under *Bashaw*, the error . . . is not harmless.").

The same holds true here. On the special verdicts, one or more jurors may have entertained doubts whether the prosecution had proved beyond a reasonable doubt all requirements of the aggravating factor, particularly since L'Heureux contested Curtis' claims of prior abuse. However, given the unanimity requirement for answering "no," they may have abandoned their positions or failed to raise their concerns. Jurors may not have reached unanimity had they not been required to do so. Because the instructional error impacted the procedure jurors used, it is impossible to determine the "flawed deliberative process" had no impact whatsoever.

D. CONCLUSION

Based on prosecutorial misconduct, this Court should vacate L'Heureux's convictions and remand for a new trial. Under Bashaw, this Court should vacate the exceptional sentence imposed on count 1.

DATED this 19th day of April, 2011.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)

Respondent,)

v.)

JEFFREY L'HEUREUX,)

Appellant.)

COA NO. 65746-1-I

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF APRIL, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JEFFREY L'HEUREUX
DOC NO. 770221
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF APRIL, 2011.

x Patrick Mayovsky