

65746-1

65746-1

NO. 65746-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY L'HEUREUX,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the prosecutor committed prosecutorial misconduct that prejudiced the defendant such that he did not receive a fair trial when she provided an alternative inference regarding the victim's poor memory when the defense equated the victim's bad memory to fabrication in closing argument.

2. Whether L'heureux has waived his challenge to the jury instruction on the aggravating circumstance.

3. Whether the court properly instructed the jury to be unanimous before returning a "no" finding on the aggravating circumstance.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant in this case, Jeffrey L'heureux, hereinafter "L'heureux," was charged by way of amended information in the King County Superior Court with Burglary in the First Degree, Felony Harassment and Interfering with Domestic Violence Reporting. Counts one and two additionally alleged the aggravating circumstance for a pattern of prolonged domestic violence. CP 15-17. Pretrial motions took place on April 12, 13,

and 14, 2010, and trial testimony was taken on April 15, 19, 20, and 21, 2010, after which a jury found L'heureux guilty as charged and found the aggravating circumstance present on counts one and two. CP 52-56. On July 2, 2010, the trial court sentenced L'heureux to 84 months on count one, nine months above the standard range sentence. CP 104. The court cited the jury's finding of the presence of the aggravating circumstance as the justification for the additional nine months above the standard range sentence. 9RP 13-16.¹

2. SUBSTANTIVE FACTS

The defendant and Ms. Curtis became a couple in approximately 1994. 5RP 111-14. Ms. Curtis recalls that the first incidence of Domestic Violence that occurred between the two of them was within the first year or two of their relationship. 5RP 114. At the time, the two lived in downtown Kirkland in a studio apartment across the street from a place called Hector's. Id. On one occasion, the defendant and Ms. Curtis were arguing and the

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.

defendant sat on her while she was on the couch and spanked her. 5RP 114-17. When Ms. Curtis was finally able to escape, she climbed out the window and went to a neighbor who had an art studio in order to escape. Id. Ms. Curtis left the apartment building through that neighbor's studio and didn't come back for a couple of days but she did not go to the police. Id. Ms. Curtis and the defendant again resumed a romantic relationship.

On a date in 1997, the defendant and Ms. Curtis were traveling via car on Interstate Highway 405 toward Kirkland. 5RP 117. The defendant was driving and Ms. Curtis was in the front passenger seat. 5RP 119-20. The two were arguing because Ms. Curtis did not want the defendant to go to Kirkland and do drugs. 5RP 117-19. Both Ms. Curtis and the defendant had been drinking that evening. 5RP 119. While driving, the defendant hit Ms. Curtis in the face multiple times with the back of his fist. 5RP 120. When Ms. Curtis observed a police car, she jumped out of the car and was able to obtain police assistance. 5RP 120-21. Ms. Curtis' nose was bleeding profusely when the police made contact and the police arrested the defendant for driving while under the influence of alcohol. 5RP 121. The defendant was convicted of DUI and Felony Violation of a No Contact Order

(based on the assault) as there was a no contact order in place protecting Ms. Curtis at the time of the incident. Exhibits 11, 12 and 13.

On a date in June 1998, the defendant and Ms. Curtis were in an argument at her mother's house and the police showed up. 5RP 125-26. The defendant was convicted of violating a no contact order that listed Ms. Curtis as a protected party due to that incident. Exhibit 14. In October of 2004, the defendant and Ms. Curtis were staying at a friend named Jeanne's apartment. 5RP 126. In that incident, Ms. Curtis was inside a bathroom in the apartment and failed to open the door to the bathroom when the defendant wanted to come inside. Id. In response, the defendant busted open the door and dragged Ms. Curtis out of the bathroom by either her arm or her hair. 5RP 126-27. The defendant was convicted of Assault in the Fourth Degree for this incident. Exhibits 15 and 16.

In October of 2008, a couple of instances of violence were committed by the defendant against Ms. Curtis but Ms. Curtis was unable to remember the sequence of events. 5RP 128-29. On one occasion, the defendant barricaded Ms. Curtis inside the bedroom and was on top of Ms. Curtis so that she had difficulty breathing. Id. At that time, the defendant told Ms. Curtis that he could easily

snap her neck. 5RP 129. Ms. Curtis recalls that this incident stemmed from something she had done that the defendant felt was her disrespecting his friends. 5RP 130. A couple of days later, Ms. Curtis had an argument with another female who was a friend of the defendant's. 5RP 130-31. When Ms. Curtis removed the woman's food from a microwave, the defendant got verbally and physically abusive with her and twisted her arm up behind her back. 5RP 131-32. Ms. Curtis spoke to the police after this incident due to her mother contacting the police and at the time had a black eye and another injury to her face. 5RP 132-33.

On August 16, 2009, after the defendant and Ms. Curtis hadn't seen each other in some time, both were visiting people at the Woodridge apartment complex, where they had previously resided together. Two days later, on August 18, 2009, Ms. Curtis was at her brother Troy's apartment in the complex helping him move out. When Troy and a friend left to take some boxes to storage, Ms. Curtis was left alone in the apartment. Troy left Ms. Curtis with instructions not to let anyone in as he had concerns that someone might steal his property. 5RP 47. While Ms. Curtis was alone in the apartment the defendant knocked on the front door. Ms. Curtis told the defendant that she could not let him in

until Troy returned but the defendant told her he was coming in anyway. 5RP 146-47. Ms. Curtis was scared so she went and shut and locked the window and door to the balcony and then retreated to the spare bedroom and shut and locked the bedroom door. 5RP 147-49. Shortly thereafter, Ms. Curtis heard the defendant inside the apartment outside the bedroom door ordering her to open the door. Id.

Ms. Curtis believed that the defendant had come into the apartment by climbing up a ladder and then coming in through the balcony window which can be unscrewed and removed even if the window is locked. 5RP 149-51. Ms. Curtis and the defendant were both aware of being able to remove the window as they both had done maintenance work on the building. After hearing the defendant's demand to let him in, Ms. Curtis braced herself on the back of the bedroom door by her back. 5RP 151. At that time, the defendant shoved the door from the other side, sending it off its hinges. 5RP 152. Ms. Curtis was knocked over briefly and the defendant grabbed her head and slammed it into the wall twice. 5RP 152-53. Ms. Curtis tried to call 911 but the defendant struggled with her to get the phone away. 5RP 153-54. Ms. Curtis landed on the bed, which was a mattress on the floor. Id. The

defendant then shoved his knee into Ms. Curtis' back and put his hand over her mouth and told her to be quiet. Id. When Ms. Curtis continued crying the defendant said he was going to kill her if she did not stop crying. 5RP 154-55. Ms. Curtis tried to keep quiet but she had difficulty breathing due to the defendant's hand being over her mouth and her face being down on the mattress. 5RP 155. The defendant then abruptly got off of Ms. Curtis and left the bedroom. 5RP 156. At that point, Ms. Curtis went out on the balcony hoping she could get the attention of one of the roofers who was working on the building. 5RP 157. Ms. Curtis did make eye contact with one of the roofers. Id. The roofer heard the defendant say something like you deserved this to Ms. Curtis and then the defendant fled the area on a bicycle. 5RP 19-20. The roofer observed the defendant moving a ladder in the area a few minutes before this incident and noticed the ladder leaning up against Troy's apartment balcony when he saw Ms. Curtis outside holding her face. 5RP 17-21. Ms. Curtis had a swollen lip, a small bump on her head and an injury to her leg when police arrived to the scene based on a 911 call from Troy Curtis regarding this incident. 6RP 58-60.

C. ARGUMENT

1. L'HEUREUX HAS NOT SHOWN THAT HE IS ENTITLED TO A NEW TRIAL DUE TO THE PROSECUTOR'S REBUTTAL ARGUMENT.

a. The Prosecutor's Statement In Rebuttal Argument Was Proper.

When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's comments were both improper and prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). A prosecutor "enjoys reasonable latitude in arguing inferences from evidence, including inferences as to witness credibility." State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201, 1229 (2006) (quoting State v. Johnson, 40 Wn. App. 371, 381, 699 P.2d 221 (1985)). Statements that the defense claims to be improper, must be viewed in "the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201, 1228 (2006) (quoting State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995)). Further, comments that might otherwise be considered improper by the prosecutor are not grounds for reversal

“if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” State v. Weber, 159 Wn.2d 252, 276-77, 149 P.3d 646, 659 (2006) (quoting Russell, 125 Wn.2d at 86, 882 P.2d 747).

Here, in its closing argument, defense argued that Ms. Curtis could not remember specific events because she was fabricating those events. Pursuant to that argument, the prosecutor responded that Ms. Curtis' poor memory could be attributed to her years of substance abuse as well as physical abuse by Mr. L'heureux. As the jury heard evidence of six different incidents of domestic violence apart from the incident that charges arose from, including five that included physical abuse, the prosecutor was responding to the defense's invitation for the jury to infer fabrication by proposing to the jury that another inference was just as reasonably made from the evidence in this case. 7RP 41. A prosecutor may make and invite the jury to make reasonable inferences from the evidence. State v. Johnson, 40 Wn. App. 371, 381, 699 P.2d 221 (1985). State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201, 1229 (2006). In explaining Ms. Curtis' poor

memory to the jury, a reasonable inference is that her history of substance abuse, as well as physical abuse, led to her inability to remember all the details of various events.

The defense argues that the few events of violence that were introduced at trial would not have caused Ms. Curtis' memory loss, however there is no evidence to support that assertion. Moreover, prosecution stated that a pattern of violence, along with drug and alcohol use, may have led to Ms. Curtis' memory loss; the prosecution did not single out a specific incident of violence by Mr. L'heureux that caused Ms. Curtis' memory loss, as it was the pattern of abuse that the prosecution inferred may have caused such memory loss. The convictions of assault against Ms. Curtis, as well as testimony regarding other incidents of abuse, is documented in the record and would further support such inference. On appeal, defense makes light of this evidence and claims that the prosecutor was alluding to other incidents that were either not raised or excluded in pretrial motions. The fact that the prosecutor, in response to the objection by defense and the court's reminder of the instructions to the jury, told the jury that the victim's poor memory could be attributed to many different things and moved onto other arguments, shows that the prosecutor was not

alluding to or intending for the jury to presume that there were other acts of violence that they did not hear testimony regarding.

In closing argument, defense counsel invited argument regarding Ms. Curtis' memory and prosecution was responding to that invitation. State v. Weber, 159 Wn.2d. 252, 276-77, 149 P.3d 646, 659 (2006). In closing argument, defense counsel discussed Ms. Curtis' poor memory and argued that her lapse in memory suggested that Mr. L'heureux was not guilty. 7RP 70-72. It was a specific line of argument defense was using to discredit Ms. Curtis as a witness. In rebuttal closing argument, the prosecutor was responding to defense counsel's argument, and presenting its interpretation of the evidence, that a pattern of substance and physical abuse caused Ms. Curtis' memory lapse. State v. McKenzie, 157 Wn. 2d 44, 56, 134 P.3d 221, 228 (2006). When viewed in the context of the arguments and evidence proposed, the statements made by the prosecutor do not rise to the level of prosecutorial misconduct. State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201, 1228 (2006). Throughout the trial, both sides had debated the incidents of prior abuse, as well as the event in question; Ms. Curtis and Mr. L'heureux each had different interpretations of the events. The defense used Ms. Curtis' poor

memory as a line of argument in its closing argument, addressed above. Viewing the statements in this context, the prosecutor was merely addressing the inconsistencies apparent at trial, and proposing a reason that was consistent with the evidence that would explain such inconsistencies.

Again, defense counsel does not address this in its brief. Case law makes plain that the statements of counsel in closing argument are not to be read in a vacuum but in the context of arguments and evidence presented at trial, as well as the fact that if a statement may have been improper, if it is invited or invoked it is not improper. State v. Weber, 159 Wn. 2d 252, 276-77, 149 P.3d 646, 659 (2006) (quoting Russell, 125 Wn.2d at 86, 882 P.2d 747). Defense does not address the fact that it invited the argument in by arguing Ms. Curtis was not credible because of her poor memory, nor does defense address whether the statement, appearing in the context of the arguments and evidence, is still improper.

b. Even If The Prosecutor's Statement Was Improper, The Defense Has Not Established Prejudice.

To establish prejudice, the defendant must show a substantial likelihood that the instances of misconduct affected the

jury's verdict. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646, 655 (2006) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Prosecutorial remarks that may otherwise be improper do not constitute grounds for reversal if they are made in reply to defense arguments, unless an instruction would not have cured them. State v. Jones, 71 Wn. App. 798, 809, 863 P.2d 85, 92 (Wash. Ct. App. 1993) (quoting State v. Swan, 114 Wn.2d 613, 663, 790 P.2d 610 (1990)).

The Supreme Court's decision in Warren is instructive. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940, 944 (2008). In Warren, the prosecutor repeatedly told jurors in closing that the defendant was not entitled to "the benefit of the doubt." 165 Wn.2d 17, 24-25, 195 P.3d 940, 943 (2008). Defense counsel objected

each time, and the trial court interrupted the argument and gave an “appropriate and effective curative instruction.” Id. at 28. Although the Supreme Court held that the prosecutor's remarks were improper and flagrant, the court held that the curative instruction cured any error. Id. The Court explained:

In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. Had the trial judge not intervened to give an appropriate and effective curative instruction, we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error. However, reviewing the argument in context, because Judge Hayden interrupted the prosecutor's argument to give a correct and thorough curative instruction, we find that any error was cured. We presume the jury was able to follow the court's instruction.

Id. at 28 (citation omitted).

Here, as in Warren, defense objected after the prosecutor's allegedly improper statement. Immediately following the objection, the judge addressed the jury, “[m]embers of the jury, ultimately you will decide what are the facts establish in this case.” 7RP 93. A curative instruction to the jury by the court may serve to neutralize any apparent improper statements. State v. Weber, 159 Wn.2d 252, 277, 149 P.3d 646, 659 (2006). The instruction by the judge to the jury cured any prejudice that may have resulted from the

statement. It reminded the jury that closing argument is just that – argument. The inferences that the prosecutor made in regard to the evidence and testimony admitted at trial were reasonable under the circumstances and did not draw on information not presented at trial. Additionally, the court issued an instruction immediately following the allegedly improper statement. Assuming that the jury was able to follow the instructions issued by the judge, there is no reason that the statement would have caused prejudice.

In addition, viewed in context of the arguments and evidence at trial, the comment was not prejudicial. Before the statement was made, during the prosecutor's rebuttal argument, the judge told the jury "[m]embers of the jury, this is argument. It is not evidence. You are the ultimate judges of what was established in evidence and what was not. You should take the argument in that context as well as all the statements of counsel." 7RP 63. In fact, as in Warren, the prosecutor even told the jury that they were responsible for determining the credibility of each witness. 7RP 63. The jury was on full notice that closing arguments were only argument, merely interpretations of the evidence that was presented at trial. Even if the statement was improper, given the

context of the statement and the repeated instructions to the jury, the statement by the prosecutor was not prejudicial.

2. THE COURT SHOULD REJECT L'HEUREUX'S BELATED CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.

Citing the recent case of State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), and State v. Ryan, --- P.3d---, 2011 WL 1239796, 1 (2011),² L'heureux challenges the special verdict instructions for the pattern of abuse aggravating circumstance, arguing that the jury should not have been told that it had to be unanimous in order to answer "no." However, L'heureux did not object to this instruction below, and because the claimed error is not of constitutional magnitude, he has waived this issue on appeal. Even if the issue is not waived, the rule in Bashaw does not apply to the exceptional sentence aggravating circumstance because, unlike the school bus stop enhancement at issue in that case, the relevant statute governing exceptional sentence procedures expressly requires jury unanimity for a "no" finding.

² The State concedes that this issue has been resolved by Division One in State v. Ryan cited above but provides these arguments to preserve this issue as the State has asked for review of Ryan by the Washington State Supreme Court.

a. Relevant Facts.

The court provided the jury with a special verdict form for the pattern of abuse aggravating circumstance. The instruction for the special verdict forms 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 79. This instruction is identical to WPIC 160.00. L'heureux did not object or take exception to this instruction. 3RP 449-50.

b. L'heureux Has Waived Any Challenge To The Special Verdict Instruction.

Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal when it involves a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918,

935, 155 P.3d 125 (2007). L'heureux must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. Id.

The case cited by L'heureux, Bashaw, makes clear that the claimed error is not of constitutional dimension. Bashaw was charged with three counts of delivery of a controlled substance and a school bus stop sentencing enhancement. The special verdict form for the sentencing enhancement stated: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139. The Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held that "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." 169 Wn.2d at 146.

In so holding, the court acknowledged that this rule was not of constitutional dimension. "This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital

sentencing aggravators), cert. denied, ___ U.S. ___, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." 169 Wn.2d at 146 n.7. Instead, the court cited policy justifications for this common law rule:

The rule we adopted in Goldberg and reaffirm today serves several important policies.... The costs and burdens of a new trial, even if limited to the determination of a special finding, are substantial. We have also recognized a defendant's "'valued right' to have the charges resolved by a particular tribunal." [Citation omitted]. Retrial of a defendant implicates core concerns of judicial economy and finality. Where, as here, a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality.

Id. at 146-47.

Thus L'heureux has waived his challenge to this instruction.

c. The Special Verdict Instruction Was A Correct Statement Of The Law For The Aggravating Circumstance.

Even if the issue is not waived, L'heureux cannot show that the special verdict instruction given was erroneous with respect to the exceptional sentence aggravating circumstance because the relevant statute requires jury unanimity for any kind of verdict. Bashaw involved a school bus stop sentencing enhancement,³ and the relevant statute is silent as to whether the jury must be unanimous before they may answer "no" to the special verdict. See RCW 69.50.435. In contrast, the statute governing exceptional sentence aggravating circumstances requires jury unanimity for any verdict. RCW 9.94A.537(3) states in pertinent part: "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory." By its plain language, RCW 9.94A.537(3) requires jury unanimity to return either a "no" or a "yes" special verdict on an aggravating factor.

³ Goldberg, the case cited in Bashaw, also did not involve an exceptional sentence aggravating circumstance; rather, it was an aggravated first-degree murder case and involved aggravating circumstances under RCW 10.95.020. 149 Wn.2d at 894-95.

Moreover, the Supreme Court defers to the legislature's policy judgment with respect to the exceptional sentence procedures, State v. Davis, 163 Wn.2d 606, 614, 184 P.3d 639 (2008), and the legislature has made it clear that the policy justification for the common law rule discussed in Bashaw does not apply to aggravating circumstances. As discussed above, the Bashaw court held that the reason that unanimity was not required for a "no" finding was because, in the court's opinion, the costs and burdens of conducting a second trial on a sentencing enhancement outweighed the interest in imposing the additional penalty on a defendant. However, with respect to aggravating circumstances, the legislature has indicated that the imposition of an appropriate exceptional sentence outweighs any concern about judicial economy or costs. When an exceptional sentence is imposed but is subsequently reversed, the legislature has expressly authorized the superior court to conduct a new jury trial on the aggravating circumstances alone. RCW 9.94A.537(2).⁴ This policy judgment is not surprising, because exceptional sentences are reserved for the worst offenders. When the jury finds an aggravating circumstance,

⁴ In this case, if this Court were to reverse L'heureux's exceptional sentence based upon Bashaw, the State would be entitled to again seek an exceptional sentence at a new trial on the aggravating circumstance.

the trial court has the discretion to impose a sentence up to the statutory maximum. In contrast, the Supreme Court characterized the school bus zone sentencing enhancement as simply "an additional penalty" imposed upon a defendant "already subject to a penalty on the underlying offense." Bashaw, 169 Wn.2d at 146-47. Bashaw does not apply to aggravating circumstances, and the special verdict form accurately stated the law.

d. The Rule In Bashaw Is Contrary To Legislative Intent.

While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, § § 21 and 22. Const. art. I, § 21, which provides that "[t]he right of trial by jury shall remain inviolate," preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. State v. Stegall, 124 Wn.2d

719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The Washington Supreme Court has rejected the notion that a defendant can waive the unanimity requirement. In State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966), the defendant's first trial resulted in a hung jury which stood 11 to 1 for acquittal. On appeal, the court characterized as "without merit" the notion that the defendant could waive his right to a unanimous verdict and accept the vote of 11 jurors as a valid verdict of acquittal. Id. at 446.

When enacting sentencing enhancement statutes, the legislature is presumed to be familiar with the court's rulings on jury unanimity. In only one sentencing statute concerning aggravated first-degree murder, RCW 10.95.080(2), did the legislature give force or meaning to a non-unanimous verdict. Thus, for all other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes, but must then wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

D. **CONCLUSION**

For the foregoing reasons, the State asks this Court to deny appellant's request to vacate the convictions and the exceptional sentence.

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Respectfully submitted,

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