No. 43930-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rebecca Trebilcock,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-00534-5

The Honorable Judge Michael H. Evans

Appellant's Amended Opening Brief

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3. Dr. Tolby invaded the province of the factfinder by expressing a "nearly explicit" opinion on Mrs. Trebilcock's guilt.

4. The trial court improperly imposed an exceptional sentence.

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30. The conviction for third-degree criminal mistreatment (count three) was based on insufficient evidence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A "nearly explicit" opinion on the accused person's guilt violates an accused person's constitutional right to an

independent determination of the facts by the fact-finder. In this case Dr. Tolby was permitted to testify that Mrs. Trebilcock's case was "the worst case of chronic abuse and neglect" of any that he'd seen. Did the opinion testimony invade the province of the fact-finder and violate Mrs. Trebilcock's right to an independent determination of the facts, in violation of her right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3?

2. A sentencing court exceeds its authority by imposing an exceptional sentence based on inapplicable aggravating factors. In this case, the court based its exceptional sentence on two aggravating factors that do not apply to criminal mistreatment. Must the exceptional sentence be vacated and the case remanded for a new sentencing hearing?

3. An exceptional sentence may not be based on aggravating factors that inhere in the crime charged. Here, the sentencing court based its exceptional sentence for first-degree criminal mistreatment on "abuse of trust" and "ongoing pattern/multiple incidents" aggravating factors. Did the sentencing judge erroneously base the exceptional sentence on factors that inhere in first-degree criminal mistreatment?

4. An exceptional sentence violates due process if it is based in part on the sentencing judge's religious beliefs. Here, the trial court judge referenced his own religious beliefs in setting the length of Mrs. Trebilcock's exceptional sentence. Was the 96-month exceptional sentence impermissibly based in part on the judge's religious beliefs, in violation of Mrs. Trebilcock's Fourteenth Amendment right to due process?

5. An accused person has a constitutional right to a jury determination of facts that increase punishment beyond the standard range. Here, Mrs. Trebilcock waived her right to a jury trial before the prosecution alleged any aggravators, and did not waive her right to a jury determination of aggravating factors after the Information was amended. Did the imposition

of an exceptional sentence based on judicial fact-finding violate Mrs. Trebilcock's right to a jury determination of aggravating factors?

6. Under the state constitution, the parties to a felony prosecution may not dispense with a jury for trial of factual issues. The conviction in this case was entered without a jury determination of the facts. Was the conviction entered in violation of the state constitution's requirement that felony cases be heard by a jury?

7. An accused person's state constitutional right to a jury trial is broader and more highly valued than the corresponding federal right. Here, the record does not affirmatively demonstrate that Mrs. Trebilcock understood her right to help select the jury, to be tried by a fair and impartial jury, and to be presumed innocent by the jury. In the absence of such an affirmative showing, was Mrs. Trebilcock's waiver of her right to a jury trial inadequate under Wash. Const. art. I, § 21 and § 22?

8. A conviction for third-degree criminal mistreatment requires proof of either an imminent risk of substantial bodily harm or the actual infliction of substantial bodily harm. Here, the evidence was insufficient to prove that A.T. suffered substantial bodily harm or that she was placed at imminent risk of such harm. Did Mrs. Trebilcock's conviction for third-degree criminal mistreatment violate her Fourteenth Amendment right to due process because it was based on insufficient evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. PRIOR PROCEEDINGS

Rebecca Trebilcock and her husband Jeffrey were charged with 13 counts of felony and non-felony Criminal Mistreatment involving their five adopted children. CP 1. Following a bench trial, the couple was acquitted of 11 of the 13 charges. RP 2630-2635. The trial judge also rejected two of the four alleged aggravating factors. RP 2635. Mrs. Trebilcock was sentenced to an exceptional sentence of 96 months in prison, and she appealed. CP 14. The court signed Findings of Fact and Conclusions of Law nine months after entry of the Judgment and Sentence. Findings of Fact and Conclusions of Law, Supp. CP.

II. STATEMENT OF FACTS

Rebecca and Jeffrey Trebilcock had four biological children, and also served as foster parents. They decided to adopt more children. RP 2167. They first adopted two foster children who were brother and sister. RP 2174, 2345. J.T. and A.T. were born in 1997 and 1999 respectively, and were adopted by the Trebilcocks in 2004. RP 292-3; CP 1-3. Later, the Trebilcocks adopted two more siblings, this time from Haiti. T.T. and

N.T. (born in 1999 and 2001, respectively). RP 296, 626. Finally, they also adopted a third Haitian girl, G.T. RP 883-886, 2345.

The family lived on a large property in rural Cowlitz County. The grounds included a big garden, orchard, farm animals, and a sizable home. Each child had chores, from feeding the goats or chickens to sweeping the porch or cleaning the bathroom. RP 301, 364, 463, 528, 560, 631, 958, 1061-1062. All the children were homeschooled, by the parents as well as a tutor who worked with them weekly. RP 341, 665, 755-763, 914.

The Trebilcocks attended church as a family, went camping often, and took trips together. RP 332-333, 339, 342-343, 385-386, 663-664, 1955. The family had a large circle of supportive friends and family. RP 530-531, 790-791, 989, 1571-1687, 2660-2691.

In March of 2011, J.T. was thirteen years old. The entire family had recently suffered from the flu, and J.T. was particularly unwell. RP 182, 371, 2376. He was quite weak and couldn't walk without stumbling. RP 2376. Rebecca Trebilcock took him to their local pediatric clinic. RP 149, 2376-2380. J.T. was so cold his temperature could not be taken, and he was described as thin, frail, trembling, malnourished and weak. RP 162, 177-179, 409, 412. He was admitted to the hospital, stabilized, and then transferred to a children's intensive care unit for a number of weeks. RP 185, 422.

By the end of March, the Department of Social and Health Services had placed all of the Trebilcock's adopted children in foster care. RP 230. The state charged both parents with one count of Criminal Mistreatment in the First Degree, and four counts of Criminal Mistreatment in the Second Degree. Each adopted child was the subject of one count. Information filed 5/24/11, Supp. CP. The original Information did not allege any aggravating factors. Information filed 5/24/11, Supp. CP.

In June of 2011, Mr. and Mrs. Trebilcock signed a form entitled "Waiver of Jury Trial." Waiver of Jury Trial, Supp. CP. The court reviewed the document with Mrs. Trebilcock:

> JUDGE EVANS: Mrs. Trebilcock, your attorney, Mr. Debray, has handed me this document, it's called a waiver of a jury trial. Did -- did you talk about this document with Mr. Debray?
> MRS. TREBILCOCK: Yes.
> JUDGE EVANS: Did you read over it?
> MRS. TREBILCOCK: Yes.
> JUDGE EVANS: Okay. So, do you understand that you have the right to have any -- your case heard by twelve of your peers, and that by signing this document and agreeing to this document, you're saying that that's not going to happen, that it'll be a single person, a judge, hearing the case, making a decision? Do you understand that?
> MRS. TREBILCOCK: Yes.
> JUDGE EVANS: Also with regard to the jury selection process, you would be able to be involved in that process. As questions are being asked, you could give your input to your attorney and determine which jurors you feel would be most favorable to your case, and by -- by waiving your right to a jury trial, you're giving up that right.

MRS. TREBILCOCK: Yes.
JUDGE EVANS: Okay. And do you have any questions about that waiver of the jury trial?
MRS. TREBILCOCK: No.
JUDGE EVANS: And is that something -- is that what you want to do?
MRS. TREBILCOCK: Yes.
RP 61-62.

The court accepted her waiver. RP 62. Neither the written waiver nor the court's colloquy addressed Mrs. Trebilcock's right to a jury determination of any aggravating factors. RP 61-62; Waiver of Jury Trial, Supp. CP.

In July of 2011, the state notified Mrs. Trebilcock of its intent to seek an exceptional sentence, and added four aggravating factors to each felony count. Specifically, the Amended Information added the following language on each felony charge:

> . . .and furthermore the state gives notice pursuant to RCW 9.94A.537 of its intent to seek an exceptional sentence above the standard range for the charged offense, and any lesser included offenses, based upon the following aggravating factors: (1) the victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense, as provided by RCW 9.94A535(3)(y); (2) the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, as provided by RCW9.94A.535(3)(n); (3) the current offense involves domestic violence, as defined in RCW 10.99.020, and one or more of the following was present (a) the offenders conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim, as provided by RCW 9.94A.535(3)(h); (b) the offense was part of an ongoing pattern of psychological or physical abuse of the victim manifested by multiple incidents over a prolonged period of time. Amended Information filed 7/6/11, Supp. CP.

Mrs. Trebilcock did not execute a waiver of her right to a jury determination of aggravating factors, and no further discussions took place regarding her right to a jury trial. Clerk's Minutes 7/6/11, Supp. CP; *see also* RP 62-145.

A bench trial was held in July of 2012.[1] One of the state's key witnesses at trial was Dr. Blaine Tolby. He had been the family's pediatrician, and had treated J.T. in 2008. He saw J.T. again in March of 2011. RP 1321. The Trebilcocks' attorneys expressed concern that Dr. Tolby (and other state experts) would provide opinions on the ultimate issues at trial, and urged the court to enter a ruling excluding such testimony. RP 1101-1107. Just before Dr. Tolby was called to testify, the defense attorneys renewed their objections. RP 1313-1314. During the prosecution's re-direct examination, Dr. Tolby gave the following testimony:

> I would place the severity of this particular case, as being the worst case of chronic abuse and neglect of any that I've seen in my thirty-seven years -- uh – being a physician, that has not resulted in death of the patient.
> RP 1463-1464.

[1] Midway through the three-week trial, the state again amended the charges. The Third Amended Information added four counts of Criminal Mistreatment in the Third Degree and four counts of Criminal Mistreatment in the Fourth Degree. CP 1.

The state presented voluminous and complex evidence to support its theory that the Trebilcocks were negligent parents at best, and at worst purposefully or recklessly failed to appropriately care for their adopted children. RP 146-1546, 2526-2543, 2597-2611.

In the end, the trial judge rejected the vast majority of this evidence, dispensing with 11 of the 13 charges by acquitting Mrs. and Mr. Trebilcock of any alleged criminal mistreatment of T.T., N.T. and G.T., and rejecting the felony mistreatment charge relating to A.T. RP 2631.

In his oral ruling, Judge Evans noted that the parents, who had been foster parents for 14 years, provided a "noble service" to the community. RP 2629. He remarked on the challenges of running a large household:

> the Trebilcocks ran an orderly home and that they had a large family and you need to have order when you have a large family. You need to have some pretty fairly stringent rules.
> RP 2617.

He found that several of the parents' decisions were reasonable, like using standing on the porch as punishment, using an alarm system to control the children's movement in the night, and requiring the rinsing of urine-soaked sheets in a bucket. RP 297-299, 316, 2619, 2622.

Judge Evans rejected the state's claims that the parents used duct tape on the children's mouths, failed to adequately clothe them, and didn't

provide appropriate footwear. RP 298, 330-332, 345, 476-478, 658, 2619, 2623. He also described the parents' desire to avoid involvement with CPS, the police, and certain doctors as "a healthy disdain and kind of a caution." RP 2629.

He stated

> the Trebilcocks love their children. I don't there's any question about that. I do think, and I think it's not uncommon, that there tends to be maybe some children that are – are easier to love and don't require as much effort. … And I think [J.T.] was more of a challenge….
> RP 2618-2619.

Judge Evans found that food was the most problematic issue in the Trebilcock household. Mrs. Trebilcock had traveled to Mexico for bariatric surgery, and had expressed her desire that the children not suffer the same problems with weight that had plagued her for much of her life. RP 2621. The judge alluded to the parents' struggle with food issues:

> I think -- this is my sense, is that, like many Americans, the Trebilcocks had struggled with their weight. And I think when it becomes -- I think it's really easy to get a warped view of food. I think it's really easy to do. And I think you have to really work on it to be tempered. My sense was that the view of food became distorted and obscured somehow and because is that -- is a temptation, yet it sustains and it's a really tricky combination.
> RP 2620.

He noted the consequences of these issues:

> And food in our society is -- is a really complex issue. And I think food was used as a carrot and also used as a -- as a punishment. For

> example, with chores. If the chores are undone, then you don't eat, or if they are, then you do eat.
> RP 2619
>
> Yet, I don't think so when you've got six or so trained medical professionals exercising their own independent medical judgments and they say that food is being withheld and that malnourishment is -- is taking place and that is the reason for the lack of growth.
> RP 2628.

Based on these food-related problems, Judge Evans found the Trebilcocks guilty of only two charges: first-degree criminal mistreatment (regarding J.T.), and second-degree criminal mistreatment (regarding A.T.) RP 2631-2634. The court rejected two aggravating factors, declining to find that J.T.'s injuries substantially exceeded the level of harm necessary to prove the offense, and rejecting the suggestion that the Trebilcocks were guilty of domestic violence involving deliberate cruelty toward J.T. RP 2635.

The court endorsed the remaining two aggravating factors on the single felony conviction, finding that both parents abused their position of trust to facilitate the offense against J.T., and that both parents committed a domestic violence offense involving an ongoing pattern of physical abuse manifested by multiple incidents over a prolonged period of time. RP 2635.

At sentencing, the state sought an exceptional sentence of 102 months. RP 2648-2655. The court imposed an exceptional sentence of 96

months. The court based the length of this sentence on a finding that the three adopted daughters (T.T., N.T., and G.T.) had suffered at the hands of their parents (even though he'd acquitted the Trebilcocks of wrongdoing with respect to these three children). RP 2726.

Judge Evans also quoted scripture prior to pronouncing his sentence:

> This is the phrase that some of you may be familiar with: "Which one of you, if his son asks him for bread, will he give them a stone, or if he asks a fish, will he give him serpent?" Your children asked for bread and, for reasons which baffle, literally baffle the bulk of society, you gave them a stone.
> RP 2729-2730.

Rebecca Trebilcock timely appealed. CP 23.

ARGUMENT

I. MRS. TREBILCOCK'S CONVICTIONS WERE OBTAINED IN VIOLATION OF HER DUE PROCESS RIGHT TO A FAIR TRIAL.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, No. 85367–3, ___, 291 P.3d 876 (2012). A manifest error affecting a constitutional right may be raised for the first time on review.[2] RAP 2.5(a)(3).

[2] The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); s*ee State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

B. Mrs. Trebilcock's convictions violated her constitutional right to an independent determination of the facts because they were based in part on impermissible opinion testimony.

Impermissible opinion testimony on the accused person's guilt invades "the exclusive province of the finder of fact." *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987); *see also State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007).[3] Such testimony creates a manifest error affecting a constitutional right if it is a "nearly explicit" or "almost explicit" statement by the witness that the witness believes the accused is guilty. *Kirkman,* 159 Wn.2d at 937. The admission of a nearly explicit opinion on the accused person's guilt may be raised for the first time on review. *Id.;* RAP 2.5(a)(3); *see also State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009).

To convict Mrs. Trebilcock of first-degree criminal mistreatment, the prosecution was required to prove that she recklessly caused great bodily harm by withholding basic necessities. RCW 9A.42.020. To convict her of third-degree criminal mistreatment, the prosecution was required to prove that she negligently caused substantial bodily harm by withholding basic necessities. RCW 9A.42.035. One of the primary issues

[3] Although not clear from the Supreme Court's opinion, the defendant in *Black* was convicted following a bench trial. *See Black*, 46 Wn. App. at 260.

at trial was Mrs. Trebilcock's mental state: the defense vigorously contested any suggestion that she knew about or understood the harm that was the subject of expert testimony at trial. *See* RP, *generally*.

In this case, Dr. Tolby was permitted to opine that Mrs. Trebilcock's case was "the worst case of chronic abuse and neglect of any that [he'd] seen in [his] thirty-seven years [of] being a physician, that has not resulted in death of the patient." RP 1463-1464. In context, this amounted to a "nearly explicit" or "almost explicit" statement that Dr. Tolby believed Mrs. Trebilcock was guilty. *Kirkman,* 159 Wn.2d at 937. The only conclusion to be drawn from Dr. Tolby's testimony was that Mrs. Trebilcock must have known J.T. was at risk of great bodily harm, and by implication, that she was negligent with regard to A.T.'s risk of substantial bodily harm.

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Irby,* 170 Wn.2d 874, 886, 246 P.3d 796 (2011); *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang,* 140 Wn.2d at 32. Reversal is required unless the state can prove that any reasonable

fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke,* 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Irby,* 170 Wn.2d at 886. Dr. Tolby's improper opinion testimony provided the clearest evidence suggesting that Mrs. Trebilcock knew of and disregarded a substantial risk that J.T. would suffer great bodily harm, despite the fact that experts differed on the causes and magnitude of the injuries. RP 171-193, 244-291, 398-439, 703-754, 794-882, 1110-1208, 1313-1475, 1502-1521, 1720-1938. The same argument applies with even greater force with respect to A.T., since the state was required to prove only criminal negligence in count three.

Under these circumstances, the error cannot be described as trivial, formal, or merely academic. *Lorang,* 140 Wn.2d at 32. Nor can Respondent prove an absence of prejudice, or that the error in no way affected the final outcome of the case. *Id.* A rational fact-finder could have entertained a reasonable doubt about Mrs. Trebilcock's knowledge and understanding of the risk of harm. Because the error was not harmless, the convictions must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT IMPROPERLY IMPOSED AN EXCEPTIONAL SENTENCE BASED ON IMPERMISSIBLE FACTORS.

A. Standard of Review

The legal justifications for an exceptional sentence are reviewed *de novo*. *State v. Stubbs*, 170 Wn.2d 117, 124, 240 P.3d 143 (2010). A challenge to an unlawful sentence may be made for the first time on appeal. *State v. Sims*, 171 Wn.2d 436, 444, fn. 3, 256 P.3d 285 (2011).

B. The "abuse of trust" aggravating factor applies only to crimes requiring proof of intentional, rather than reckless conduct.

RCW 9.94A.535(3) sets forth "an exclusive list of factors that can support a sentence above the standard range." An exceptional sentence may be imposed if "[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." RCW 9.94A.535(3)(n).

Under the statute, "the factor applies only to purposeful misconduct." *State v. Hylton*, 154 Wn. App. 945, 953, 226 P.3d 246 (2010).[4] It may not be applied to conduct that is merely reckless. *Id.*

[4] Prior to the "*Blakely* fix" legislation (Laws of 2005, ch. 68), a nonexclusive list of aggravating factors permitted imposition of an exceptional sentence for reckless conduct by analogy to the codified aggravating factor. *Hylton,* 154 Wn. App. at 953 (citing *State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992)).

Because Mrs. Trebilcock was convicted of a crime involving reckless conduct, the "abuse of trust" aggravating factor could not lawfully be applied to her. *Id.* Because the list set forth in RCW 9.94A.535(3) is specifically designated an exclusive list, the sentencing court should not have found that she abused a position of trust to facilitate commission of the crime, and should not have relied on the "abuse of trust" aggravating factor to enhance her sentence. *Id.*

Because the trial court erred by finding the "abuse of trust" aggravating factor, Mrs. Trebilcock's exceptional sentence cannot stand. Her sentence must be vacated and the case remanded for sentencing within the standard range. *Id.*

C. The "ongoing pattern" aggravating factor applies only to crimes of domestic violence defined in RCW 10.99.020.

One of the aggravating factors relied upon by the court is set forth in RCW 9.94A.535(h). That provision requires proof that

> The current offense involved domestic violence, as defined in RCW 10.99.020, and [that] [t]he offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time.

RCW 9.94A.535(h). By its plain terms, the "ongoing pattern" aggravating factor applies only to "domestic violence, as defined in RCW 10.99.020."

First-degree criminal mistreatment is not a crime of domestic violence under that statute.

Accordingly, the "ongoing pattern" aggravating factor cannot be applied to Mrs. Trebilcock's conviction. Her exceptional sentence must be vacated and the case remanded for sentencing within the standard range.

D. The "abuse of trust" and "ongoing pattern" aggravating factors inhere in first-degree criminal mistreatment and cannot form the basis for an exceptional sentence.

A sentencing court may impose an exceptional sentence above the standard range if there are "substantial and compelling reasons" justifying the sentence. RCW 9.94A.535. The court exceeds its authority when it imposes an exceptional sentence for reasons that are not substantial or compelling. *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001).

Any factor inherent in the crime cannot justify an exceptional sentence. *Id., at* 647-648. A factor inheres in the crime if it was necessarily considered by the legislature in establishing the standard range for the offense. *Id.* Thus, for example,

> conviction of the offense of exposing another person to HIV with intent to do bodily harm leaves no room for an additional finding of deliberate cruelty as justification for an exceptional sentence. A finding by the trial court that Petitioner's act constituted deliberate cruelty cannot be used to elevate the sentence to an aggravated exceptional sentence because intent to do bodily harm is an element of the offense charged under former RCW

9A.36.021(1)(e), and was already considered by the Legislature in establishing the standard sentence range.

Id., at 648. *See also Stubbs*, 170 Wn.2d at 127-149 (severity of injury already considered by legislature in setting the standard range for first-degree assault); *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003) (injuries caused by choking inhere in second-degree assault and cannot support manifest injustice disposition.)

9. Abuse of trust inheres in the crime of first-degree criminal mistreatment.

First-degree criminal mistreatment may only be committed by "[a] parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life." RCW 9A.42.020. Such persons necessarily occupy a position of trust; accordingly, all persons who may be convicted of criminal mistreatment have abused the trust placed in them.[5] Because of this, the legislature necessarily considered "abuse of trust" in setting the standard

[5] As noted above, however, RCW 9.94A.535(3)(n) applies only to purposeful misconduct, and cannot aggravate a crime committed with the mental state of recklessness. *Hylton,* 154 Wn. App. at 953.

range for the offense, and the aggravator cannot be used to justify an exceptional sentence in this case. *Ferguson,* 142 Wn.2d at 648-649.

10. The "ongoing pattern" aggravating factor inheres in first-degree criminal mistreatment.

First-degree criminal mistreatment requires proof, *inter alia,* that the accused person caused great bodily harm by withholding basic necessities. RCW 9A.42.020. Great bodily harm "means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." Great bodily harm

> encompasses the most serious injuries short of death. No injury can exceed this level of harm...

Stubbs, 170 Wn.2d at 128.

To achieve this level of injury, criminal mistreatment committed by means of withholding food requires an ongoing pattern, manifested by multiple "incidents" over a prolonged period of time. Withholding food for a short period will not result in great bodily harm.

Although the length of time needed to inflict great bodily harm will vary depending on the degree of malnourishment, the legislature necessarily considered the range of possibilities in setting the punishment for the crime. *See Stubbs,* 170 Wn.2d at 127-149.

Thus the standard range is presumed to inflict the appropriate punishment on those who cause great bodily harm by completely starving a child for a shorter period and those who inflict the same degree of harm by providing inadequate nutrition over a longer period. *Id.*

Because the legislature necessarily considered the "ongoing pattern" scenario in setting the standard range for first-degree criminal mistreatment, the aggravating factor set forth in RCW 9.94A.535(3) cannot be used to support the exceptional sentence in this case. Mrs. Trebilcock's sentence must be vacated and the case remanded for sentencing within the standard range.

E. The trial judge violated Mrs. Trebilcock's Fourteenth Amendment right to due process by considering his own religious beliefs in setting the length of Mrs. Trebilcock's exceptional sentence.

The sentencing process must satisfy the requirements of the due process clause. *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). A sentence may not be based on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant..." *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). A similar principle applies "when a judge impermissibly takes his own religious characteristics into account in sentencing." *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991).

In *Bakker,* the court vacated a 45-year sentenced imposed upon televangelist James Bakker because of the sentencing judge's comment that Bakker "had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.*" *Id., at* 740 (emphasis in original). The appellate court explained the impropriety of this comment:

> Our Constitution, of course, does not require a person to surrender his or her religious beliefs upon the assumption of judicial office. Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. Regrettably, we are left with the apprehension that the imposition of a lengthy prison term here may have reflected the fact that the court's own sense of religious propriety had somehow been betrayed… [T]his case involves the explicit intrusion of personal religious principles as the basis of a sentencing decision…

Id., at 740-41.

In this case, the sentencing judge quoted scripture just before imposing sentence, and applied the quoted passage to Mrs. Trebilcock:

> "Which one of you, if his son asks him for bread, will he give them a stone, or if he asks a fish, will he give him serpent?" Your children asked for bread and, for reasons which baffle, literally baffle the bulk of society, you gave them a stone.
> RP 2730.[6]

[6] The reference is to Luke 11:11.

By injecting his own person religious beliefs into the sentencing proceeding, the sentencing judge violated Mrs. Trebilcock's right to due process. *Bakker,* 925 F.2d at 740-741. Accordingly, the sentence must be vacated and the case remanded for a new sentencing hearing before a different judge. *Id.*

III. THE EXCEPTIONAL SENTENCE INFRINGED MRS. TREBILCOCK'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY DETERMINATION OF AGGRAVATING FACTORS.

A. Standard of Review

Constitutional issues are reviewed *de novo. McDevitt,* 85367–3 *at* ___. Failure to submit aggravating factors to a jury violates the Sixth Amendment, and can be raised for the first time on review. *State v. O'Connell*, 137 Wn. App. 81, 89, 152 P.3d 349 (2007); RAP 2.5(a)(3).

B. An accused person has a constitutional right to a right to a jury determination of aggravating factors.

Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. U.S. Const. Amend. VI and XIV; Wash. Const. art. I, § 21 and § 22.; *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington,* 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Imposition of an

enhanced sentence without a proper jury finding on the underlying facts violates an accused person's right to due process and to a jury trial. *Blakely,* 542 U.S. at 303. In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. art. I, § 21).

An accused person may waive the right to a jury determination of aggravating factors beyond a reasonable doubt; however, to be valid, the waiver must be "voluntary, knowing, and intelligent." *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010). Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Waiver of a constitutional right must clearly consist of "an intentional relinquishment or abandonment of a known right or privilege." *Zerbst,* 304 U.S. at 464. The "heavy burden" of proving a valid waiver of constitutional rights rests with the government. *Matter of James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982).

In this case, Mrs. Trebilcock did not waive her right to a jury trial on any aggravating factors. Although she waived her right to a jury trial on the underlying offense, this occurred before she had been notified of the prosecution's intent to seek an exceptional sentence. Her waiver was signed and accepted in June; the aggravators were not alleged until July.

Waiver of Jury Trial, Supp. CP; Amended Information filed 7/6/11, Supp. CP. Her written waiver did not show that she understood her right to a jury determination of aggravating factors. Waiver of Jury Trial, Supp. CP. Her colloquy with the judge made no mention of aggravating factors. RP 61-62.[7] Thus, nothing in the record shows that she was even aware of her Sixth Amendment rights under *Apprendi* and *Blakely*. *See* Waiver of Jury Trial, Supp. CP; RP 59-89 *generally*.

Based on this record, the prosecution cannot meet its "heavy burden" of proving a valid waiver of the Sixth Amendment right to a jury determination of any aggravating factors. *James,* 96 Wn.2d at 851. The exceptional sentence must be vacated, and the case remanded for sentencing within the standard range. *Id.*

[7] The written waiver refers to her "case," her "trial," and her "right to be tried by a jury." It makes no reference to aggravating factors, sentencing, or the basis for an exceptional sentence. Waiver of Jury Trial, Supp. CP. Similarly, in her brief colloquy with the judge, the court referenced her "case" and made sure she understood that a judge rather than a jury would be making "a decision." RP 61-62. The judge did not discuss trial of the aggravating factors, and made no reference to sentencing. This is not surprising, given that the prosecution had not alleged any aggravators at the time the waiver was entered.

IV. MRS. TREBILCOCK'S CONVICTION WAS ENTERED IN VIOLATION OF THE STATE CONSTITUTION'S REQUIREMENT THAT FACTUAL ISSUES IN FELONY CASES BE TRIED BY A JURY.

A. Standard of Review.

Constitutional questions are reviewed *de novo*. *McDevitt,* 85367–3 *at* ___.

B. Wash. Const. art. I, § 21 and § 22 provide greater protection than does the Sixth Amendment.

As with many other constitutional provisions, the right to a jury trial under the Washington state constitution is broader than the federal right.[8] *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982). The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). *Gunwall* analysis in this context suggests that all felony cases in Washington must be tried to a jury, regardless of the parties' wishes.

C. Under the state constitution, parties to a criminal prosecution may not dispense with the jury in a felony case.

1. The language of the state constitution.

[8] The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Analysis of a constitutional provision begins and ends with the text. *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 459-460, 48 P.3d 274 (2002). This includes an examination of the words themselves, their grammatical relationship with one another, and their context. *Gallwey,* 146 Wn.2d at 459-460. The constitution must be construed as the framers understood it in 1889. *State v. Norman*, 145 Wn.2d 578, 592, 40 P.3d 1161 (2002).

Art. I, § 21 preserves the right of jury trials "inviolate." This term "connotes deserving of the highest protection." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). This language

> indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

Id. The strong, simple, direct, and mandatory language ("shall remain inviolate") suggests that the present-day jury trial right must be identical to the right as it existed in 1889. As discussed below, it was almost universally believed during that time period that the right could not be waived, and the framers elected not to continue an experiment undertaken by the territorial legislature in the years prior to 1889.

Furthermore, art. I, § 21 expressly grants the legislature authority to allow waivers in civil cases, but not in felony prosecutions. Under the

maxim *Expressio unius est exclusio alterius*,[9] this express grant of authority in civil cases suggests an intent to prohibit waivers in criminal cases. *See, e.g., State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 830, 966 P.2d 1252 (1998).

Similarly, art. I, § 22 provides strong protection to the jury system. The specific mention of juries in the context of "criminal prosecutions," and the mandatory language employed by the provision ("shall have the right… to have a speedy public trial by an impartial jury") demand that the jury tradition be afforded the highest respect.

Thus, the language of the two provisions weighs in favor of an independent application of the state constitution in this context.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. art. I, § 21 has no federal counterpart. The Washington Supreme Court in *Mace* found this significant, and held that under the Washington constitution "no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime." *Mace,* 98 Wn.2d at 99-

[9] "The expression of one thing is the exclusion of another." *Black's Law Dictionary* (6th ed. 1990).

100. This is in contrast to the more limited protections available under the federal constitution. *Mace,* 98 Wn.2d at 99-100.

Thus, differences in the language between the state and federal constitutions favor an independent application of the state constitution. Even though waiver of the federal right may be found in appropriate cases, the Washington constitution prohibits jury waiver in felony prosecutions.

3. State constitutional and common law history demonstrates that drafters of the Washington constitution intended to require jury trials for all felony prosecutions.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. art. I, § 21, Washington "preserves the right as it existed at common law in the territory at the time of its adoption." *Mace*, 98 Wn.2d at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (Smith I).

Although "little is known about what the drafters of art. I, § 22 intended in 1889," the explicit enumeration of certain rights suggests "that the drafters of this provision believed that these rights are of great importance." *State v. Martin*, 171 Wn.2d 521, 531, 252 P.3d 872 (2011).

In 1889, when the state constitution was adopted, there was a nearly universal understanding, throughout the states and territories, that the right to a jury trial in felony cases could not be waived. *See e.g., State*

v. Lockwood, 43 Wis. 403, 405 (1877) ("The right of trial by jury, upon information or indictment for crime, is secured by the constitution, upon a principle of public policy, and cannot be waived"); *State v. Larrigan*, 66 Iowa 426 (1885); *Cordway v. State*, 25 Tex. Ct. App. 405, 417 (1888) (A defendant "may waive any... right except that of trial by jury in a felony case"); *United States v. Taylor*, 11 F. 470, 471 (C.C.Kan. 1882) (Taylor I) ("This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner's consent is erroneous"); *United States v. Smith*, 17 F. 510, 512 (C.C.Mass. 1883) (Smith II) ("The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...")

This tradition was rooted in the common law:

> There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4 Black. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale's Pleas of the Crown, 161; Bacon's Abridg. tit. Juries, A.; 2 Bennett & Heard's Lead. Cas. 327... The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court... A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform

> their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory.

Harris v. People, 128 Ill. 585, 590-591 (Ill. 1889), *overruled in part by People ex rel. Swanson v. Fisher,* 340 Ill. 250 (1930).

The constitutional prohibition against waiver of the jury right was thought to be based in "the soundest conception of public policy." *State v. Carman*, 63 Iowa 130, 131 (1884). According to the Iowa Supreme Court:

> Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safe guards.

Carman, 63 Iowa at 131.

The prohibition against jury waivers was also viewed as a natural limitation on an accused person's power to shape the proceedings. For example, in *Territory v. Ah Wah*, 4 Mont. 149, 168-173 (1881), the Montana Supreme Court considered the question of whether or not a defendant could waive a twelve-person jury:

> By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration... "[T]he prisoner's consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive requirement of the law..."
>
> "...It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated,

> however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

Territory v. Ah Wah, 4 Mont. at 168-173 (citations omitted).

As these authorities show, judges throughout the nation believed that a felony charge could only be tried to a jury. Despite this prevailing view, the Washington territorial legislature enacted a statute in 1854 allowing "[t]he defendant and prosecuting attorney with the assent of the court [to] submit the trial to the court, except in capital cases." Laws of Washington Territory, Chapter 23, Section 249 (1854-1862). However, this experiment did not survive the passage of the constitution.[10, 11] The framers would have been aware of both the prevailing view (described above) and the territorial legislature's experiment. Because the framers did not explicitly permit the legislature to provide for waivers in felony cases, such permission cannot be read into the constitution.

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[10] Instead, as noted above, they adopted language permitting the legislature to allow waiver only in civil cases.

[11] The 1854 statute was implicitly repealed by the adoption of Wash. Const. art. I, § 21, because it was the statute was repugnant to that provision of the constitution: "All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature…" Wash. Const. art. XXVII, § 2.

The state constitutional and common law history shows that jury waivers are prohibited in felony cases. *Gunwall* factor three favors the interpretation of art. I, § 21 urged by Mrs. Trebilcock.

4. Although pre-existing state statutes permit jury waivers in felony cases, the constitutionality of such laws has yet to be properly analyzed.

The fourth *Gunwall* factor "directs examination of preexisting state law, which 'may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.'" *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall,* 106 Wn.2d at 62).

As noted previously, the territorial legislature provided for jury waivers in noncapital criminal cases. Laws of Washington Territory, Chapter 23, Section 249 (1854-1862). This law did not survive adoption of the constitution. Wash. Const. art. XXVII, § 2. A similar statute (RCW 10.01.060) is in effect today, and is echoed in CrR 6.1. However, the constitutionality of these enactments has never been properly analyzed under Wash. Const. art. I, § 21.

Instead, Washington courts have come to accept jury waivers in felony cases on the basis of *dicta*, and on authority relating to the federal jury right. Furthermore, the cases examining the issue all predate

Gunwall, and thus are no longer binding precedent. *See, e.g., State v. Brown*, 132 Wn.2d 529, 595 n. 169, 940 P.2d 546 (1997).

The first case addressing the issue in *dicta* was *State v. Ellis*, 22 Wash. 129, 132, 60 P. 136 (1900), *overruled in part by State v. Lane,* 40 Wn.2d 734, 246 P.2d 474 (1952). Although the opinion reversed a guilty verdict reached by fewer than 12 jurors, the court evidently believed the jury trial right could be waived:

> It would seem to the writer of this opinion that the first clause of the section, viz., "that the right of trial by jury shall remain inviolate," was simply intended as a limitation of the right of the legislature to take away the right of trial by jury, and that it did not intend to interfere with the right of the individual to waive such privilege.[12]

State v. Ellis, 22 Wash. at 131, 134. From this brief *dicta*, the Washington Supreme Court eventually found constitutional authority for the legislature to authorize waiver of the jury trial right even in felony cases.

First, however, the court in *State v. Karsunky*, 197 Wash. 87, 84 P.2d 390 (1938) held that waivers of the jury trial right were statutorily prohibited in felony cases. In *State v. McCaw*, 198 Wash. 345, 88 P.2d

[12] The Supreme Court expressly reserved its opinion on the effect of the second clause of art. I, § 21: "What construction might be placed upon the further provisions of the same section as indicating the intention of the members of the constitutional convention is not necessary to determine here, for the trouble with the case at bar is that the legislature has not attempted to provide any method by which the guilt or innocence of a defendant can be determined other than by a jury; and it must be conceded that, when the constitution speaks of a right of trial by jury, it refers to a common law jury of twelve men." *Ellis,* 22 Wash. at 131-132.

444 (1939), the court held that this statutory prohibition also extended to misdemeanors.

In *Brandon v. Webb*, 23 Wn.2d 155, 160 P.2d 529 (1945), the court held that a defendant could waive the right to a jury trial by pleading guilty:

> It is undoubtedly true that, under [art. I, § 21], the right of trial by jury may not, by legislative or judicial action, be annulled, nor be so impaired, obstructed, or restricted as to make of it a nullity. That does not mean, however, that a trial by jury is imperative and compulsory in every instance, regardless of whether or not the accused by his plea has raised an issue of fact triable by a jury. The purpose of the constitutional provision was to preserve to the accused the right to a trial by jury as it had theretofore existed; it was not the purpose of the fundamental enactment to render the intervention of a jury mandatory, in the face of the accused person's voluntary plea of guilty to the charge, where no issue of fact was left for submission to, or determination by, the jury.

Webb, 23 Wn.2d at 159.

In *Lane,* the court denied an appeal based on invited error, where the defendant had requested the trial court to allow an eleven person jury to reach a verdict. The court also suggested in *dicta* (which relied upon the above-quoted *dicta* in *Ellis,* as well as a U.S. Supreme Court decision analyzing the federal jury right) that a waiver of the right to a jury trial would be permitted under the state constitution:

> [Art. I, § 21] is a guaranty that the right of trial by jury shall not be impaired by legislative or judicial action.... But, because an accused cannot be deprived of this right, it does not follow that he

> cannot waive it....*[S]ee Patton v. United States,* 281 U.S. 276, 293 et seq., 74 L.Ed. 854, 50 S.Ct. 253, 70 A.L.R. 263 (1930).... A right which can be waived is, in fact, a privilege... It is not the legislative policy of this state that a jury trial is essential in every case to safeguard the interests of the accused and maintain confidence in the judicial system. The cited enactment is consistent with the idea that persons accused of crime have individual rights of election which must be secure. Granting a choice of privileges can in no way jeopardize their preservation. If an accused desires to waive a privilege, our concern should be to assure him that it can be done. ...The denial of that power of election would convert the privilege into an imperative requirement. *Patton,* 281 U.S. at 298.

Lane, 40 Wn.2d at 739 (state citations omitted).

Finally, in 1966, relying on *Lane,* 40 Wn.2d at 739 (and again citing *Patton,* 281 U.S. 276), the Supreme Court upheld a defendant's waiver of his right to a jury trial (based on a 1951 statute authorizing such waivers):

> The judgment of the trial court is affirmed on the authority of [*Lane*], where we held that an accused can waive his privilege of a trial by a jury of 12 and submit his case to 11 jurors. That the right of an accused to waive the presence of one juror compels the conclusion that he may waive the entire jury, see also [*Patton*].
>
> ...Constitutional guarantees are subject to waiver by an accused if he knowingly, intentionally, and voluntarily waives them.

State v. Forza, 70 Wn.2d 69, 70-71, 422 P.2d 475 (1966).

As these cases show, the current practice of allowing waivers in felony prosecutions rests on *dicta* and on cases allowing waiver of the federal right, rather than on sound analysis of the state constitution under

Gunwall. Because it was decided "without benefit of *Gunwall* scrutiny," *Forza* "lack[s] the precedential force which follows from this more thorough review." *State v. Rivers*, 129 Wn.2d 697, 723, 921 P.2d 495 (1996) (Sanders, J., dissenting). Because of this, *Forza* and the preceding cases do not control the issue. *Brown,* 132 Wn.2d at 595 n. 169. Thus, even though the fourth *Gunwall* factor does not support Mrs. Trebilcock's position, this factor alone should not be dispositive.

5. Differences in structure between the federal and state constitutions.

The fifth *Gunwall* factor "will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power." *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). As in all contexts, this factor favors independent application of the state constitution. *Id.*

6. Matters of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The ability of an accused person prosecuted in state court to effectuate a waiver of rights guaranteed by the state constitution is purely a matter of state concern. *See Smith* I,

150 Wn.2d at 152. *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

7. Conclusion: *Gunwall* analysis establish that the parties may not dispense with the jury in a felony case.

Five of the six *Gunwall* factors indicate that the parties to a felony prosecution may not dispense with jury trials when there are issues of fact to be decided. Factor four (preexisting state law that is not of constitutional dimension) does not support Mrs. Trebilcock's position; however, it should not be permitted to influence the outcome because the preexisting state law is not controlling and rests on unsound footing.

The waiver in this case violates Wash. Const. art. I, § 21 and § 22. Accordingly, Mrs. Trebilcock's conviction must be reversed and the case remanded to the trial court for a jury trial.

D. *Forza* does not control the outcome of this issue.

Although *Forza* was decided by the Supreme Court, it does not control Mrs. Trebilcock's case for two reasons.

First, as noted above, the *Forza* court lacked the benefit of *Gunwall's* analytical framework. Cases addressing the state constitution without benefit of *Gunwall* were implicitly overruled by *Gunwall*. *Brown,* 132 Wn.2d 529. In *Brown,* the Supreme Court addressed a capital defendant's argument that "death qualifying" a jury violates art. I, § 22.

Brown, 132 Wn.2d at 593-600. Although the same issue had previously been decided prior to *Gunwall*, the court did not consider the pre-*Gunwall* holding to have continuing viability in the post-*Gunwall* era:

> *Hughes* did not analyze the six factors in *State v. Gunwall* to conclude that death qualification is allowed under the Washington Constitution. Thus, in determining whether death qualification violates the Washington Constitution, *Hughes* and the cases following *do not control at this point*.

Brown, 132 Wn.2d at 595 n. 169 (emphasis added) (additional citations omitted).

Similarly, the *Forza* decision failed to take into account matters that are essential to understanding of a state constitutional provision, and thus its result stems from a flawed understanding of art. I, § 21. It, and any subsequent cases, "do not control at this point." *Id.*

Second, the *Forza* court considered only the issue of waiver under art. I, § 21. *See Forza, at* 70 ("Appellant's sole assignment of error is that RCW 10.01.060, providing for waiver of a jury trial by an accused in non-capital cases, is unconstitutional because it contravenes art. 1, § 21 of the Washington State Constitution.") (footnotes omitted). The *Forza* court did not examine waivers under art. I, § 22, and did not consider whether the two provisions together protected the longstanding tradition of requiring parties to submit any issues of fact to a jury, when the accused person was charged with a felony.

Mrs. Trebilcock, by contrast, brings her argument under both constitutional provisions, and makes the arguments that were not addressed in *Forza*. Accordingly, *Forza* does not control the outcome of Mrs. Trebilcock's case. Under the state constitution, her waiver was ineffective. The conviction is invalid, because it was achieved without involvement of a jury.

E. Even if the jury may be dispensed with in a felony case, Mrs. Trebilcock did not properly waive her right to a jury trial.

1. Where the state constitution provides broader protection than its federal counterpart, waiver of the state right requires greater safeguards.

Courts indulge every reasonable presumption against waiver of fundamental rights. *Zerbst,* 304 U.S. at 464. Waiver of a constitutional right must clearly consist of "an intentional relinquishment or abandonment of a known right or privilege." *Zerbst,* 304 U.S. at 464. The "heavy burden" of proving a valid waiver of constitutional rights rests with the government. *James*, 96 Wn.2d at 851. A valid waiver is one that is "voluntary, knowing, and intelligent." *Hos*, 154 Wn. App. at 250.

As noted in the preceding sections, the right to a jury trial under the state constitution is broader than the corresponding federal right. *See, e.g., Mace,* 98 Wn.2d at 99-100. The state constitutional right to a jury trial "is a valuable right, jealously guarded by the courts." *Watkins v. Siler*

Logging Co., 9 Wn.2d 703, 710, 116 P.2d 315 (1941). Any waiver under the state constitution "should be narrowly construed in favor of preserving the right." *Wilson v. Horsley,* 137 Wn.2d 500, 509, 974 P.2d 316 (1999).

Because the state constitutional right to a jury trial is broad and highly valued, a waiver of the state constitutional right must be examined carefully.[13] In order to meet its heavy burden of proving an intentional relinquishment or abandonment of a known right or privilege, the state must show that any waiver was executed with a thorough understanding of the right. If the accused person lacked a thorough understanding of the right, the waiver cannot be "voluntary, knowing, and intelligent." *Hos*, 154 Wn. App. at 250.

Accordingly, in order to sustain a waiver, a reviewing court must find in the record affirmative proof that the defendant fully understood the right under the state constitution—including the right to a local jury (from the county where the offense occurred), the right to participate in selecting jurors, the right to a jury of twelve, the right to a fair and impartial jury, the

[13] Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wn. App. 419, 427-428, 35 P.3d 1192 (2001). The federal constitutional right to a jury trial is one of the most fundamental of constitutional rights, one which an attorney "cannot waive without the fully informed and publicly acknowledged consent of the client..." *Taylor v. Illinois,* 484 U.S. 400, 418 n. 24, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (Taylor II). In the absence of a valid waiver of the federal right, a criminal defendant's conviction following a bench trial must be reversed. *Treat,* 109 Wn. App. 419.

right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.[14]

Here, the record does not affirmatively establish that Mrs. Trebilcock waived her state constitutional right to a jury trial with a full understanding of the right. Her written waiver did not make clear that she understood she was entitled to a fair and impartial jury.[15] Nor did it make clear that the jury would be instructed on the presumption of innocence. Waiver of Jury Trial, Supp. CP. Her brief colloquy with the judge was simply a review of the document, and did not cover her right to a fair and impartial jury and the right to be presumed innocent. RP 61-62.

Knowledge of these two rights is critical to a knowing, intelligent and voluntary waiver of the state constitutional right to a jury trial. Although an accused person does not give up the right to a fair and impartial fact-finder or the right to the presumption of innocence by waiving jury, the decision to proceed with a bench trial can only be

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[14] The requirement of a record establishing a knowing, intelligent, and voluntary waiver is illustrated in other circumstances such as waiver of the right to remain silent and the right to counsel in the context of custodial interrogation (*see Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)), waiver of the right to counsel at trial (*see Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)), and waiver of trial rights attendant upon a plea of guilty (*State v. Robinson*, 172 Wash. 2d 783, 263 P.3d 1233 (2011)).

[15] This is particularly important in light of the publicity that surrounded her case, as evidenced by the presence of news media in the courtroom.

described as fully informed if the person knows these rights attach to a jury trial. Otherwise, a defendant contemplating her options might believe she will face outraged community members who have already decided her guilt, and might prefer a bench trial because of a mistaken belief that jurors, unlike judges, are permitted to approach a case with all the biases intact.

The average criminal defendant most likely believes that trial will proceed on the appointed day, even if the entire venire is prejudiced. Under such circumstances, the advantage of proceeding with a judicial officer—a professional adjudicator sworn to uphold the law—would seem overwhelming. Thus, even though the right to an impartial jury and the right to the presumption of innocence remain intact when a person waives jury, such a waiver cannot be knowing, intelligent, and voluntary if the person erroneously believes the process will lack integrity unless the waiver is entered.

Division II has reached the opposite conclusion on this point. *See State v. Pierce*, 134 Wn. App. 763, 772-773, 142 P.3d 610 (2006) ("Pierce never waived his right to be presumed innocent until proven guilty beyond a reasonable doubt or his right to an impartial trier of fact because these rights are inherent in all trials… The only right unique to jury trials that the court did not specifically explain to Pierce was his right to participate

in juror selection.") This reasoning should be reconsidered. A person who does not understand that jurors—like judges— (1) must be impartial, (2) must presume the defendant innocent, and (3) must not convict except upon proof beyond a reasonable doubt, cannot appropriately value the right to a jury trial. A waiver premised on ignorance of what the right encompasses cannot be knowing, intelligent, and voluntary. A person who waives jury under the mistaken belief that judges must be impartial (as a function of their office) but that jurors need not (because they are average citizens) has lost a valued and cherished right due to a misunderstanding, rather than as a result of a reasoned examination of the costs and benefits.

In the absence of an affirmative showing that Mrs. Trebilcock fully understood her state constitutional right to a jury trial, her waiver is invalid and her conviction was entered in violation of Wash. Const. art. I, § 21 and § 22. The case must be remanded to the trial court for a new trial.

2. *Pierce* should be reconsidered in light of controlling Supreme Court precedent.

Just as *Gunwall* analysis controls the interpretation of a state constitutional right, *Gunwall* also applies to determine the validity of a waiver of a state constitutional right. For example, *Gunwall* applies to

determine the validity of a capital defendant's waiver of his state constitutional right to appeal[16] and the validity of a waiver of the right to counsel under Const. art. I, § 22.[17] Courts have relied on a party's failure to adequately brief *Gunwall* in refusing to review a waiver of the state constitutional right to testify,[18] have found *Gunwall* analysis of a waiver unnecessary where the state constitutional right has already been determined to be coextensive with the federal right,[19] and have specifically dispensed with a *Gunwall* analysis prior to examining a waiver by assuming that the state constitution provides greater protection.[20]

Thus the Supreme Court, Division I, and Division III have all recognized that *Gunwall* applies when determining how a state constitutional right may be waived. *Thomas*, 128 Wn.2d at 562; *Dodd,* 120 Wn.2d at 20-21; *Earls,* 116 Wn.2d at 374-378; *Medlock,* 86 Wn. App. at 98-99; *Russ,* 93 Wn. App. at 245-247.

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[16] *State v. Dodd*, 120 Wn.2d 1, 20-21, 838 P.2d 86 (1992).

[17] *State v. Medlock,* 86 Wn. App. 89, 98-99, 935 P.2d 693 (1997).

[18] *State v. Thomas*, 128 Wn.2d 553, 562, 910 P.2d 475 (1996).

[19] *State v. Earls*, 116 Wn.2d 364, 374-378, 805 P.2d 211 (1991).

[20] *State v. Russ*, 93 Wn. App. 241, 245-47, 969 P.2d 106 (1998).

Despite this, Division II has held that *Gunwall* does not apply to waiver of state constitutional rights:

> *Gunwall* addresses the extent of a right and not how the right in question may be waived.... The issue here is waiver. Although Washington's constitutional right to a jury trial is more expansive than the federal right, it does not automatically follow that additional safeguards are required before a more expansive right may be waived.

Pierce, 134 Wn. App. 770-773 (citations omitted).

Pierce was wrongly decided, and should be reconsidered. *Gunwall* provides the appropriate framework for determining what safeguards are required for waiver of a right under the state constitution. *Dodd,* 120 Wn.2d at 20-21. The *Pierce* court did not articulate *any* test for determining the requisites of a valid waiver under the state constitution. Because *Pierce* fails to outline any test for determining the validity of a state constitutional right, it should be abandoned.

Mrs. Trebilcock did not waive her state constitutional right to a jury trial. Accordingly, her conviction must be reversed and the case remanded for a new trial.

V. MRS. TREBILCOCK ADOPTS AND INCORPORATES THE ARGUMENTS SET FORTH IN SECTION D.1 OF MR. TREBILCOCK'S OPENING BRIEF.

Pursuant to RAP 10.1, Mrs. Trebilcock adopts and incorporates section D.1 of Mr. Trebilcock's Opening Brief.

CONCLUSION

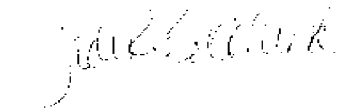
Mrs. Trebilcock's convictions were based (in part) on improper opinion testimony rather than an independent determination of the facts. Furthermore, the facts were impermissibly determined by a judge rather than a jury, in contravention of the state constitutional requirement that felony cases be decided by a jury. Finally, her jury waiver was invalid because the record does not establish that it was knowing, intelligent, and voluntary. Her convictions must be reversed and the case remanded for a new trial.

In the alternative, Mrs. Trebilcock's exceptional sentence must be vacated and the case remanded for sentencing within the standard range. First, she did not waive her right to a jury determination of aggravating factors. Second, the judge improperly considered aggravating factors that were statutorily inapplicable and that inhered in the charged crime. Third, the judge impermissibly relied on his own religious beliefs in setting the term of the sentence.

Finally, as outlined in Mr. Trebilcock's Opening Brief, the evidence was insufficient for conviction of third-degree criminal mistreatment, as alleged in count three. The conviction must be reversed and the charge dismissed with prejudice.

Respectfully submitted on June 4, 2013,

BACKLUND AND MISTRY



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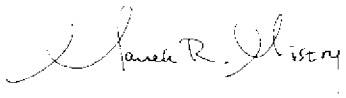

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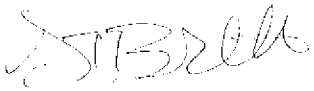

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Amended Opening Brief, postage prepaid, to:

Rebecca Trebilcock, DOC #361389
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
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and to

Lisa E. Tabbut, Attorney for Codefendant
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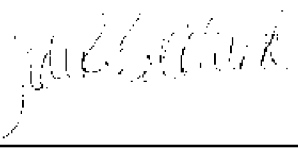
I filed the Appellant's Amended Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 4, 2013.



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BACKLUND & MISTRY

June 04, 2013 - 4:08 PM

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