

COURT OF APPEALS
WASHINGTON

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No. 36757-2-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH G. COLEMAN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Kitty-Ann Van Doorninck (trial) and the Honorables Bryan
Chushcoff, Frank Cuthbertson, Katherine Stolz and Lisa Worswick
(motions), Judges

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to accept the jury's verdict of "no" on the special verdict for the aggravating factor of sexual motivation and in ordering the jury to reconsider that verdict.

2. Coleman's state and federal rights to a fair trial before an impartial jury were violated when the court improperly coerced a special verdict.

3. Appellant assigns error to the portion of Finding VI of the findings in support of the exceptional sentence, which provided:

The Court instructed the jury to continue its deliberations. The Court did not coerce the jury to reach a unanimous verdict.

CP 164.¹

4. Appellant assigns error to the court's Conclusions of Law in support of the exceptional sentence, in their entirety. CP 166-68.

5. The sentencing court violated Coleman's state and federal rights to trial by jury under Blakely v. Washington² and the relevant sentencing statutes in entering the indeterminate and exceptional sentences. Appellant assigns error to Findings VII, VII and a portion of Finding X of the court's Findings and Conclusions on the Exceptional Sentence, which provide, as follows:

VII.

The Court also finds that there are three aggravating circumstances in this case that justifies [sp] an exceptional sentence above the standard range. The aggravating circumstances

¹A copy of the findings and conclusions is attached hereto as Appendix A.

²Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004).

found by the court are the same as those found by the jury beyond a reasonable doubt: that the defendant committed the crime with sexual motivation, that the commission of the crime involved an invasion of the victim's privacy and that the victim was present when the crime was committed.

VIII.

The Court finds that there was more than one victim in this case, E.M. and Hollie Mitchell. Both E.M. and Hollie Mitchell were present at the time of the commission of the crime and the defendant invaded the privacy of both E.M. and Hollie Mitchell.

...

X.

Considering the purposes of the Sentencing Reform Act, the aggravating circumstance found by the jury beyond a reasonable doubt, and the same aggravating circumstances found by the court, there is a substantial and compelling reason justifying an exceptional sentence.

CP 164-65. Appellant also assigns error to the court's oral finding that "[t]here's an invasion of privacy just where he was touching her" that was "not required" for the assault or burglary. 13RP 12.

6. Coleman's state and federal due process rights to notice and to trial by jury were violated at sentencing.

7. The aggravating factor of "invasion of privacy" did not apply.

8. The prosecutor committed misconduct and improperly reduced his constitutionally mandated burden of proof in closing.

9. Appellant's state and federal rights to effective assistance of counsel under the Sixth Amendment and Article I, § 22 were violated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Coleman was accused of, *inter alia*, committing the crime

4. An aggravating factor must distinguish the current case from others of the same type and must not be based on conduct which the Legislature necessarily considered in setting the presumptive range. Did the court err in relying on the aggravating factor of “violation of a zone of privacy” when caselaw establishes that such a violation inheres in and cannot be an aggravating factor for burglary?

5. In closing argument, the prosecutor told the jury it should find Coleman guilty if it had the same degree of certainty in guilt as it would need in order to feel safe crossing a road when the “walk” light was in their favor. Courts across the country have condemned this same type of comparison as highly improper, noting that it reduces the prosecution’s burden to more akin to a “preponderance of the evidence” standard of proof.

Is reversal required for this serious violation of Coleman’s right to have the state prove his guilt beyond a reasonable doubt? Further, was counsel ineffective in his handling of this misconduct?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant, Joseph G. Coleman, was charged by Amended Information with First-Degree Burglary, aggravated by factors of “sexual motivation,” “invasion of the victim’s privacy,” and that the offense was a burglary committed while the victim was present. CP 6; RCW 9.94A.030, RCW 9.94A.533, 9.94A.535(3)(f), RCW 9.94A.535(3)(p), RCW 9.94A.535(3)(u), RCW 9A.52.020(1)(b).

Pretrial hearings and motions were held before the Honorable

Judge Lisa Worswick on November 7 and December 6, 2006, the Honorable Judge Katherine Stolz on January 31, March 15 and 27 and April 9, 2007, and the Honorable Judge Kitty-Ann Van Doorninck on April 17 and 26, May 31 and June 27, 2007, and trial was held before Judge Van Doorninck on July 5, 9-10, 2007.³

On July 10, 2007, the jury initially found Coleman guilty of the burglary and also found that two of the three aggravating factors had been met. TRP 119-32; CP 105-107.⁴ After being ordered to redeliberate, they then found the third factor had also been met. TRP 130-33; CP 106. Sentencing was held before Judge Van Doorninck on September 5 and 6, 2007, after which the judge imposed an indeterminate sentence based on the sexual motivation finding, as well as an exceptional term of community custody based on aggravating factors. TRP 130-33, 12 RP; 13RP; CP 122-36, 162-68. The court also denied a motion to set aside the sexual motivation factor. 13RP; CP 162-68. Findings and conclusions on the exceptional sentence and on the denial of the motion were entered by Judge Van Doorninck on November 9, 2007. 14RP 1-4; CP 162-68.

Coleman appealed, and this pleading follows. See CP 142-158.

2. Overview of relevant facts⁵

At about 4 in the morning on June 5, 2006, E.M., then 16 years old, was asleep in her room when she was awakened by feeling something

³Explanation of citations to the record is contained in Appendix E hereto.

⁴A copy of the special verdict for is attached hereto as Appendix B.

⁵More detailed discussion of facts relevant to issues on appeal is contained in each argument section, *infra*.

on her face. TRP 39-40. Although her television was on, E.M. said she could hear “like, a heavy breathing.” TRP 41. It was not a panting or a sound like when someone was out of breath but just an “all-the-way-in breathing.” TRP 52. E.M. froze, lying there on her side, and felt something come down on her face and go around the rim of her ear and down. TRP 41. At that point, she “freaked out,” jumping up and turning around as fast as she could. TRP 41. Leaning in her window was a man. TRP 41.

When E.M. jumped up, the man jumped back. TRP 41. E.M. started to yell at the man, saying “holy hell” and demanding to know what the amn was doing. TRP 55, 41. The man apologized and said he was at the wrong window. TRP 41. E.M. asked who the man was looking for and he said, “Tina Johnson.” TRP 41. E.M. said there was no one by that name living anywhere in the cul-de-sac and the man then said, “okay, well, I’m sorry.” TPR 41.

At that point, E.M. told the man, “you need to leave.” TRP 42. E.M. said the man then asked her how old she was. TRP 42. She said it did not matter how old she was, he just needed to leave. TRP 42. The man said “okay” but came forward a small step, asking if E.M. was going to tell anyone what had happened. TRP 42, 58. E.M. said, “no, not if you leave.” TRP 42. Before leaving, the man again asked E.M. not to tell anyone and she again promised not to if he left right away. TRP 42. The man said, “okay,” shut the window and walked away. TRP 42.

After a moment, E.M. got up and ran to her mother’s room to tell her what had happened. TRP 42.

E.M. said that, when she went to bed, the window was cracked open a little with her fan against the opening of it. TRP 44. When she woke up, the window was completely open, the fan moved in the window and other items like a music box and a picture frame appeared pushed to one side. TRP 45. E.M. was wearing shorts, a tank top and a bra in bed. TRP 50-51.

A little later, E.M. saw what she thought was the same guy on the street, a street away. TRP 59-50. She later picked that man, identified as Joseph Coleman, out of a photographic montage. TRP 63-65; 11RP 18-19. Officers went to Coleman's home on August 17, 2006, intending to arrest him. TRP 91-94. Coleman was cooperative and spoke with the police. TRP 91-93. When asked about the incident, Coleman initially denied any involvement. TRP 94-95; 11RP 19-21. After an officer told him that E.M. had identified him as the suspect, Coleman was arrested. TRP 94-95. At that point, Coleman started crying and apologizing, saying he had reached in and touched E.M. and was very sorry. TRP 96; 11RP 19-20. In a later statement, he said, *inter alia*, he was on a regular walk around the neighborhood when it happened. TRP 96. He said he had seen and been interested Hollie Mitchell, E.M.'s mom, for several years, had wanted to meet her and had thought it was her in the window. TRP 100-104.

Hollie Mitchell, E.M.'s mother, said she did not know Coleman before the incident and he had never tried to introduce himself to her. TRP 69-72.

Fingerprints lifted at the home did not match those of Mr.

Coleman. 11RP 10. There was no “biological evidence” gathered or even suspected to exist at the crime scene. 11RP 12, 27. A Tacoma Police Department detective testified that such would be able to indicate whether someone left semen or sperm at a crime scene, but there was nothing indicating that the man was masturbating or that there was any ejaculation involved, regardless of the claim of “heavy breathing.” 11RP 27-30.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO ACCEPT THE JURY’S VERDICT AND VIOLATED APPELLANT’S CONSTITUTIONAL RIGHTS TO TRIAL BY A FAIR AND IMPARTIAL JURY

a. Summary of facts/argument

When the jury first returned with its verdicts, it had found Mr. Coleman guilty of the burglary and two of the aggravating factors but had found “no” for the special verdict on sexual motivation. The trial court subsequently ordered the jury to redeliberate and, ultimately, they changed their “no” verdict to a “yes.” The court relied on that changed verdict in imposing both an indeterminate sentence and an exceptional sentence.

Reversal is required, because the trial court did not have authority to refuse to accept the verdict and order the jury to reconsider, and the court’s acts improperly coerced the jury and violated Coleman’s rights to trial before a fair and impartial jury.

b. Facts relevant to issue

In the Amended Information, the prosecution alleged that Coleman had committed the burglary with several aggravating factors, including that the burglary “included a finding of sexual motivation pursuant to

RCW 9.94A.835.” CP 6. The jury was instructed on the aggravating factors as follows, in relevant part:

In order to answer any of the questions on the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer for that specific question. If you have a reasonable doubt as to the question, you must answer “no.”

CP 93.

When they had concluded their deliberations, the jury informed the court they had verdicts. TRP 119. With the jurors back in the room, the judge read the verdicts of guilt for burglary and two of the aggravating factors. TRP 119. For the special verdict on “sexual motivation,” however, the jurors had written “no.”⁶ TRP 120; CP 106.

Sua sponte, the court told the jury, “the verdicts need to be unanimous.” TRP 120. The court told jurors it was going to ask some questions and jurors should raise their right hands if the answer was “yes.” TRP 120. The court then said it needed to “make sure all 12 of you agreed to the answers” in the verdict forms. TRP 120-21. It asked the jurors to indicate their “personal vote” and 12 jurors raised their hands “yes” for the findings of guilt for the burglary and two of the special verdicts. TRP 120-21. The court went on:

[COURT]: Then, as to the Special Verdict Form, Question 1, the defendant committed the crime of Burglary With Sexual Motivation, if the answer is “no,” please raise your hand.

THE JUROR: Uh - -

THE COURT: That’s okay. I see two hands are raised. We’ll just keep going.

⁶The propriety of the other factors is discussed in more detail, *infra*. TRP 120; CP 6.

TRP 121. After finishing the poll, the court had the jury taken back to the jury deliberation room, then told counsel:

Clearly, on the guilty finding, it was very unclear as to the first answer. The answer “no,” it looks to me like two of them said “yes,” that that was their vote. I don’t know if you want to do something else with that. It looks more like they were hung on Question No. 1, than there was unanimous response to that.

TRP 121-22.

At that point, the prosecutor noted the jurors were only “out” for two hours before they rendered their verdicts. TRP 122. Characterizing the jurors as “hung” on the sexual motivation special verdict, the prosecutor argued that it would be improper to accept that verdict and suggested the court should order jurors to “continue to deliberate.” TRP 122-24.

The court questioned whether it had clearly instructed the jurors that they needed to be “unanimous about the special verdicts.” TRP 122. The judge reread instruction 21⁷, the instruction on the special verdict, and then said she thought it was “a little unclear” that they had to be unanimous not only to answer “yes” but also to answer “no.” TRP 123.

Coleman objected that the jury had filled out the special verdict form pursuant to the instruction, which told the jurors only that they had to be unanimous to answer “yes” but should answer “no” if they had a reasonable doubt about the verdict. TRP 125. He argued that the verdict should be honored and accepted, especially because the prosecution had drafted the special verdict form and any ambiguity should thus be

⁷A copy of Instruction 21 is attached hereto as Appendix C.

interpreted against the state. TRP 125-28.

The court decided to give “[t]he standard hung jury question” to the jury foreperson. TRP 127. The court was concerned that the aggravating factor of sexual motivation should be available to be “re-tried” if the conviction was reversed on appeal. TRP 129. When the jurors returned to the courtroom, the court said, “I think, maybe, I was talking too fast, so I want to ask the one question again, and then I may have some follow-up questions.” TRP 129-30. The court then inquired about the sexual motivation verdict, saying,

Was that your personal vote? If you would raise your hand if that was your personal vote; if your personal vote was ‘no’ to sexual motivation. I see three hands now. Okay. Thank you. Four hands. A question about whether there’s a fourth hand.

TRP 130.

The court went on to address the presiding juror:

I’m going to ask you a question, but I only want you to answer “yes” or “no.” I’m going to tell you what the question is, then I’m going to ask you the question, so you can think about it before you answer.

The question is going to be: Is there a reasonable probability of the jury reaching an agreement, within a reasonable time, as to the Special Verdict Form, Question 1, regarding sexual motivation.

So I’m going to ask the question, and I only want you to answer “yes” or “no.” Not another word. Okay?

So the question is: Within a reasonable time - - no, I’m sorry. I want to make sure I word it exactly right. Is there a reasonable probability of the jury reaching an agreement, a unanimous agreement, within a reasonable time, as to the special verdict form question regarding sexual motivation: “Yes” or “no” - -

THE JUROR: I almost can’t answer that “yes” or “no.”
We did agree- -

THE COURT: No - -

THE JUROR: Yes, I guess - -

THE COURT: Let me just carefully word the question again. Is there a reasonable probability of the jury reaching a unanimous agreement within a reasonable time - - you can't talk to each other - - within a reasonable time, as to the special verdict form regarding sexual motivation?

THE JUROR: Yes.

TRP 131.

At that point, the court ordered the jury back to the jury room to reconsider their verdict on the aggravating factor of sexual motivation.

TRP 132. When counsel indicated an intent to leave the courtroom, the court asked counsel to wait five minutes, which it said was a "reasonable period of time" for the jury to reconsider. TRP 132. 18 minutes later, the jury was back in the courtroom and this time the special verdict form for the factor of sexual motivation now read "yes." TRP 132; CP 106. The court asked the jurors about their "personal vote," and all 12 jurors raised their hands to indicate they agreed. TRP 132-33. The court then accepted the amended special verdict. TRP 133.

Before sentencing, Coleman moved to set aside the "sexual motivation" special verdict, arguing that the court had erred in ordering the jury to reconsider its verdict on that aggravating factor. CP 108-16. He cited State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), noting that the Supreme Court had rejected the idea that the court was authorized to order such reconsideration where, as here, the jury was not "deadlocked." CP 106-116. Coleman also argued that the trial court's actions here were improperly coercive and violated Coleman's constitutional rights to jury

trial and a fair and impartial jury. CP 108-116; 13RP 3-4. He was also concerned that the court's instructions said that the jury had to be unanimous to answer "yes" but said nothing about being unanimous if their answer was "no." 12RP 8. Because the court had specifically told the jury it had to be unanimous, counsel noted, the jury was effectively told they had to find "yes," because under the instructions, "the only unanimity that they could reach under the jury instruction was a 'yes.'" 12RP 11.

In ruling, the trial court stated that it found Goldberg puzzling in that the case seemed to go against the "general principle that verdicts in criminal cases must be unanimous." 13RP 11. The court stated its belief that it had not acted coercively. 13RP 11-12. The court also thought that the special verdict form was wrong for failing to tell the jury it needed to be unanimous to answer the special verdict "no." 13RP 11-12. The court concluded, "I'm going to find that the sexual motivation aggravating factor exists, that the jury found that unanimously." 13RP 12. Based upon that conclusion, the court entered an indeterminate sentence and an exceptional term of community custody. 13RP 13-14; CP 122-36, 162-168.

The court later entered findings in its Findings and Conclusions for Exceptional Sentence in support of its rulings. CP 162-68.

- c. The court should have accepted the jury's verdict, had no authority to order the jury to reconsider, and violated Coleman's rights to trial by a fair, impartial jury with its coercive acts

An essential part of the constitutional right to trial by jury is the right to have each juror reach a verdict "uninfluenced by factors outside

the evidence, the court's proper instructions, and the arguments of counsel." State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978); see also, State v. Ring, 52 Wn.2d 423, 428, 325 P.2d 730 (1958). As a result, the Supreme Court has recognized, the defendant has a "compelling interest" in having his guilt or innocence determined by a jury which is impartial and free from coercion. State v. Watkins, 99 Wn.2d 166, 172, 660 P.2d 1117 (1983).

Despite this interest, in cases where there is a "deadlock" and the jury is unable to return a verdict, however, the trial court has a carefully proscribed authority to attempt to avoid the cost of a retrial, provided certain requirements are met. Watkins, 99 Wn.2d at 172, 178. Under CrR 6.15(f)(2), a court with a deadlocked jury may instruct the jury further, but must not do so "in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." See Watkins, 99 Wn.2d at 175. Because of the constitutional interests involved, a trial court's intervention or instruction to a deadlocked jury is subjected to scrutiny and reversal will be required if there is a reasonably substantial possibility that the resulting verdict was improperly influenced by the court's actions. Watkins, 99 Wn.2d at 178.

The limited ability of the judge to try to prevent the cost of a retrial under CrR 6.15(f) is only applicable, however, where the jury is "deadlocked" and cannot reach a verdict. Goldberg, 149 Wn.2d at 893-95. Where the jury *has* returned a verdict, however, it is not "deadlocked" for the purposes of CrR 6.15(f). Goldberg, 149 Wn.2d at 893-95. As a result, the jury is no longer "deliberating" and the trial court does not have

authority under CrR 6.15(f) to order the jury to effectively reconsider its verdict. Id. Instead, the court is required to honor and accept the jury's decision and should discharge the jury. Id.

In this case, the trial court violated these principles. When the jury returned with its verdicts - including its verdict of "no" to the sexual motivation aggravating factor - the jury was clearly not "deadlocked." It had rendered decisions on all of the verdicts which it was given. See CP 105-107. It was not, as the trial court mistakenly found in Finding VI, still in "deliberations." See CP 164. The deliberations were over. As a result, under Goldberg, the court was required to accept and honor the jury's verdicts.

Further, under Goldberg, the court had no authority under CrR 6.15(f) to order the jury to conduct any further deliberations. The state had failed to prove to every juror, beyond a reasonable doubt, the essential elements of the sexual motivation allegation. The jury instruction had specifically told the jurors that they need not be unanimous in order to render a verdict of "no" on the allegation. CP 93. The jurors had followed that instruction and rendered their verdict and the trial court had no authority to order them to reconsider.

The trial court's failure to comply with the binding precedent of Goldberg appears to have been based upon a misunderstanding of the holding of that case and the relevant principles of law. The judge said she found Goldberg puzzling because it seemed to go against what she thought was the "general principle that verdicts in criminal cases must be unanimous." 13RP 11. But the Goldberg Court specifically considered

that constitutional principle before reaching its conclusion. 149 Wn.2d at 894-95. And the court's actions in Goldberg were very similar to the court's actions here. In Goldberg, the defendant, who believed his son-in-law had molested his granddaughter, had killed the son-in-law before he was scheduled to testify in a dissolution proceeding. 149 Wn.2d at 890. The jury found the defendant guilty of first-degree murder but indicated "no" on the special verdict form which asked whether the crime was committed because of the victim's role as witness in an adjudicative proceeding. 149 Wn.2d at 891.

After the jury returned with their verdicts, the court conducted a jury poll and asked the jurors to raise their hands to indicate how many had voted "no" on the special verdict. 149 Wn.2d at 891-92. The jury was ultimately asked if they could reach a "unanimous decision" on the aggravating circumstance within a reasonable time, and they said no. 149 Wn.2d at 891-92. The court sent the jury home and had them return in the morning to deliberate again and see if they could reach "unanimity" on the aggravating factor. 149 Wn.2d at 892. After three hours of further deliberation, the jurors returned a verdict, which they said was unanimous, voting "yes" on the special verdict. 149 Wn.2d at 891-92.

In ruling that the trial court had erred, the Supreme Court specifically noted the constitutional requirement of unanimous verdicts contained in Article I, § 21 of the Washington constitution. 149 Wn.2d at 892-93. The Court nevertheless held that a jury need not be unanimous in order to find that the state had not met its burden of proving the special verdict. 149 Wn.2d at 894-95. More specifically, the Court said, the "no"

verdict did not “need to be unanimous in order to be final” under the instructions the jury was given. 149 Wn.2d at 895. Under those instructions, the jurors were specifically told they did not have to be unanimous in order to render a final special verdict. 149 Wn.2d at 892-94. As a result, the unanimous Goldberg Court concluded, the “no” was a final verdict which the trial court should have accepted. Id. The trial court had erred in failing to do so, and reversal was required. Id.

Just as in Goldberg, here, the jury instruction on the special verdict did not tell the jurors that they had to be unanimous in order to render a negative verdict for the sexual motivation aggravating factor. Instruction 21 provided, in relevant part:

In order to answer any of the questions on the special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer for that specific question. If you have a reasonable doubt as to the question, you must answer “no.”

CP 93. Just as in Goldberg, the jurors here were specifically instructed what to do if any of them had a reasonable doubt about whether the state had proven the aggravating factor - render a “no,” even if they did not all agree. Just as in Goldberg, the jurors complied with the relevant instruction and entered a complete, binding verdict. And just as in Goldberg, the trial court should have accepted the jury’s verdict once it was rendered, rather than order the jury to reconsider. Because the jury had completed their deliberations and rendered their verdict, under the plain language of CrR 6.15 and the binding authority of Goldberg, there was no authority for the court to tell the jury to set aside a verdict it had properly reached based upon the instruction given. The special verdict and

resulting sentence should therefore be reversed.

There is one difference between the verdicts rendered in Goldberg and those rendered in this case, but it is a difference which does not change the ultimate result. The special verdicts in Goldberg were rendered as part of the aggravated first-degree murder statute, which provided for the aggravation of the underlying crime if “one or more of the . . . aggravating circumstances exist[s].” RCW 10.95.020. The special verdict in this case was rendered under RCW 9.94A.537, which requires not only that the “facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt” but also that “[t]he jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory.” RCW 9.94A.537(3). Thus, the statute providing for the special verdict in this case appears to include the requirement that a jury should be unanimous in rendering its verdict on an aggravating factor.

This does not, however, change the ultimate result. Goldberg did not rely on the language of RCW 10.95.020 in reaching its conclusion. Instead, the Goldberg Court was concerned with the special verdict instruction given to the jury and whether the jury had followed that instruction in rendering its initial verdict. 149 Wn.2d at 893. Similarly, here, regardless of the language of the statute, the jury was specifically instructed that it could properly render a “no” verdict on the sexual motivation factor without being unanimous. It did so. The court’s later determination that it had improperly instructed the jury in the defendant’s favor does not justify ordering the jury to reconsider its verdict, especially under the circumstances here, which were incredibly coercive.

Indeed, the statute authorizing courts to order reconsideration of a verdict makes the error here clear. That statute provides:

When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider the verdict; and if after such reconsideration they return the same verdict it must be entered, but it shall be good cause for a new trial. *When there is a verdict of acquittal the court cannot require the jury to reconsider it.*

RCW 10.61.060 (emphasis added). RCW 10.61.060 makes it plain that a court may only request that a jury reconsider its verdict when the *jury* mistook the law, not when it was *misadvised* of the law by the court. And regardless whether the jury makes an error of law, under RCW 10.61.060, a court is strictly prohibited from ordering a jury to reconsider a verdict of acquittal, i.e., in the defendant's favor. Here, there was a verdict of acquittal for the special verdict, in the defendant's favor, and the error of law, if any, was by the court and the parties, not the jury. There was thus no authority under statute or rule for the court to order the jury to reconsider its "no" on the special verdict.

Nor did the court's concern about double jeopardy on potential retrial justify its acts. The court's declaration that the state should be allowed to resubmit the "sexual motivation" aggravating factor if there was a retrial appears to have been a concern that, if it accepted the jury's verdict of "no" on that factor, the state would later be precluded from trying to prove that factor again at any retrial. TRP 129.

That concern, however, was misplaced. There is no question that acquittal terminates jeopardy and prevents retrial. See State v. Ervin, 158 Wn.2d 746, 753, 147 P.3d 567 (2006). And if the jurors are "silent" as to

a particular verdict, there may be an implied acquittal preventing retrial based on double jeopardy principles. See Green v. United States, 355 U.S. 184, 191, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957); see, State v. Linton, 156 Wn.2d 777, 784-85, 132 P.3d 127 (2006) (majority opinion).

But there is no prohibition against retrial where the jury is not “silent” but rather disagrees and does not reach a unanimous conclusion. See State v. Davis, 190 Wash. 164, 167, 67 P.2d 894 (1937); Sylvester v. United States, 170 U.S. 262, 18 S. Ct. 580, 42 L. Ed. 2d 1029 (1898).

Where there is a disagreement which is “formally entered upon the record,” the state is free to retry a defendant on the charge for which there was no agreement. Sylvester, 170 U.S. at 269-70. This longstanding principle was reaffirmed in Ervin, in which the Court held that, where the jury was instructed to leave verdict forms blank if unable to agree on a verdict, the fact that the jurors did so was not “silence” but rather an indication of inability to agree so that “implied acquittal” did not apply and retrial did not offend double jeopardy. Ervin, 158 Wn.2d at 757.

Here, the jury instructions and verdict were sufficient for the state to prevent jeopardy from attaching to the verdict on sexual motivation. Instruction 21, the instruction telling the jury how to decide the special verdict, specifically told the jury that they had to answer “no” if they had a reasonable doubt as to the question, but did not tell them they had to be unanimous to do so. CP 93. The only “unanimity” required was to answer “yes.” CP 93.

Further, even if the court’s concern had some validity before the jury poll, the poll answered the question of whether the jury was

unanimous in answering “no.” That result was clearly on the record and available to the prosecution for use if there was any claim of double jeopardy or question on retrial. See TRP 120-31.

In any event, even if the court had been vested with the authority to order new deliberations under CrR 6.15, the statute’s language about unanimity or some concern for double jeopardy, the facts here would compel reversal. When judicial intervention in juror deliberations is authorized, it must still be limited so that it does not suggest to the jury “the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.” See Watkins, 99 Wn.2d at 175. On review, this Court examines whether the court’s intervention “tended to and most probably did influence the minority jurors to vote with the majority.” Boogard, 90 Wn.2d at 740. If there is a “reasonably substantial possibility that the verdict was improperly influenced by the trial court’s intervention,” reversal is required. Watkins, 99 Wn.2d at 177-78.

A court’s intervention has the prohibited effect if the court gives instructions which suggest that a juror “who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict, regardless of how “subtly the suggestion may be expressed.” Boogard, 90 Wn.2d at 736. Thus, in Boogard, such improper coercion occurred after the jurors had been deliberating for a long time when the court asked the bailiff to check with jurors about how the vote stood. 90 Wn.2d at 735. The court was told it was “10 to 2.” 90 Wn.2d at 735. Because the next day was a holiday and it was already 9:30 in the evening,

the court called the jurors into the courtroom, asked the foreman about the history of the vote, how long it had stood at 10 to 2, and whether he thought the jury could reach unanimity within a half an hour. 90 Wn.2d at 735. When the foreperson said yes, the court then asked the jurors individually, and all but one said they could reach a verdict within a half hour. Id. The court ordered the jury to go back to deliberate for a half hour. Id. After they did so, they returned with a verdict of guilty. Id.

Because the trial court was aware of the vote and set a time during which it expected deliberations, the Supreme Court held, the court violated the defendant's rights to a fair, unbiased jury. Id. The court's actions, while not intended to be coercive, still "unavoidably tended to suggest to minority jurors that they should 'give in' for the sake of that goal which the judge obviously deemed desirable - namely, a verdict within a half hour." Id.

Similarly, in Iverson v. Pacific Am. Fisheries, 73 Wn.2d 973, 442 P.2d 243 (1968), the Supreme Court found improper coercion when the jury was aware that the trial court knew the nature of individual juror's votes when it ordered further deliberation. The jury had deliberated for 8 hours and then sent a note to the judge saying they were deadlocked, with the vote standing at 9 to 3 for the defendant. 73 Wn.2d at 973. The court then gave the jurors a standard instruction telling them the verdict had to be agreed upon by 10 jurors (as required in that civil case) and that they should not surrender their convictions but should try to "harmonize" their verdict. 78 Wn.2d at 973. 10 minutes after that instruction was given, the jurors returned a verdict of 11 to 1, sufficient for the verdict to stand. Id.

In finding that the court's further instruction had been improperly coercive, the Court said:

the immediate return of the jury, after they had been instructed to harmonize their differences and reach a verdict if possible, when considered in conjunction with the jurors' knowledge that the trial court had been informed they stood 9 to 3 for the defendant, *represents almost conclusive evidence that two jurors were pressured into a change of position.*

Iverson, 73 Wn.2d at 975 (emphasis added); see also, Watkins, 99 Wn.2d at 175 (noting that it is prohibited for a court to instruct a deliberating jury that there is a need for agreement, the consequences of no agreement, or the length of time the jury will be required to deliberate).

Here, the facts were even more egregious than in Boogard and Iverson. Not only did the judge set a time limit of a "reasonable time," the jurors were told they should "come to agreement" and had to be unanimous within such a time, when they knew the court was aware that only a few of them were voting "no" but the majority were saying "yes." Even worse, the jurors had been specifically told in Instruction 21 that they only had to be unanimous if they were going to render a vote of "yes" on the special verdict, not a "no." CP 93. And it is certainly telling that, like in Iverson, the jurors came back almost immediately with their new verdict, not even taking twenty minutes to change the result.

There can be no question here that the court's "intervention," even if it had been authorized, was improperly coercive because it "tended to and most probably did influence the minority jurors to vote with the majority" for the sake of the unanimous verdict the court told them it wanted. See Boogard, 90 Wn.2d at 740. Even if the court's actions had

been proper and the court had been authorized to order reconsideration of the special verdict, there is more than a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention." Reversal of the special verdict, the indeterminate sentence, and the exceptional sentence based upon this aggravating factor is required. See Watkins, 99 Wn.2d at 177-78.

In response, the prosecution may attempt to rely on *dicta* in a recent decision in Division Three, State v. Bashaw, 144 Wn. App. 196, 182 P.3d 451 (2008), in which a Petition for Review is pending.⁸ This Court should reject any such effort. Aside from the fact that *dicta* is not precedential, the facts in Bashaw are sufficiently different so as to completely distinguish that case from this one. See Plankel v. Plankel, 68 Wn. App. 89, 92, 841 P.2d 1309 (1992) (re: *dicta*). In Bashaw the jury was specifically told, without defense objection, that it had to be unanimous to return a verdict of either "yes" or "no" on a special verdict. Bashaw, 144 Wn. App. at 201. The jury indicated "yes" on the special verdict and, when polled, confirmed that its conclusion was unanimous. 144 Wn. App. at 201-202. For the first time on appeal, the defendant challenged the special verdict instruction, arguing that the instruction was improper because it required unanimity for either a "yes" or a "no." Id. The defendant's position was that Goldberg mandates that a jury enter a "no" if they are not unanimous and the instruction requiring unanimity for a "no" was therefore wrong. 144 Wn. App. at 201-202.

⁸No. 81633-6; scheduled to be considered 2/3/09. <https://acordsweb.courts.wa.gov> (August 11, 2008).

In ruling, Division Three said that it did not believe the Goldberg holding applied and that, even if it did, any error was harmless. 144 Wn. App. at 201-202. In *dicta*, Division Three went on to say that it did not believe Goldberg meant to suggest that it was improper to tell the jury it had to be unanimous in order to render a “no” special verdict. 144 Wn. App. at 201-203. In any event, the Court said, “Ms. Bashaw has no basis for challenge” because “[t]he juror was polled, at her request, and unanimity was confirmed,” so any error was harmless. 144 Wn. App. at 203.

Thus, Bashaw involved a situation far different than that present here. Bashaw did not involve a jury which had rendered a verdict it was ordered to reconsider. It did not involve a judge who was aware of the vote of the jury and told the jurors they had to be unanimous and reach agreement within a “reasonable time.” Instead, Bashaw involved a challenge to a jury instruction, raised for the first time on appeal, and the separate question of whether it is proper to tell the jury that it must be unanimous in order to render either a “yes” or “no” on an aggravating factor. Bashaw does not assist the prosecution here.

The prosecution may also attempt to convince the Court that the other instructions given in the case somehow affect the analysis this Court should apply. There is no dispute that instructions regarding the guilt phase said that the jury should “deliberate in an effort to reach a unanimous verdict” (Instruction 19) (CP 90), and provided, “[b]ecause this is a criminal case, each of you must agree for you to return a verdict”

(Instruction 20). CP 91-92.⁹ But both of those instructions referred to the burglary charge or the “verdict,” not the special verdict. CP 90-92. In contrast, Instruction 21 specifically referred to the “special verdict” only. CP 93. And the jury was instructed to reach the instructions on the special verdict only if they had already completed the guilt phase and found guilt for the burglary. CP 93. Because a special verdict is “a separate finding made after the guilt-determining stage of the jury’s deliberations,” a court cannot assume that instructions given for the guilt phase will be applied by the jury to the special finding phase. See State v. Tongate, 93 Wn.2d 751, 756, 613 P.2d 121 (1980). Instruction 21, the instruction specific to the special verdict, told the jury it did not need to be unanimous in order to render a verdict of “no,” the fact that guilt phase instructions indicated unanimity was required for the burglary charge is of no moment to the analysis of the errors here.

The right to an uncoerced jury is, in plain terms, the right to a fair trial. See Watkins, 99 Wn.2d at 176. Mr. Coleman was denied that right when the trial court first refused to accept the jury’s verdict, then instructed the jury to effectively reconsider their decision in such a way as to plainly coerce the result. This Court should reverse.

⁹Copies of Instructions 19 and 20 are attached hereto as Appendix D.

2. THE SENTENCING COURT ERRED AND VIOLATED COLEMAN'S SIXTH AMENDMENT AND ARTICLE 1, §§21 AND 22 RIGHTS TO TRIAL BY JURY AND HIS RIGHTS TO CONSTITUTIONALLY SUFFICIENT NOTICE IN IMPOSING THE EXCEPTIONAL SENTENCE AND NOT ALL THE AGGRAVATING FACTORS APPLIED

a. Relevant facts

In the Amended Information, the prosecution charged Coleman with having committed the burglary with the aggravating factors of 1) "a finding of sexual motivation," 2) that "the offense involved an invasion of the victim's privacy," and 3) that "the current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed." CP 6. The only victim identified was "E.M." CP 6.

At trial, Coleman argued, *inter alia*, that the "invasion of privacy" factor was "inherent" in the charge of first-degree burglary and thus did not support imposition of an exceptional sentence. TRP 113-14. He reiterated this argument at sentencing. 12RP 12-13. In response, the prosecutor argued that the trial court could "conclude on its own" based on the individual facts that "some Burglary in the First Degree cases are more appropriate for a zone of privacy exceptional sentence." 12RP 13-14.

After the sentencing was set over a day, the prosecutor proposed that the court could rely on the invasion of the privacy not only of E.M. but also of Hollie Mitchell, the mother, in imposing an exceptional sentence. 13RP 9. Coleman objected that he had only been charged with the aggravating factors in relation to E.M., not Hollie Mitchell, and imposing an exceptional sentence based on Hollie Mitchell as a victim

would violate his rights to notice. 13RP 9-10.

In ruling, the trial court made the factual finding that Coleman's touching E.M. through the window was an aggravating factor because such touching was "not required for the assault" and "not required for the burglary." 13RP 12. The court acknowledged that it did not know whether the prosecution had charged the case with Hollie Mitchell, E.M.'s mother, named as a victim, but nevertheless found that Hollie was a "victim" who was "present" during the burglary. 13RP 12. The court then relied on that finding in concluding that the "victim's presence during a burglary" aggravating factor applied. 13RP 12. The court imposed an exceptional term of community custody (for life), stating it did so based upon each of the aggravating factors independently. 13RP 13-14.

The court's written findings reflected its decision to make factual findings on its own, as follows:

VII.

The Court also finds that there are three aggravating circumstances in this case that justifies [sp] an exceptional sentence above the standard range. The aggravating circumstances found by the court are the same as those found by the jury beyond a reasonable doubt: that the defendant committed the crime with sexual motivation, that the commission of the crime involved an invasion of the victim's privacy and that the victim was present when the crime was committed.

VIII.

The Court finds that there was more than one victim in this case, E.M. and Hollie Mitchell. Both E.M. and Hollie Mitchell were present at the time of the commission of the crime and the defendant invaded the privacy of both E.M. and Hollie Mitchell.

CP 164. The court's conclusions of law included the conclusion, in Finding X, that the "aggravating circumstances found by the court"

supported the conclusion there were “substantial and compelling reason[] justifying an exceptional sentence,” and in Conclusion IV that the substantial and compelling reasons justifying the sentence included the “aggravating circumstances . . . found by the court in the Findings of Fact above.” CP 165, 167.

- b. The court violated Coleman’s 6th Amendment and Article I, § 21 and 22 rights in finding “facts” and relying on them to impose an exceptional sentence

In Blakely, supra, the highest Court in this country held that a defendant’s rights to trial by jury and proof beyond a reasonable doubt are violated when a judge makes factual findings regarding “aggravating factors” by a preponderance of the evidence, then relies on those findings in exceeding the maximum sentence which could have been imposed based on just the jury’s verdict. Blakely, 542 U.S. at 311-14. Instead, a defendant is constitutionally entitled to have every fact upon which a court relies in imposing an exceptional sentence found by a jury and proved beyond a reasonable doubt. Id. Blakely is the law of the land and applies to all cases in Washington. See State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). In addition, the Washington constitutional provisions on the right to trial by jury and proof beyond a reasonable doubt are violated whenever the similar federal rights are violated. See id.

Those constitutional mandates, and Coleman’s state and federal rights to trial by jury, were violated here, as were the relevant sentencing statutes. Taking the last issue first, the Washington Legislature has amended the sentencing statutes several times in an effort to comply with the mandates of Blakely. The amendments applicable to this case

occurred in 2005 although, as a practical matter, none of them were changed with 2007 amendments to the same scheme. See RCW 9.94A.345 (requiring that a sentence “shall be determined in accordance with the law in effect when the current offense was committed”); CP 6 (crime occurred June 5, 2006); Laws of 2007, ch. 205, § 3 (2007 amendments are effective April 27, 2007). Under the law in effect when the crime was committed, former RCW 9.94A.535, a court may impose an exceptional sentence based on facts (other than the fact of a prior conviction) which are determined pursuant to RCW 9.94A.537. Former RCW 9.94A.535.

The version of RCW 9.94A.537 in effect at the time of the commission of the crime in this case provided, in relevant part:

- (2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. . .
- (3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y) shall be presented to the jury during the trial of the alleged crime[.]

Former RCW 9.94A.537 (2005). The aggravating circumstances listed in former RCW 9.94A.535(3) were the circumstances which the legislature deemed must be found by a jury, and included (f), that the “current offense included a finding of sexual motivation,” (p) that the offense “involved an invasion of the victim’s privacy,” and (u) that the “current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.” Former RCW 9.94A.535(3)(f), (p) and (u).

Thus, under the relevant law for this case (and indeed the law in

effect today), the aggravating circumstances alleged in this case were required to be proved to and found by a jury, beyond a reasonable doubt. There was simply no authority for the trial court to make its own factual findings regarding any of the alleged aggravating factors, and to then rely on those findings as justification for the sentence in this case.

Nor was there authority for the trial court to make up its own aggravating factor that reaching through the window and touching E.M.'s face was not "required" to commit the crimes charged. 13RP 12. Former RCW 9.94A.535 provides the exclusive list of the aggravating circumstances upon which a trial court may rely in imposing an exceptional sentence *without* a finding of act by a jury, as follows: (a) the defendant and the state stipulate that it would serve the interests of justice and the court makes certain findings on that, (b) there is prior unscored criminal history and the court makes a specific finding about the effect of that, (c) there are multiple current offenses and some offenses would go unpunished, and (d) there is some criminal history omitted from the offender score calculation which makes a standard range sentence clearly to lenient. Former RCW 9.94A.535(2)(a), (b), (c) and (d). Further, those factors, and the factors which are to be found by the jury under subsection (3) of former RCW 9.94A.535, are the "exclusive list of facts that can support a sentence above the standard range." Former RCW 9.94A.535(3); see State v. Vance, 142 Wn. App. 398, 408, 174 P.3d 697 (2008).

Here, in deciding to impose the exceptional sentence on the burglary, the sentencing court made and relied on its own factual findings

that the “touching” through the window was not “necessary” in order to commit burglary and assault. 13RP 12. The court also made its own findings that Hollie Mitchell was also a “victim,” was also “present” at the time of the crime and also had her privacy violated. 13RP 12; CP 164. And the court specifically made and relied on its own factual findings about the existence of each of the charged aggravating factors, finding that the crime was committed with sexual motivation, that E.M.’s “zone of privacy” was violated, and that E.M. was present in the home when the burglary occurred. CP 164. The court then relied on those findings in increasing Coleman’s sentence. CP 164-67.

At the outset, the trial court’s insistence on making its own factual findings is extremely troubling. It has now been several years since Blakely was decided and the highest Court in this state has made it clear that a trial court violates a defendant’s important, substantial constitutional rights by making their own independent factual findings and increasing a sentence based upon those findings. State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), overruled in part on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Yet the trial court in this case specifically did just that when it found the “presence” of the aggravating factors. See e.g., State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) (pre-Blakely case stating that the presence of such factors is a “factual determination[]”).

Further, as noted above, there was absolutely no statutory authority for the court to make *any* of the findings it made. The aggravating factors actually charged are explicitly required to be found by the jury under

former RCW 9.94A.535 and former RCW 9.94A.537. The only aggravating factors submitted to the jury were those involving E.M., the only named victim. See CP 6; CP 105-107. State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008).

In addition, there is *no* aggravating factor allowing a court to increase a defendant's sentence because the crime involved conduct (here, touching through the window) which was not "*required*" in order to commit the crime. Former RCW 9.94A.535 and former RCW 9.94A.537. It is impermissible for a court to rely on an aggravating circumstance which is not contained in the exclusive list of former RCW 9.94A.535. See Vance, 142 Wn. App. at 408. And to the extent the court was relying on its facts about what was "required" to commit the crime to find an invasion of privacy, that, too, violated Coleman's rights.¹⁰

It may be that the court's reference to acts which are not "required" to commit the charged crimes was the court's attempt to state that there were "substantial and compelling reasons justifying an exceptional sentence," a conclusion the court is permitted - indeed, required - to make. Former RCW 9.94A.535. But even in that instance, the court's focus was wrong. An exceptional sentence is not justified simply because there was conduct which was not required in order to commit the *minimum* version of the charged crime. See e.g., State v. Jeannotte, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997); State v. Nelson, 108 Wn.2d 491, 501, 740 P.2d 835 (1987). To justify an exceptional sentence, the crime must be

¹⁰That factor was also legally improper in this case. See infra.

distinguished from the average crime in the same category. See Grewe, 117 Wn.2d at 218. The facts of the crime must be more egregious than typical, not simply greater than the minimum required to commit the offense. See id. Thus, in State v. Cardenas, 129 Wn.2d 1, 8-9, 914 P.2d 57 (1996), although there were multiple, severe injuries, an exceptional sentence could not be upheld because such injuries were “often” the result of the crime of vehicular assault and thus did not “distinguish the crime from the typical vehicular assault” sufficient to justify the exceptional sentence.

In response, the prosecution may argue that the court’s making factual findings on the charged aggravating factors involving E.M. as the victim was “harmless,” because the jury also made similar findings. At first glance, it may seem so. But the fact remains that the court made factual findings to support an exceptional sentence nearly four years after the highest court in this country established that to do so was a clear violation of a defendant’s fundamental constitutional rights. Further, any argument of harmlessness for the findings the court made concurrent to the jury’s findings does not address the other findings the court made and relied on - that Hollie Mitchell was also a “victim,” that her zone of privacy was also violated, that she was a victim of the burglary and was present in the house at the time the burglary was committed, and that touching through the window was not “necessary” to commit the charged crimes.

The Supreme Court has recognized that the right to jury trial is “no mere procedural formality, but a fundamental reservation of power in our

constitutional structure.” State v. Kirkman, 159 Wn.2d 918, 938, 155 P.3d 125 (2007) (quoting, State v. Evans, 154 Wn.2d 438, 445, 114 P.3d 627 (2005)). This trial court violated the mandatory provisions of the relevant sentencing statutes, went outside its authority, and violated Coleman’s state and federal rights to trial by jury under Blakely. This Court should not allow such violations to go unredressed, and should reverse.

- c. Coleman’s rights to constitutionally sufficient notice and trial by jury were also violated by the court’s reliance on facts neither charged nor proven to the jury

The court’s findings regarding Hollie Mitchell and whether the touching through the window was “necessary” also violated Coleman’s fundamental due process rights to notice and an opportunity to defend, as well as the relevant sentencing statutes. Both the state and federal due process clauses mandate that the accused shall be informed of the charges against him. Recuenco, 163 Wn.2d at 436 n. 7, 440; Sixth Amend., Fourteenth Amend.; Art. I, §§ 3, 22. These rights ensure that a defendant may be able to “prepare and mount a defense at trial.” Recuenco, 163 Wn.2d at 440. And to be able to so prepare, the notice “must be logically given at some point prior to the opening statements of the trial.” 163 Wn.2d at 441.

The constitutional rights to notice are also enshrined in the relevant sentencing statute. Former RCW 9.94A.537 (2005) required the prosecution to give notice prior to trial of the specific “aggravating circumstances upon which the requested sentence will be based.” Put another way, the prosecution is required to “set out” any aggravating

factors upon which it is going to rely, prior to trial. State v. Bobenhouse, 143 Wn. App. 315, 331, 177 P.3d 209 (2008). This requirement makes sense because, under former RCW 9.94A.537(3), the prosecution's evidence to support the aggravating factors must be submitted during the trial on guilt. Without adequate notice of the aggravating circumstances upon which the state intends to rely, there is no way for a defendant to present a defense to those circumstances at trial.

In this case, in addition to violating Coleman's rights under Blakely and the sentencing statutes requiring aggravating circumstances to be proven and submitted to the jury, the court's reliance on Hollie Mitchell as a victim whose presence supported the "presence while the burglary occurred" aggravating factor and whose privacy was violated for the "zone of privacy violation" factor, as well as its reliance on the "touching through the window not necessary" factor all violated the constitutional and statutory requirements of notice. The only aggravating factors charged here specifically referred back to E.M., as follows:

I. .do accuse JOSEPH GEORGE COLEMAN of the crime of BURGLARY IN THE FIRST DEGREE, committed as follows:

That JOSEPH GEORGE COLEMAN, . . .on or about the 5th day of June, 2006, did unlawfully and feloniously, with intent to commit a crime against a person or property therein, enter or remain unlawfully in a building, located at 8122-109th Street East, Puyallup, WA, and in entering or while in such building or in immediate flight therefrom, the defendant or another participant in the crime did intentionally assault E.M., a person therein . . .with sexual motivation. . .and the crime was aggravating by the following circumstances: . . .the current offense involved a finding of sexual motivation,. . .the offense involved an invasion of the victim's privacy, and/or. . .the current offense was a burglary and the victim of the burglary was present in the building or residence when the crime was committed[.]

CP 6. Nothing in those charges told Coleman the state would ask for an exceptional sentence based on the fact that the conduct in this case was not “necessary” to commit the charged crimes. Nothing in those charges told Coleman that the prosecution would ask for an exceptional sentence based on Hollie as a “victim” whose privacy was invaded or whose presence aggravated the crime.

Further, the only “victim” identified for the jury for whom the aggravating factors could be found was E.M. CP 68-1027. The jury was never asked to find if Hollie Mitchell’s “zone of privacy” was violated by the burglary and assault on her daughter. See CP 68-107. It was never asked to decide whether, as a factual matter, it believed the state had proven beyond a reasonable doubt that Hollie Mitchell was also present when the burglary occurred. See CP 68-107. And it was certainly never asked anything about whether the “touching” was part and parcel of a burglary with an underlying assault, rather than being “unnecessary” to commit the crimes. CP 105-107.

In response, the prosecution may attempt to rely on State v. Berrier, 143 Wn. App. 547, 178 P.3d 1064 (2008), a recent decision in which this Court held that the defendant’s constitutional rights to notice were not violated when the state gave him notice of aggravating factors by filing a separate “notice of intent to seek an exceptional sentence,” without including those factors in the information. 143 Wn. App. at 549. Any such reliance would be misplaced. Berrier involved a situation in which a defendant was actually informed of the aggravating factors before trial but who argued that notice was insufficient because the factors had not been

alleged in the information. 143 Wn. App. at 549-59. The defendant admitted he had such actual notice. 143 Wn. App. at 555-56. The Court concluded that it was not constitutionally required for the state to include aggravating factors in an information so long as it gave proper notice, which it had done by filing the “notice of intent.” 143 Wn. App. at 555-59.

Notably, Berrier was decided before Recuenco, which casts serious doubt on much of the Court’s reasoning in Berrier. See Berrier, 143 Wn. App. at 555-56 (aggravating factor which will increase a sentence is not an element of a crime); Recuenco, 163 Wn.2d at 433-36 (enhancement which will increase a sentence *is* an element of a crime and must be charged). Berrier does not assist the state here.

The aggravating factors regarding Hollie Mitchell and that the conduct was not “necessary” to commit the crime were neither charged nor submitted to the jury as required by statute and due process. This Court should so hold and should reverse.

d. The “invasion of privacy” aggravating factor did not apply as a matter of law

The exceptional sentence was also unsupported by the aggravating factor of “invasion of a zone of privacy,” because that factor did not apply. “The legal adequacy of an aggravating factor to justify a departure from the standard range is a question of law.” State v. Dunaway, 109 Wn.2d 207, 218, 743 P.2d 1237 (1988). As such, it is reviewed de novo. Id.; Grewe, 117 Wn.2d at 215.

Under RCW 9.94A.585, the reviewing court uses the same

standard of review for exceptional sentences as that which was used before former RCW 9.94A.210 was recodified into section .585. Like its predecessor statute, RCW 9.94A.585 still provides:

(5) To reverse a sentence which is outside the standard sentence range, the reviewing court must find (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585; see former RCW 9.94A.210(4) (2002) (same). Under subsection (a), there are two questions. See State v. Collicott, 118 Wn.2d 649, 662, 827 P.2d 263 (1992). The first question is factual, i.e., whether the record supports the reasons for imposing the sentence. Id., quoting, State v. Fisher, 108 Wn.2d 419, 423, 739 P.2d 683 (1987). The second question is legal and requires the reviewing court to “determine independently, as a matter of law, if the . . . reasons justify the imposition of a sentence outside the presumptive range.” Fisher, 108 Wn.2d at 423. To meet that standard, the reasons must be sufficiently “substantial and compelling” to distinguish this particular crime apart from others in the same category, and must take into account factors other than those which are necessarily considered in computing the presumptive range for the offense. See Grewe, 117 Wn.2d at 218.

The requirement that even statutorily authorized aggravating factors must take into account factors other than those considered in computing the standard range for the offense stems from the language of RCW 9.94A.585(1)(a), and has not changed despite the other changes to the sentencing scheme occasioned by the decision in Blakely. See RCW

9.94A.585(1)(a); former RCW 9.94A.535; former RCW 9.94A.537.

Invasion of a victim's "zone of privacy" inheres in the crime of burglary. State v. Lough, 70 Wn. App. 302, 336, 853 P.2d 920 (1993), affirmed, 125 Wn.2d 847, 889 P.2d 487 (1995). Because unlawful entry into the victim's home is an element of that crime, "invasion of the victim's zone of privacy cannot be used as a basis for imposition of an exceptional sentence" for a burglary offense. State v. Post, 59 Wn. App. 389, 401-402, 797 P.2d 1160 (1990), affirmed, 118 Wn.2d 596, 826 P.2d 172, 837 Wn.2d 599 (1992); see State v. Hicks, 61 Wn. App. 923, 812 P.2d 893 (1991). Put another way, such an invasion is already necessarily considered by the Legislature in computing the presumptive range for burglary. Lough, 70 Wn. App. at 336.

The court therefore erred in relying on both its own finding and the finding of the jury that there was an "invasion" of the victim's privacy, in ordering the exceptional sentence on the burglary.

3. THE PROSECUTOR COMMITTED SERIOUS,
CONSTITUTIONALLY OFFENSIVE MISCONDUCT BY
MISSTATING AND RELIEVING HIMSELF OF THE
FULL WEIGHT OF HIS CONSTITUTIONALLY
MANDATED BURDEN OF PROOF AND COUNSEL
WAS INEFFECTIVE

The correct standard of proof beyond a reasonable doubt is the "touchstone" of the criminal justice system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Correct application of the standard is in fact the "prime instrument for reducing the risk of convictions resting on factual

error.” Id. Indeed, reasonable doubt is so vital to our system that failure to properly define it and the “concomitant necessity for the state to prove each element of the crime by that standard” is not just error, it is “a grievous constitutional failure.” State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

Further, because the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, it absolutely essential to ensure that the jury is not misled as to the correct standard. See State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). That standard is so carefully defined after years of litigation that the highest Court in this state has decreed that courts must resist the “temptation to expand upon the definition of reasonable doubt” in ways which permit dilution of the prosecution’s constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

In this case, reversal is required, because the prosecutor committed serious, prejudicial and constitutionally offensive misconduct by repeatedly misstating the standard of proof beyond a reasonable doubt and thus reducing his constitutionally mandated burden of proving his case. Further, counsel was utterly ineffective in failing to attempt to correct the prosecutor’s repeated dilution of the essential standard of proof beyond a reasonable doubt. Counsel’s client suffered serious prejudice as a result, because he was convicted by a jury which believed the standard was far less than was actually required.

a. Relevant facts

In closing argument, the prosecutor told the jury he wanted to

explain the standard of proof beyond a reasonable doubt. 11RP 45. He went on to discuss “abiding belief,” saying the jury could have such a belief “in the truth of the charge” and thus be satisfied beyond a reasonable doubt even if it “did not know the truth of every bit of what happened.”

11RP 46. The prosecutor described “abiding belief” as a belief the jurors would be “satisfied with” and confident they would still have in the future.

11RP 46-47. The prosecutor then went on to describe the type of certainty jurors would have to have in order to be “convinced beyond a reasonable doubt:”

I posit to you, this is not a standard that you’re unfamiliar with. You actually use this standard a lot.

11RP 47. At that point, the prosecutor compared the degree of certainty required to believe the state had proved Coleman’s guilt beyond a reasonable doubt to the certainty required to be willing to walk across the street when one has a “walk” signal in their favor:

If you parked up in the apartment across the street when you came here today, and you came down, and you came to the crosswalk and the light was - - there’s a walk sign and a don’t walk sign. And you looked at that light and you waited for it to become “walk,” said, “Okay. Let’s walk across the street.” You’re satisfied beyond a reasonable doubt that it’s safe to cross that street.

11RP 47-48. Indeed, the prosecutor said, a person would feel confident in that decision because, although it is *possible* that something unexpected or extreme could happen which would potentially make it unsafe to cross and there is no “guarantee” that you will be safe just because the light is in your favor, it is “reasonable to believe” that you are safe and that degree of certainty is the same as the certainty required to find that the state had

proven its case beyond a reasonable doubt:

You've looked left. You've looked right. Is it guaranteed that you won't get hit? Is it guaranteed that the guy that actually stopped and looked at you and waved you through isn't going to be the biggest jerk in the world and run you down; isn't going to have a heart attack and have his foot fall off the brake and roll into you; isn't going to get hit from behind and knock - - his car get knocked into yours?

No. Those are all possibilities, but is it reasonable to believe that now you can cross the street. Are you satisfied beyond all reasonable doubt? Yes. And you live with that standard in every courtroom in America, and we're not paralyzed by it, the way you're not paralyzed by your decision with whether or not to cross the street. You have to make that decision to do that.

11RP 47-48.

- b. The prosecutor committed constitutionally offensive misconduct and improperly relieved himself of the full weight of his burden of proof by misstating and reducing the requirements for satisfying the demanding standard of proof beyond a reasonable doubt

While Washington courts apparently have yet to rule on this issue in any published case, many courts have recognized that comparing proof beyond a reasonable doubt to the certainty people use even in important everyday decisions improperly misstates the prosecutor's constitutionally mandated burden of proof. This is because, while "[a] prudent person" acting in "an important business or family matter would certainly gravely weigh" the considerations and risks of such a decision, "such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment." Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). As a result, "[b]eing convinced beyond a reasonable doubt cannot be equated with being 'willing to act. . . in the more weighty and important

matters in your own affairs.” 347 F.2d at 470.

Thus, in Commonwealth v. Ferreira, 364 N.E.2d 1264 (Mass. 1977), the judge told the jury that proof beyond a reasonable doubt required the jury to be “as sure” as they would at any time in their own lives when they had to make “important decisions,” such as “whether to leave school or to get a job or to continue with your education, or to get married or stay single, or to stay married or get divorced, or to buy a house or continue to rent, or to pack up and leave the community where you were born and where your friends are.” In reversing, the Court stated that these examples “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” 364 N.E. 2d at 1272. Citing a case in which the prosecutor only used an example of the degree of “certainty” a juror would have to have in deciding whether to undergo heart surgery, the Court declared:

‘The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the jury, they may not be illustrative of the degree of certainty required.’ We think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from the seriousness of the decision and the Commonwealth’s burden of proof. . . The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

364 N.E. 2d at 1273, quotation omitted.

Analogies to even important personal decisions “trivialize[] the proof-beyond-a-reasonable-doubt standard.” State v. Francis, 561 A.2d

392, 396 (Vt. 1989). Indeed, such analogies go further, effectively reducing the standard of proof to something more akin to “proof by a fair preponderance of the evidence.” Commonwealth v. Rembiszewski, 461 N.E. 2d 201, 207 (Mass. 1984); see Scurry, *supra*, 347 F.2d at 470 (it denies the defendant the “benefit” of the reasonable doubt standard to make the comparison between finding a person guilty beyond a reasonable doubt and “making a judgment in a matter of personal importance”); see also People v. Johnson, 119 Cal. App. 4th 976, 14 Cal. Rptr. 3d 780 (2004) (improper to compare the certainty required for the state’s burden to the certainty required to feel comfortable driving through an intersection when the light was in your favor); People v. Johnson, 115 Cal. App. 4th 1169, 1171, 9 Cal. Rptr. 3d 781 (2004) (rejecting the notion “that people planning vacations or scheduling flights engage in a deliberative process to the depth required of jurors” or that they “finalize their plans” only after they have reached the degree of certainty required for proof beyond a reasonable doubt.)

Here, the comparison was not even to a personal decision of any importance. It was a comparison to something utterly trivial - the degree of certainty a juror would have to have to believe they were safe to cross the street when they had the “walk” sign in their favor. Even more than comparison to the certainty required to make *important* personal decisions, such as getting a divorce or moving, the comparison in this case was on a completely *unimportant* issue.

The degree of certainty required to “know” whether it is safe to cross the street with the light is nowhere near the degree of certainty

required for proof beyond a reasonable doubt. The comparison completely misstated the grave burden the prosecution was required by the constitution to shoulder, and was thus improper and misconduct.

Reversal is required. Because the misconduct directly affected Coleman's constitutional due process rights to have the prosecution shoulder the burden of proving its case against him beyond a reasonable doubt, the constitutional "harmless error" standard applies. See, e.g., State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). That standard requires the prosecution to shoulder the very heavy burden of showing the error harmless. Easter, 130 Wn.2d at 242. The prosecution can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425.

Further, although this Court does not look at whether the error could have been cured by instruction when the constitutional harmless error standard is applied, it is worth noting that the error could not have been so cured in this case. The concept of reasonable doubt is so complex that even learned judges have difficulty defining it. See State v. Castle, 86 Wn. App. 48, 51-56, 935 P.2d 656, review denied, 133 Wn.2d 1014 (1997), disapproved on other grounds by Bennett, supra. The prosecutor's minimization of his burden, using an evocative and easy-to-understand comparison, was extremely likely to stick with the jury, regardless whether they were instructed to ignore it.

The correct standard of reasonable doubt is the very centerpiece of our entire criminal justice system, because it is the “prime instrument for reducing the risk of convictions resting on factual error.” Cage, 498 U.S. at 40. It is also the means of providing the “concrete substance for the presumption of innocence” guaranteed to all accused. In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Indeed, without assurance the jury properly understood reasonable doubt as the prosecution’s burden of proof, the entire trial is affected, because a “misdescription of the burden of proof” will vitiate all the jury’s findings. Sullivan v. Louisiana, 508 U.S. 275, 280-81, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

In the unlikely event this Court finds that the prosecutor’s misstatement of the law and reduction of his constitutionally mandated burden of proof could have been cured if counsel had objected and requested a curative jury instruction, this Court should nevertheless reverse based on counsel’s ineffectiveness. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel’s representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a “strong presumption” that counsel’s representation was effective, that presumption is overcome where counsel’s conduct fell below an objective standard of

reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general, the decision whether to object or request instruction is considered “trial tactics,” that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel’s failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel’s failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, there could be no “tactical” reason for failing to object to the prosecutor’s multiple, serious misstatements of his constitutional burden of proof. An objection to the misstatement would likely have been sustained, because any reasonable trial court would have recognized that the prosecution’s argument clearly minimized the prosecution’s constitutionally mandated burden of proof.

It is Coleman’s position that the prosecution’s misconduct affecting his constitutional rights to be free from conviction upon less than proof beyond a reasonable doubt cannot be deemed harmless and were so egregious that they could not have been cured. But counsel nevertheless should not have sat mute while his client’s rights were being violated. He should have at least tried to remedy the damage done to his client’s rights by the prosecution’s acts. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 12th day of August, 2008.

Respectfully submitted,



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

to Mr. Joseph Coleman, DOC 308402, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 12th day of August, 2008.

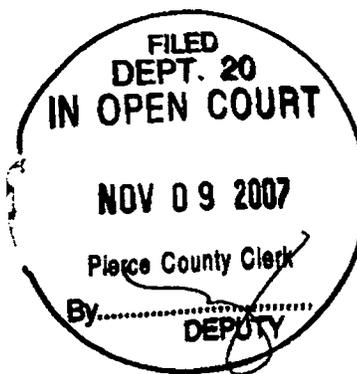

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

STATE OF WASHINGTON
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The verbatim report of proceedings in this case consists of 16 volumes, which will be referred to as follows:

November 7, 2006, as "1RP;"
December 6, 2006, as "2RP;"
January 31, 2007, as "3RP;"
March 15, 2007, as "4RP;"
March 27, 2007, as "5RP;"
April 9, 2007, as "6RP;"
April 17, 2007, as "7RP;"
April 26, 2007, as "8RP;"
May 31, 2007, as "9RP;"
June 27, 2007, as "10RP;"
the three chronologically paginated volumes containing the trial
July 5, 9-10, 2007, as "TRP;"
the additional, separately paginated volume containing proceedings
from the afternoon of July 10, 2007, as "11RP;"
September 5, 2007, as "12RP;"
September 6, 2007, as "13RP;"
November 9, 2007, as "14RP."

APPENDIX E



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-03867-5

vs.

JOSEPH G. COLEMAN,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

Defendant.

THIS MATTER having come on before the Honorable Kitty-Ann van Doorninck, Judge of the above entitled court, for sentencing on September 5th and 6th, 2007, the defendant, Joseph G. Coleman, having been present and represented by his attorney, Ed Decosta, and the State being represented by Deputy Prosecuting Attorney John Sheeran, and the court having considered all argument from both parties and having considered all written reports presented, and deeming itself fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

On February 26, 2007, the defendant was charged by way of Amended Information with one count of Burglary in the First Degree. The Amended Information also alleged three aggravating factors: that the crime was committed with sexual motivation, that the crime

ORIGINAL

06-1-04327-0

1 involved an invasion of the victim's privacy, and the victim of the burglary was present at the
2 time of the offense.

3
4 II.

5 The case proceeded to jury trial and on July 10, 2007, the defendant was
6 convicted of Burglary in the First Degree. The jury was instructed to complete the Special
7 Verdict Form if it found the defendant guilty of Burglary in the First Degree.

8
9 III.

10 The Special Verdict Form asked the jury if the State had proven beyond a reasonable
11 doubt (1) that the defendant committed the crime of Burglary in the First Degree with Sexual
12 Motivation, (2) that the commission of the Burglary in the First Degree involved an invasion of
13 the victim's privacy, and (3) the defendant committed the crime of Burglary in the First Degree
14 and the victim was present in the residence when the crime was committed.

15
16
17 IV.

18 The jury returned its verdict and the Court polled the jury. The jury indicated on the
19 record that it was unanimous with respect to the conviction on the charge of Burglary in the First
20 Degree. The jury also indicated on the record that it was unanimous with respect to its "YES"
21 answers on the Special Verdict Form, that the State had proven beyond a reasonable doubt that
22 the commission of the Burglary in the First Degree was an invasion of privacy, and that the
23 victim was present. When polled with respect to its "NO" answer to the question of whether the
24
25

06-1-04327-0

1 State had proven beyond a reasonable doubt that the defendant committed the crime of Burglary
2 in the First Degree with sexual motivation, the jury indicated that it was not unanimous.

V.

3
4
5 The Court asked the jury foreperson if there was a reasonable likelihood that
6 within a reasonable amount of time the jury could reach a unanimous verdict. The jury
7 foreperson told the Court "yes."

VI.

8
9 The Court instructed the jury to continue its deliberations. The Court did not coerce the
10 jury to reach a unanimous verdict. The jury was out approximately 5-10 minutes and returned.
11 The jury returned a verdict of guilty to the crime of Burglary in the First Degree, and answered
12 "YES" to all three questions on the Special Verdict Form. The jury was polled and indicated that
13 it was unanimous with respect to the charged crime and all three Special Verdict Form questions.

VII.

14
15 The Court also finds there are three aggravating circumstances in this case that justifies
16 an exceptional sentence above the standard range. The aggravating circumstances found by the
17 court are the same as those found by the jury beyond a reasonable doubt: that the defendant
18 committed the crime with sexual motivation, that the commission of the crime involved an
19 invasion of the victim's privacy and that the victim was present when the crime was committed.

VIII.

20
21 The Court finds that there was more than one victim in this case, E.M. and Hollie
22 Mitchell. Both E.M. and Hollie Mitchell were present at the time of the commission of the crime
23 and the defendant invaded the privacy of both E.M. and Hollie Mitchell.
24
25

IX.

1
2 Because the defendant has been convicted of Burglary in the First Degree with sexual
3 motivation, the Court imposes a sentence pursuant to RCW 9.94A.712, and sets the minimum
4 sentence of 20 months and a maximum sentence of life. The defendant is not to be released from
5 the Department of Corrections until the Indeterminate Sentencing Review Board determines he is
6 safe to be in the community.

X.

7
8 Considering the purposes of the Sentencing Reform Act, the aggravating circumstances
9 found by the jury beyond a reasonable doubt, and same aggravating circumstances found by the
10 court, there is a substantial and compelling reason justifying an exceptional sentence.

11 Considering the purposes of the Sentencing Reform Act, sentencing within the standard range is
12 not an appropriate sentence. Rather, a minimum sentence of 20 months is the appropriate
13 sentence on Count I, with life as a maximum sentence. Even if the defendant were not
14 sentenced pursuant to RCW 9.94A.712, the Court imposes an exceptional sentence of
15 community custody for life, and requires the defendant to complete a psycho-sexual evaluation
16 and any follow-up treatment, as well as comply with all conditions of Appendix F and Appendix
17 H to the Judgment and Sentence. Further the defendant is required to register as a sex offender,
18 not live within five miles of the Mitchell family and have no contact with E.M. or Hollie
19 Mitchell for the rest of his life.

IX.

20
21
22 The Court finds that any one of the aggravating factors is sufficient to impose this
23 exceptional sentence. The Court would impose this same sentence even if only one of these
24 aggravating factors existed, no matter which aggravating factor existed.
25

1 From the foregoing Findings of Fact, the Court hereby makes the following Conclusions of Law:
2

3
4 CONCLUSIONS OF LAW

5 I.

6 There is no reasonably substantial possibility that the court's instruction in this case
7 improperly influenced the jury's verdict. The court merely instructed the jury to continue
8 deliberations in an effort to reach a unanimous verdict, which was a proper response. State v.
9 Watkins, 99 Wn.2d 166, 177-78, 660 P.2d 1117 (1983), (quoting with approval ABA Standards
10 allowing the court to require continued deliberations if the jury appears unable to agree). In
11 addition, before deliberations began the court gave WPIC 1.04, directing jurors to attempt to
12 reach a unanimous verdict but not to change their opinions merely because of other jurors' views
13 or for the mere purpose of returning a verdict. The jury is presumed to have followed this
14 instruction. State v. Imhoff, 78 Wash. App. 349, 351, 898 P.2d 852 (1995).
15

16
17 II.

18 The Court did not err when it asked the foreperson if the jury could reach a unanimous
19 verdict. The jury was given the interrogatories pursuant to RCW 9.94A.535 and RCW
20 9.94A.537. These statutes were approved by the legislature after State v. Goldberg, 149 Wn.2d
21 888, 72 P.3d 1083 (2003) was decided. RCW 9.94A.537(3) requires the jury to be unanimous:
22 "The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable
23 doubt. The jury's verdict on the aggravating factor must be unanimous, and by special
24 interrogatory."
25

III.

1
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3 The jury's unanimous finding that the defendant committed the offense with sexual
4 motivation, in the presence of the victims, and invaded the privacy of the victims, satisfies the
5 Sixth Amendment requirement that, "Other than the fact of a prior conviction, any fact that
6 increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to
7 a jury, and proven beyond a reasonable doubt." Blakely v. Washington, 124 S. Ct. 2531, 2536,
8 159 L. Ed. 2d 403 (2004).

IV.

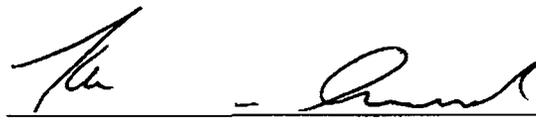
9
10
11 There are substantial and compelling reasons justifying an exceptional sentence above the
12 standard range. These reasons are the aggravating circumstances found by the jury as specified
13 in the Special Verdict Form, and found by the court in the Findings of Fact above.
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06-1-04327-0

V.

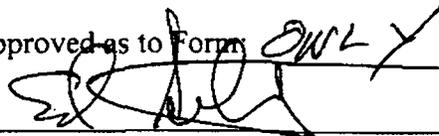
Defendant Joseph G. Coleman, should be incarcerated in the Department of Corrections for an indeterminate period of 20 months to life on COUNT I. The defendant shall be on community custody for life, and be required to comply with the conditions of Appendix F and Appendix H, regardless of whether or not he is sentenced pursuant to RCW 9.94A.712.

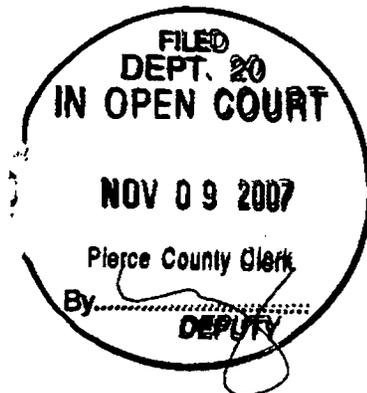
DONE IN OPEN COURT this 9th day of November, 2007.


JUDGE KITTY ANN van DOORNINCK

Presented by:

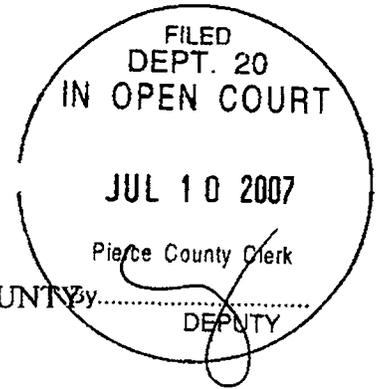

John Sheeran
Deputy Prosecuting Attorney
WSBA # 26050

Approved as to Form ONLY

ED DECOSTA
Attorney for Defendant
WSBA # 21673





06-1-03867-5 27827320 SVRD 07-11-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOSEPH GEORGE COLEMAN Defendant.

CAUSE NO. 06-1-03867-5

SPECIAL VERDICT FORM

We, the jury, having found the defendant guilty of the crime of Burglary in the First degree, make the following answers to the questions submitted by the court:

QUESTION: Has the State proven the existence of the following beyond a reasonable doubt?

(1) The defendant committed the crime of Burglary in the First Degree with Sexual Motivation

ANSWER: ~~no~~ yes (Yes/No)

(2) The commission of the Burglary in the First Degree involved an invasion of the victim's privacy

ANSWER: yes (Yes/No)

(3) The defendant committed the crime of Burglary in the First Degree and the victim was present in the residence when the crime was committed

ANSWER: yes (Yes/No)

Florence Bey PRESIDING JUROR

INSTRUCTION NO. 21

You will also be furnished with a special verdict form. If you find the defendant not guilty of the crime of Burglary in the First Degree do not use the special verdict form. If you find the defendant guilty of the crime of Burglary in the First Degree, you will then use the special verdict form and fill in the blanks with the answer "yes" or "no" according to the decision you reach.

Answer each question separately. Your answer on one question should not impact your answer on the other questions.

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

APPENDIX C

INSTRUCTION NO. 19

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

APPENDIX D

INSTRUCTION NO. 20

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms, A and B, and one Special Verdict form. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Burglary in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty,"

according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of Burglary in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Criminal Trespass in the First Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.