NO. 39009-4-II

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

STATE OF WASHINGTON,

Appellant

v.

JOANNE MARIE GARDNER,

Respondent

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

The Honorable Michael J. Sullivan, Judge

APPELLANT'S OPENING BRIEF

DAVID BUSTAMANTE, WSBA #30668
Attorney for Respondent

DAVID J. BURKE
PACIFIC COUNTY PROSECUTING ATTORNEY
P.O. Box 45
South Bend, WA 98586
(360) 875-9361

09 JUL 17 PM 1:00
STATE OF WASHINGTON
BY
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COURT OF APPEALS
DIVISION II

4-16-09

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I. REMEDIES SOUGHT

In this appeal, the State seeks the following remedies:

A. Remand to the trial court with instructions to reinstate the conviction for theft in the third degree.

B. Remand to the trial court with instructions to reassign the case to a different judge for sentencing and for a ruling on the State's restitution request.

C. Reasonable attorney's fees and costs arising from the filing and prosecuting of this appeal.

II. ASSIGNMENTS OF ERROR

1. The court abused its discretion by unreasonably limiting the State to a total of 20 minutes for closing arguments after a three-day trial involving approximately 15 to 16 alleged incidents of criminal misconduct.

2. The court erred when it granted a CrR 7.4 motion to arrest its own judgment of guilty to the lesser-included offense of theft in the third degree on the ground that neither party had asked the court to consider the lesser included offense during closing argument.

3. The court erred by prematurely stating, prior to the sentencing hearing, and before hearing arguments from counsel, as provided in RCW

9.94A.500(1), that it was leaning toward ordering a deferred sentence, thereby depriving the State of its right to a fair, impartial, and neutral sentencing hearing.

4. The trial judge erred by stating, prior to the restitution hearing, that the State would have an "uphill battle" on its restitution request. The trial judge created an appearance of bias and partiality against the victim in the case, a state agency, by indicating that, in awarding restitution, he distinguished between crime victims that are private persons and those victims that are governmental agencies, and by advocating against the State's restitution request, on behalf of the defendant, before the State had any opportunity to present testimony or to fully explain the basis of the restitution request in fact and in law.

5. The trial judge created the appearance of partiality and bias by citing his 25-year acquaintance with the defense counsel as a reason for denying the State's motion for presentencing release conditions.

6. The trial judge created the appearance of partiality and bias by questioning the prosecutor, at the sentencing hearing, as to why it had taken the Parks Department so long to prepare restitution figures, when the matter had not yet been scheduled for a restitution hearing and when the court had never given the State any deadline for filing a restitution request.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In a non-jury criminal trial on a charge of theft in the second degree, does the State have any obligation, during closing arguments, to ask the court to consider a lesser included offense of theft in the third degree?

2. Once the superior court makes a finding that the defendant has committed a lesser included offense beyond a reasonable doubt, and enters a verdict of guilty to that lesser included offense, and formalizes its verdict with written findings of fact and conclusions of law, does the court have the authority to set aside that verdict on purely procedural grounds, when the only alleged procedural irregularity is that neither side has asked the court during closing arguments to consider the lesser included offense, and where there has been no showing of the court's lack of jurisdiction over the person or the offense; no showing that the indictment or information does not charge a crime; and no showing of insufficiency of the proof of a material element of the crime?

3. When the facts and circumstances strongly suggest that the trial judge may no longer be presumed to be neutral or impartial, is it appropriate to remand the case back to the trial court with instructions to assign a different judge for purposes of sentencing and deciding a request for restitution?

IV. COMMENT REGARDING THE RECORD ON REVIEW

The record on review consists of the 74-page Clerk's Papers and the three-part Report of Proceedings. Because neither Ms. Gardner nor the trial court raised the issue of sufficiency of a material element of the offense in connection with the Motion to Set Aside Oral Verdict, we have not provided a transcript of the entire trial. The State's position is that, with the exception of Assignment of Error #1, the appeal may be decided based on what transpired after the court announced its verdict in the case. As to Assignment of Error #1, we have relied on the Clerk's Notes from the trial, the State's Response to the defendant's Motion to Set Aside Oral Verdict, and the court's Memorandum Opinion.

Due to the page-numbering system employed by the court reporter in this matter, the Report of Proceedings shall be cited as follows: 1 RP shall refer to the transcript of the hearing of December 19, 2008, wherein the court announced its verdict in the case; 2 RP shall refer to the transcript of the hearing of January 23, 2009, in which the court announced its decision to deny the defendant's Motion to Set Aside Oral Verdict and heard arguments on the same; 3 RP shall refer to the sentencing hearing of February 6, 2009, in which the court entered the Findings of Fact and Conclusions of Law on Non-Jury Trial, heard arguments on sentencing, and announced that it would reconsider the defendant's Motion to set Aside Oral Verdict.

V. STATEMENT OF THE CASE

Joanne Gardner was charged by information in the Pacific County Superior Court with one count of theft in the second degree for a series of incidents alleged to have occurred at the Grayland State Park between January 4, 2008, and February 20, 2008, which incidents were alleged to have been part of a common scheme or plan of embezzlement from the defendant's employer, the State of Washington Parks and Recreation Commission, with the aggregate amount stolen being greater than $250. CP 1. The State charged as an aggravating circumstance that the current offense was a major economic offense or series of offenses, so identified by a consideration of the following: (i) the current offense involved multiple victims or multiple incidents per victim; (ii) the current offense involved attempted or actual monetary loss substantially greater than typical for the offense; (iii) the current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or (iv) the defendant used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. CP 1-2.

The case was tried before the court on December 15, 16, and 17, 2008, in a non-jury trial, with the Honorable Michael J. Sullivan presiding. CP 14; CP 15; CP 16-36; CP 61. During the course of the trial, the court

heard testimony from Park Ranger Ron Dyste, Sgt. Rick Ekman of the Pacific County Sheriff's Office, Ranger Edward Girard, Deputy Ron Davis of the Pacific County Sheriff's Office, Ranger Daniel Yorkston, Debra Hamrick of the Parks Department, Joanne Gardner, Tammy Hansen, Melanie Watness of the Parks Department, Christy Sterling of the Parks Department, and Mike Swigert of the Parks Department. CP 16-36. Approximately 119 exhibits were discussed and/or admitted into evidence. Id. There were also video tapes shown to the court during the trial. CP 29; CP 39. Prior to hearing closing arguments, the court initially limited each side to 15 minutes for closing argument over the State's objection. CP 36; CP 49. The State requested that closing arguments be continued to a different day to allow each side more time, and this motion was denied. CP 36. The prosecutor then asked the court to at least allow 20 minutes per side, and the court agreed. CP 36. During closing arguments, neither side asked the court to consider the lesser included offense of theft in the third degree. CP 41; CP 67.

Two days after the conclusion of the trial, on December 19, 2008, the court announced its oral verdict of not guilty to the greater offense of theft in the second degree. CP 37; CP 39-40; 1 RP 5. And having found the defendant not guilty of the greater offense of theft in the second degree, the court went on to find the defendant guilty of the lesser

included offense of theft in the third degree, having also found that the defendant had committed eight separate acts of theft within the time period charged, with a total amount of $186.50 stolen by the defendant. 1 RP 5-9. Immediately after announcing this verdict, the court informed the defense counsel, *sua sponte*, that if he wanted to research the issue of whether the court had the authority to find a lesser included offense, the court was prepared grant that time before signing a written order. 1 RP 9-11.

The State moved the court to enter an Order for Pre-Sentencing Release Conditions requiring that Ms. Gardner have no criminal law violations; no contact with witnesses Ron Dyste, Daniel Yorkston; or Melanie Watness; that she provide the court with an address where she would reside while the matter was pending; that such address would not be changed without written permission of the court. 1 RP 12. The defense counsel replied that it was not necessary to set conditions of release. 1 RP 12. The court noted, "Now, as far as pretrial release conditions, if you client's staying in contact with you, that's fine with me, Mr. Janhunen." 1 RP 13. The State asked the court if it was ordering the defendant to remain in contact with her attorney at least once a week.[1] 1 RP 13. The court responded, "No. I've known Mr. Janhunen for almost 25 years and if

[1] Pursuant to a local court rule, defendants are required to contact their counsel once a week. LCrR 2(G).

he says his client is—is no problem staying in contact, I really don't need to go there." 1 RP 14. The prosecutor then asked the judge about the other release conditions. 1 RP 14. The court replied by asking the defense counsel what his client's record was like and whether she was planning to contact the park rangers. 1 RP 14. The defense counsel responded that Ms. Gardner had no prior criminal history, and Ms. Gardner replied that she was not planning to contact the rangers, whereupon the court answered that it did not need any release conditions. 1 RP 14.

On December 26, 2008, the defendant filed a Motion to Set Aside Oral Verdict, pursuant to CrR 7.4 and CrR 7.5, in which the defendant acknowledged that the court had the authority to find a lesser included offense, but that nevertheless the court should set aside its verdict because neither party had asked the court to consider the lesser included offense. CP 41-42. The defendant argued that "both the prosecution and the defense submitted the case to the court as a felony." CP 42. The defendant argued that had there been a jury impaneled, and the possibility of a lesser included instruction being offered, the defendant would have adamantly opposed such an instruction. Id. The defendant also argued that, although the court could find the defendant guilty of a lesser included offense, the court should not in the interest of justice for the reason that neither the prosecution nor the defense asked the court to consider it. Id.

The defendant did not specifically allege that there was insufficient proof of a material element of the crime of theft in the third degree, or that the court lacked jurisdiction over the case; nor did the defendant specifically argue that a new trial was the appropriate remedy under CrR 7.5. CP 41-42. The defendant did not cite any statue or case in support of its position. Id.

The State filed its response to this motion on December 29, 2008, arguing that the court in a non-jury trial had the same authority as a jury to find a lesser included offense, and that therefore, the guilty verdict should stand. CP 44-50. The State cited RCW 10.61.006; *State v. Fernandez-Medina*, 141 Wash.2d 448, 453, 6 P.3d 1150 (2000); and *State v. Berlin*, 133 Wash.2d 541, 544, 947 P.2d 700 (1997), for the proposition that the trier of fact is permitted to find a defendant guilty of a lesser offense necessarily included in the crime charged. CP 47. The state cited *State v. Jollo*, 38 Wash.App. 469, 474, 685 P.2d 669 (1984) for the proposition that a judge in a non-jury trial may do so *sua sponte*. Id. The state also cited *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978), for its two-part analysis of when a court may find a lesser included offense. CP 46. The state argued that, in a non-jury trial, the court is presumed to know the law, citing *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const.*, 64 Wash. App. 661 (1992).

On January 23, 2009, the court held a hearing on the defendant's motion to set aside the verdict. CP 58; 2 RP 1-12. At that hearing, the defendant acknowledged that the court had the authority to find a lesser included offense, but argued that the court should not exercise that authority. 2 RP 2-3. The defendant argued that she did not make a half-time motion at trial to dismiss for insufficient evidence as to the felony charge "on purpose" because the defendant knew that this might result in the case proceeding as a gross misdemeanor. 2 RP 3. The defendant argued that she hadn't wanted the court to consider the lesser included offense and also argued that the prosecutor had not wanted the court to consider the lesser included offense either. 2 RP 3-4.

The State denied the defendant's contention that the State had not wanted the court to consider the lesser included offense. 2 RP 6-7. The State pointed out that it had been limited in closing arguments to a total of 20 minutes, to summarize three day's worth of evidence, and that, under the circumstances, it was neither necessary nor was it a wise use of its time to specifically address the lesser-included offense when it was obvious that the court should make a determination on that issue in the same way that a jury would be expected to do. 2 RP 6-7.

The court commented that the defense argument hinged on what the defendant should fairly be expected to consider in its presentation and

that the defendant's position was that it "wasn't really fair" that the defendant should have to consider that, and not fair that the court should have acted as it had. 2 RP 8. The defense counsel responded that he was talking about the interests of justice. 2 RP 8.

After taking a long recess, the court returned to the courtroom and indicated that it had reviewed RCW 9A.56.010(18)(c) and wanted to clarify that it had found the defendant guilty of only one count of theft in the third degree, even though the court had found that she had committed multiple acts of theft. 2 RP 9. The court announced that it would stay with its decision to deny the defense motion, but that the court was "leaning" toward a deferred sentence. 2 RP 9-10. Judge Sullivan added that, although he did not think that his actions had been unfair, that he was open to granting a deferred sentence so that, at the end of one year, "this will not even exist." 2 RP 10. Judge Sullivan noted that the defendant's arguments had "touched a chord." 2 RP 10.

The court entered a written order that same day denying the Defendant's Motion to set Aside Oral Verdict. CP 56; CP 58. The court also set the matter on for sentencing to be held on February 6, 2009. CP 57. At no time did the court make mention of a restitution hearing, nor did it set any deadline for the State to file a restitution request. 2 RP 1-12. CP 58.

Immediately prior to the sentencing hearing of February 6, 2009, the defendant filed a presentence statement in which she requested that the court defer sentence for a period of one year. CP 59-60.

At the February 6, 2009, sentencing hearing, the court started out by addressing the matter of restitution, noting that the State had filed a Restitution Estimate and Victim Impact Statement. 3 RP 2. The State asked the court to first enter the Findings of Fact and Conclusions of Law on the non-jury trial, which the court did. 3 RP 3-4. CP 61-64.

The court then returned to the question of restitution. 3 RP 4. The court noted that there were items in the restitution request that the court had never seen before. 3 RP 4. The court asked, "Why should I order these now when I never order them and they're never asked in felony matters?" 3 RP 4. The State responded that it was requesting a total of $186.50 for the money actually stolen plus an additional $7,950.06 for investigative costs incurred by the Parks Department. Id. The State asked that the matter be set on for a restitution hearing and mentioned that there was case law supporting the State's restitution request. 3 RP 4-5.

The court then questioned the prosecutor as to when he received the information from the State [Parks Department] regarding these costs. 3 RP 5. The prosecutor answered that it had received the hard copy on February 3rd and the electronic version approximately two days prior to

that. Id. The court then asked whether the Parks Department had given any reason why it had taken them so long. Id. The court said, "It seems like an awful long time for the State to sit around and not present anything like that." Id.

The court asked for the State's recommendation on sentencing. 3 RP 8. The State answered that it was seeking 180 days in jail in addition to court costs and restitution, based on several aggravating circumstances present in the case. 3 RP 8-11.

The court then indicated to the defense counsel that it wanted to hear from him as to sentencing. 3 RP 12. The defense counsel started to respond that there were three friends of Ms. Gardner's present who wanted to address the court. 3 RP 12.

The court then interrupted the defendant's presentation by initiating the following exchange with the prosecutor:

> THE COURT: Before I do that I have a question for you, Mr. Bustamante, and I'm going to preface the question by saying that as far as I know you've always been very straightforward, up-front with the Court and have not exaggerated any statements made to the Court in terms of straightforward questions I ask and straightforward answers I receive. So my question to you is when I came back onto the bench to give my verdict back on January 23, 2009, what were the options that you actually though the Court was going to render?
>
> MR. BUSTAMANTE: Well, it would either be guilty to Theft in the Second Degree with the aggravating factors or Theft in the Third Degree, a misdemeanor—gross misdemeanor, rather.

> THE COURT: So you were actually anticipating a lesser included even though you did not ask for one?
>
> MR BUSTAMANTE: Oh yes, of course.
>
> THE COURT: Hmm.

3 RP 12-13. The court then announced that it would listen to the defense testimony, "to be fair," and that after listening to the testimony, the court would take the matter under advisement and reconsider the original defense motion to set aside the guilty verdict. 3 RP 13-14. The defense did not, at any time during the sentencing hearing, formally move the court to reconsider its ruling on the motion to set aside the guilty verdict, although the defense counsel did note, at 3 RP 3, that "there's still time for this Court to set aside its oral verdict."

The defense presented three witnesses for sentencing, each of whom had known the defendant in some capacity. 3 RP 14-19. Elaine Walls testified that Joanne Gardner has been her dear friend since she was four years old and that she had never known her to cheat, lie, or steal anything, and that she was sure that this would not even be a possibility. 3 RP 14-15. Katie Parries identified herself as Joanne Gardner's sister-in-law, and testified that she had never known the defendant to do anything illegal. 3 RP 16-18. Estelle Bailey testified that she had known Joanne

Gardner since she was four years old and that she had no doubt about her integrity. 3 RP 18-19.

After the presentation of testimony by the three defense witnesses, the defense counsel declined the opportunity to make any specific sentencing recommendations. 3 RP 19-20. Ms. Gardner was given the opportunity to exercise her right of allocution and declined to exercise that right. 3 RP 20.

The court then announced again that it would reconsider the defense motion to set aside the verdict of guilty to the lesser included offense. 3 RP 22. The court set a date for the restitution hearing of March 20, 2009, and warned that the State would "have an uphill battle" on the restitution issue if the court did not reverse itself. Judge Sullivan commented that, when he was a prosecutor, he never asked for these types of costs. 3 RP 24. When the prosecutor reminded the court that it had ordered restitution in the amount of approximately $8000 in the similar matter of *State v. Jaylene Millner*, which involved an employee accused of embezzling funds from an employer, the court noted that this was true, but that *Millner* had involved a private firm as opposed to a governmental agency. 3 RP 24-25.

On March 16, 2009, at 2:20 p.m., the court reversed itself by filing its Memorandum Re: Defendant's Motion to Reconsider Court's Verdict,

finding that the State had not argued for a lesser included offense in closing arguments, and noting that the State had not moved to amend the charges at any time during the trial. CP 66-71. In making its ruling, the court noted that it had attached great importance to the fact that the State had chosen to aggregate the various incident of theft into a single count of theft in the second degree, rather than to charge the individual thefts separately. CP 66. The court erroneously asserted that the State had cited *State v. Millner*, Pacific County Superior Court Cause No. 07-1-00059-1, for the proposition that the court had previously found a lesser included offense at a bench trial without argumentation from the State. CP 67. In actuality, the State had mentioned *State v. Miller* in connection with the restitution issue, but not in connection with any lesser included offense. *See* 3 RP 24. The court pointed out that there are times when the prosecutor does not want the court to consider a lesser included offense. CP 68. The court observed, "The Court in this case should not assume that the prosecutor wanted a lesser included offense considered in light of the prosecutor's decision to aggregate the charges into a single, felony charge." CP 68. The court added that the responsibility to inform the court what each attorney wants should be on the attorney's shoulders. Id.

The court went on to set forth several reasons why the State's Response to Defendant's Motion to Set Aside Guilty Verdict was not

persuasive. These included (1) the fact that the trial court is presumed to know the law does not excuse the State from its obligation to request a lesser included offense; (2) the State did not request to amend the information to include lesser included offenses; (3) whereas both the State and the defendant had the opportunity to argue for lesser included offenses, neither side is obligated to request, or even to discuss, a lesser included offense; but any request for a lesser included offense should be made in a clear and unambiguous statement by either party; (4) the court is not obligated to give either party whatever time they think might be necessary for closing arguments. In this case, it was reasonable for the bench to allow less time for closing arguments because the court is presumed to know the law. However, both sides had adequate time to include a one-sentence request for the court to consider lesser included offenses. CP 69-70. The court concluded by reversing its verdict of December 19, 2008, as to the lesser included offense. CP 70.

On March 16, 2009, at 2:20 p.m., the court entered an order setting aside its previous verdict and entering a new verdict of "not guilty of theft in the second degree." CP 74.

The State timely filed this appeal challenging the court's authority to set aside its guilty verdict for the reasons provided in the court's Memorandum.

VI. ARGUMENT

A. THE COURT ABUSED ITS DISCRETION BY LIMITING THE STATE TO A TOTAL OF 20 MINUTES FOR CLOSING ARGUMENTS.

An appellate court reviews limitations on closing arguments for abuse of discretion. *City of Seattle v. Erickson,* 55 Wash. 675, 677, 104 P. 1128 (1909). Normally, a reviewing court will not interfere unless the trial court's decision was both manifestly unreasonable and prejudicial. *Id.* The trial judge listens to the evidence and is then in the best position to limit closing arguments. *Id.* "The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations." *Herring v. New York,* 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

Although the trial court has broad discretion to limit the scope of closing argument, judges have been found to abuse their discretion when they go too far in circumventing litigants' rights to argue their cases. *State v. Frost*, 160 Wash.2d 765, 771-773, 161 P.3d 361 (2007). In the instant case, the State was restricted to a total of 20 minutes to present its closing argument and rebuttal, despite the fact that this three-day trial dealt with a pattern of theft involving some 15 to 16 separate incidents, included

testimony from eleven witnesses, and featured approximately 119 exhibits. CP 16-36; CP 61-64. In view of the complexity of this case, the 20-minute limitation was manifestly unreasonable.

B. WHETHER A SUPERIOR COURT HAS THE AUTHORITY TO SET ASIDE A GUILTY VERDICT FOR THE REASONS STATED IS A CASE OF FIRST IMPRESSION IN THE STATE OF WASHINGTON.

1. This is a case of first impression.

A careful search of the case law revealed no Washington case in which a superior court granted a motion to set aside its own verdict of guilty to a lesser included offense on the ground that neither party had asked the court to consider this lesser included offense during closing arguments. Moreover, there are no cases in which a superior court set aside its own guilty verdict based on a purely procedural irregularity in which the rights of the defendant were not violated in any way.

Ms. Gardner argues that, had this been a jury trial, her trial strategy would have been to *not* request a lesser-included instruction. CP 42. In the context of the jury trial, a defense attorney's choice not to request a lesser-included jury instruction presents the following difficulty on appeal: if the defense counsel does *not* request instruction as to the lesser included offense, and the defendant is found guilty of the greater offense, then the defendant may later complain of ineffective assistance of counsel,

provided that the defendant can demonstrate that the "all or nothing" trial strategy would not have been a legitimate tactic under the circumstances. *See e.g., State v. Grier,* 208 P.3d 1221, 1232-1233 (2009)(holding that, under the facts of the case, failure to request a lesser-included instruction was not sound trial strategy); *State v. Pittman*, 134 Wash. App. 376, 387-88, 166 P.3d 720 (2006) (finding ineffective assistance of counsel where trial attorney failed to request an instruction on attempted criminal trespassing as a lesser included offense of burglary); *State v. Ward*, 125 Wash.App. 243, 104 P.3d 670 (2004) (finding defense counsel's "all or nothing" approach, in deciding not to request an instruction on the lesser included offense, was not legitimate trial strategy). While the State cannot *prove* that the hypothetical "all or nothing" trial strategy would not be upheld on appeal in this case, we can only point out that, given the existing case law, such a trial strategy would likely have fallen outside the range of professionally competent assistance, as it did in *Grier, Pittman,* and *Ward.*

2. The jury trial setting in other jurisdictions.

A few states require jury instructions on all applicable lesser included offenses. Michael H. Hoffheimer. *The Future of Constitutionally Required Lesser Included Offenses.* 67 U. PITTSBURG L. REV. 585, 588 (2005-2006), citing *State v. Wimberly,* 498 So. 2d 929, 932

(Fla. 1986) (holding that a trial court must instruct on any lesser included offense regardless of the evidence); *State v. Jeffries*, 430 N.W. 2d 728, 737 (Iowa 1988)([Iowa courts] shall automatically instruct on a lesser included offense if the legal test is met); *People v. Heflin*, 456 N.W. 2d 10, 15 (Mich. 1990)(a Michigan defendant may request and receive necessarily included offense instructions without regard to the evidence).

In North Carolina, the trial court is obligated to instruct on lesser-included offenses when the evidence warrants it. *See, e.g., State v. Hicks*, 84 S.E.2d 545, 547 (N.C. 1954) (trial court must submit lesser-included offense instruction to jury "whether requested to do so or not" if evidence so warrants). The same is true in the State of California. *People v. Wickersham*, 650 P.2d 311, 323 (Cal. 1982) (trial court must instruct on appropriate lesser-included offenses supported by evidence even if neither side requests such instructions), *overruled on other grounds by People v. Barton*, 906 P.2d 531 (Cal. 1995). The rationale for placing the onus on the trial judge is that the judge's role is to "fully instruct the jury on the law applicable to each particular case." Id. at 319. In Arkansas, the trial court is required to instruct on lesser-included offenses, whether charged or not, where there is a rational basis for acquitting on the greater offense and convicting on the lesser. *Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001); *Harshaw v. State*, 344 Ark. 129, 39 S.W.3d 753 (2001). Under

Michigan law, it is the duty of the trial court to instruct the jury as to the law applicable to the case. Neither the defense nor the prosecution has the option of precluding the court from carrying out this duty in hopes of forcing an "all or nothing" verdict. *People v. Chamblis*, 236 N.W.2d 473, 476 (Mich. 1975).

Some courts have adopted a middle ground that permits, but does not require, the trial judge to instruct on lesser-included offenses when neither side requests the instruction. "[W]hen the evidence authorizes a charge on an offense included in the offense for which the defendant is being tried, the trial court is authorized to instruct the jury on the included offense *sua sponte. Powell v. State*, 510 S.E.2d 18, 21 (Ga. 1998); *see also State v. Pribil*, 395 N.W.2d 543, 549 (Neb. 1986).

3. The jury trial setting in Washington

In Washington, a trial court is permitted, but not required, to give a lesser included instruction *sua sponte*. *State v. Hoffman,* 116 Wash.2d 51, 111-112, 804 P.2d 577 (1991), citing *State v. Scott,* 110 Wash.2d 682, 686, 688 n. 5, 757 P.2d 492 (1988).

4. The non-jury trial setting in other jurisdictions.

In New Hampshire, a trial court has the discretion to consider a lesser-included offense *sua sponte* in a non-jury trial. *In re Nathan L.* No.

2000-138, (N.H., 2001) (holding that the better practice is for the court to indicate to the parties at the close of the evidence its intention to raise a lesser-included offense and to give both sides an opportunity to express their views on the subject).

In Michigan, a trial court sitting as a finder of fact may consider lesser offenses *sua sponte*. *People v Darden*, 585 N.W. 2d (1998). The trial court's failure, as finder of fact, to consider lesser included offenses which are supported by the evidence requires reversal. *People v Maghzal*, 427 N.W. 2d 552 (1988).

Under Tennessee Law the trial court is presumed to consider all appropriate lesser included offenses in rendering decisions in a bench trial. *Morrow v. Tennessee*, No. M2005-00554-CCA-R3-PC (Tenn. 2006).

5. The non-jury trial setting in Washington

In a Washington bench trial, there is nothing improper in the fact that a lesser included offense is proposed by the court rather than by one of the parties. *State v. Jollo*, 38 Wash.App. 469, 685 P.2d 669 (1984). Given the state of Washington law, it is rather surprising that the *Gardner* court felt that it was appropriate to reverse its original verdict as it did.

6. Conclusions re "Case of First Impression"

Although there has been no case on record in which a Washington judge, sitting as trier of fact, arrested judgment due to the failure of either side to address the lesser included offense in closing arguments, it appears plain from the caselaw that there is nothing improper about the court's finding the lesser included offense, *sua sponte,* under Washington law. On the contrary, it was very proper for the court to consider the lesser included offense in view of RCW 10.61.003, RCW 10.61.006, and *State v. Jollo*, 38 Wash.App. 469, 474 (1984). Once a court, in its role as trier of fact, makes a valid finding of guilty to a lesser included offense, there is no authority from any jurisdiction indicating that the defendant is entitled, retroactively, to have the verdict set aside under the circumstances presented; and there is no authority for the court to have vacated its valid judgment as it did.

C. THERE WAS NO REQUIREMENT FOR THE STATE IN THIS CASE TO ADDRESS THE LESSER INCLUDED OFFENSE IN CLOSING REMARKS.

Whenever a greater offense contains a lesser included offense, the lesser included offense is automatically charged when the greater offense is charged. RCW 10.61.006. The state is not required to charge the lesser included offense "in the alternative." When the state chooses to aggregate several incidents of theft in the third degree into one count of theft in the second degree, moreover, the lesser charge of theft in the third degree is

still charged notwithstanding that the State has chosen to aggregate these multifarious incidents into a single felony count.

The court, in its Memorandum Opinion, noted, "The State did not request to amend the information to include lesser included offenses." CP 69. The court evidently believed that the State's failure to request such an amendment was significant in some way. But RCW 10.61.003 provides that a jury may find a defendant guilty of any lesser offense included in the crime charged in the information. Amendment of the information was not necessary in this situation. *State v. Peterson*, 133 Wash.2d 885, 893, 948 P.2d 381 (1997).

During closing arguments, neither attorney has an obligation to make any specific closing argument. This is especially true in situations, such as this one, where the court has placed severe limitations on the length of time available to each side, over the objections of the one of the parties. Prosecutors have wide latitude, in closing remarks, to make arguments and draw inferences from the evidence. *State v. Dhaliwal,* 150 Wash.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown,* 132 Wash.2d 529, 565, 940 P.2d 546 (1997), *cert. denied* 523 U.S. 1007 (1998). Prosecutors have no duty to address any specific questions of law in closing arguments, although, as a general rule, a prosecutor may state the law as set forth by the court in the instructions. See e.g., *State v. Belgarde*, 110

Wash.2d 504, 755 P.2d 174 (1988); *State v. Mak,* 105 Wash.2d 692, 726, 718 P.2d 407, *cert. denied,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)(limiting prosecutors in jury trials to discussing the law as set forth in the jury instructions).

Given that the court limited the State to a total of 20 minutes to summarize its case, including rebuttal, it was not unreasonable for the prosecutor, in his discretion, to elect not to discuss the question of a lesser included offense, which should have been quite obvious as one potential option before the court.

The court in its Memorandum Opinion, suggests in one place, that the State had an obligation to request a lesser included if they wanted one. CP 69. The court writes, "What the Court does need is for the State (or Defense, if so desired) to request a lesser included." Id. Yet in another passage, the court states, "neither side is obligated to request or even to discuss a lesser included offense." Id.

The question in this case is not whether the court would have erred had it never considered the lesser included offense at all. The State concedes that the court had no obligation to consider the lesser-included offense in the absence of a request to do so by either of the attorneys. The question is rather, given that the court *did* consider the lesser included offense, and given that the court *found* the lesser included to have been

committed, beyond a reasonable doubt, was it appropriate for the court, nearly three months after the fact, to retroactively apply essentially a new procedural rule that the attorneys *must* request consideration of the lesser included offense in order for the court to grant such consideration, and thereby undo a verdict that had been perfectly valid *at the time that it was rendered*. The answer to the latter question is a resounding "no."

If the Pacific County Superior Court wishes to adopt a new local rule pertaining to lesser included offenses, let it first adopt such a rule, then publish it, and then apply it prospectively to new cases that come before the court.

A judge, presiding over a non-jury trial, is presumed to know the law. Arguments from counsel explaining the court's inherent power to find a lesser included offense are not required in a non-jury trial. The State, in its Response to the Defendant's Motion to Set Aside Oral Verdict, argued this very point, citing *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const.,* 64 Wash. App. 661 (1992). Indeed, the court, in its Memorandum Opinion, conceded that, precisely *because* the court is presumed to know the law, it was reasonable for the bench to allow even less time for closing arguments. CP 70.

Although RCW 10.61.006 gives the trier of fact the legal authority to find a lesser included offense, a jury would not *know* that it has this authority without a specific instruction from the court directing the jury that, if it finds the defendant not guilty of the crime of theft in the second degree, it should next consider the lesser included offense of theft in the third degree. The judge in a bench trial has no need of such an instruction and is fully empowered, without the argument or request of either counsel, to find a lesser included offense if such a finding is supported by the evidence in the case.

The purpose of jury instructions, in a jury trial, is to instruct the jury as to the laws which apply to the case at bar. The position occupied by the trial judge in a non-jury trial is analogous to that of a jury armed with a full set of all applicable jury instructions. Whereas, in a jury trial, the prosecutor has no obligation to discuss any particular jury instruction, including those pertaining to lesser included offenses; so in a non-jury trial, the prosecutor has no obligation to draw any particular attention to the court's inherent power to find a lesser included crime had been committed.

Ms. Gardner's argument that she was not given the opportunity to argue against the lesser included offense fails for the following reasons. Ms. Gardner could only base such a claim on CONST. ART. 1, § 22 and the

sixth amendment to the United States Constitution. Both of these provisions confer upon a defendant the right to be informed of the nature and cause of the accusation against her. *State v. Frazier*, 76 Wash.2d 373, 456 P.2d 352 (1969).

The general rule is that the crimes of which a person can be convicted, and those on which a jury is properly instructed, are restricted to those which are charged in the information. *State v. Olds*, 39 Wash.2d 258, 235 P.2d 165 (1951); *State v. Galen*, 5 Wash.App. 353, 487 P.2d 273 (1971). There are two recognized exceptions to this rule: (1) where a defendant is convicted of a lesser included offense of the one charged in the information, pursuant to RCW 10.61.006; and (2) where a defendant is convicted of an offense which is a crime of an inferior degree to the one charged, pursuant to RCW 10.61.003. *State v. Galen, supra*. Because theft in the third degree is *both* a lesser included offense *and* a crime of an inferior degree to the one charged, both RCW 10.61.003 and RCW 10.61.006 permitted the trier of fact to return a verdict of guilty to theft in the third degree.

The statute which is dispositive of the notice issue is RCW 10.61.003, which provides:

> (u)pon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, And guilty of any

degree inferior thereto, or of an attempt to commit the offense.

This statute gave Ms. Gardner sufficient notice that she was subject to a conviction of theft in the third degree.

This analysis is consistent with the approach taken in *Salinas v. United States*, 277 F.2d 914 (9th Cir. 1960), in which the United States Court of Appeals for the Ninth Circuit considered a similar issue in the context of a due process challenge. In that case, the defendant was charged with arson in the first degree but was found not guilty of that crime and was convicted of arson in the second degree. The case proceeded pursuant to Alaskan law. An Alaskan statute similar to RCW 10.61.003 provided that a defendant could be found guilty of a lower degree of the crime charged. The court stated that when an indictment charges a crime in which a lesser offense is necessarily included, or charges a higher degree of a particular offense that is divided into degrees, the accused may, consistent with the requirements of due process, be convicted of a lesser included offense or a lower degree of the offense charged. The *Salinas* court viewed the statutes in issue, i. e., first and second-degree arson statutes, "as commonly denouncing but one crime that of arson." *Salinas*, at 918.

Similarly, in the instant case, both the second-degree and third-

degree theft statutes proscribe but one offense—that of theft. Since the offense which the trial court ultimately found is a lesser degree crime of the one with which she was charged and the two crimes, namely theft, are not separate and distinct from one another, the Court should conclude that appellant was given sufficient notice to satisfy the requirements of CONST. ART. 1, § 22 and the Sixth Amendment. *See State v. Foster*, 91 Wash. 2d 466, 589 P.2d 789 (1979), applying the holdings of *Salinas v. United States* to the issue of lesser included offenses under Washington law.

D. COURT RULE 7.4 PROVIDES FOR ARREST OF JUDGMENT ONLY IN LIMITED CIRCUMSTANCES.

A motion to set aside a verdict under Criminal Court Rule 7.4 is, under the rule's own language, a motion for "arrest of judgment." Pursuant to Subsection (a), judgment may be arrested on the motion of the defendant for the following reasons: (1) lack of jurisdiction; (2) failure of the indictment or information to charge a crime; and (3) insufficiency as to the proof of a material element of the crime. None of these three circumstances apply to the case at bar; and the rule does not include any other possible reasons. When a trial court improperly grants a CrR 7.4 motion to arrest judgment, the remedy is reversal and reinstatement of the original conviction. *State v. Linden*, 138 Wash.App. 110, 120, 156 P.3d 259 (2007).

Furthermore, CrR 7.4(b) provides that the content of such a motion shall identify the specific reasons in fact *and* in law as to each ground on which the motion is based. Defendant's motion failed to identify any grounds in law upon which her motion should be granted. For these reasons, the defense Motion to Set Aside Oral Verdict was spurious. In the event that the State prevails in this appeal, the Court should award costs and reasonable attorney fees.

E. COURT RULE 7.5 DID NOT APPLY TO DEFENDANT'S MOTION TO SET ASIDE THE ORAL VERDICT.

A motion made under CrR 7.5 is, under that rule's own language, a motion for a new trial. CrR 7.5 provides for the granting of a new trial upon motion of the defendant when it affirmatively appears that a substantial right of the defendant was materially affected. CrR 7.5(a). The defendant in this case did not seek the remedy of a new trial at any time; therefore CrR 7.5 does not apply to her motion. Furthermore, none of the specific grounds enumerated in the rule were set forth in the defendant's motion. CrR 7.5 sets forth eight separate grounds for granting a new trial, none of which were present in the instant case. These include:

(1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;

(2) Misconduct of the prosecution or jury;

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;

(4) Accident or surprise;

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of the court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

(6) Error of law occurring at the trial and objected to at the time by the defendant;

(7) That the verdict or decision is contrary to law and the evidence;

(8) That substantial justice has not been done.

Examining each of these in turn, it is readily apparent, with respect to #1, that since there was no jury involved, there could be no receipt by the jury of any evidence not allowed by the court. With respect to #2, there was no allegation of misconduct by the prosecution or jury. With respect to #3, there was no mention of newly discovered evidence. With respect to #4, there was no allegation of accident or surprise. With respect to #5, there was no irregularity in the proceedings by which the defendant was prevented from having a fair trial. The finding of a lesser included offense by the trial judge in a bench trial, on the court's own initiative, is not a

procedural irregularity. See *State v. Falco*, 59 Wash.App 354, 356, 796 P.2d 796 (1990), citing *State v. Jollo*, 38 Wash.App. 469, 474 (1984). With respect to #6, there was no error of law occurring at the trial. The defendant acknowledged that that court had the authority to find a lesser included offense. CP 42, lines 2-3. With respect to #7, there was no showing that the verdict was contrary to law or to the evidence. With respect to #8, there was no showing that substantial justice had not been done. The court's finding of a lesser included offense, in the absence of any specific request by the parties that the court consider such lesser included offense, clearly does not rise to the level of substantial justice not being done.

In summary, Ms. Gardner filed her Motion to Set Aside Oral Verdict pursuant to the authority of both CrR 7.4 and CrR 7.5 even though not one of the factors provided for in those court rules was shown to apply. To the extent that Ms. Gardner relied on either CrR 7.4 or CrR 7.5, her Motion to Set Aside Oral Verdict was spurious, and this Court should award costs and reasonable attorney fees for the necessity of filing and prosecuting the instant appeal.

F. IN A MOTION TO ARREST OR VACATE A JUDGMENT IN A CRIMINAL TRIAL, IT IS THE DEFENDANT WHO BEARS THE BURDEN OF SHOWING WITH SPECIFICITY THE GROUNDS IN FACT AND IN LAW FOR THE RELIEF SOUGHT.

Both CrR 7.4(b) and CrR 7.5(b) place the burden squarely on the defendant to establish the specific reasons in fact and in law as to each ground on which the motion is based. Ms. Gardner failed to meet her burden of showing that the court had any legal authority to set aside its verdict for the reasons given by Ms. Gardner. Not a single requirement of the court rules was satisfied by the defendant and not a single case on point was cited. The reasons for granting relief were not stated with sufficient specificity.

G. THIS CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO REASSIGN THE MATTER TO A DIFFERENT JUDGE FOR SENTENCING AND FOR DECIDING RESTITUTION.

Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *State v. Perala,* 132 Wash.App. 98, 110-11, 130 P.3d 852, *review denied,* 158 Wash.2d 1018, 149 P.3d 378 (2006). A judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal,* 77 Wash.App. 720, 722, 893 P.2d 674 (1995) (quoting *State v. Ladenburg,* 67 Wash.App. 749, 754-55, 840 P.2d 228 (1992). There is ample precedent in Washington for

reassigning a matter to a different judge when the judge's remarks call into question his ability to be impartial. *State v. Ra*, 144 Wash. App. 688, 704-705, 175 P.3d 609 (2008). Moreover, a trial court should not enter into the "fray of combat" or assume the role of counsel. *Egede-Nissen v. Crystal Mountain, Inc.,* 93 Wash.2d 127, 141, 606 P.2d 1214 (1980).

In *In Re Custody of R.,* 88 Wash.App. 746, 762-762, 947 P.2d 745 (1997), a case was remanded to a different judge to promote the appearance of fairness after the original judge had engaged in a questionable exchange with one of the parties during a hearing. The Court of Appeals did not address the question of whether there was *actual* bias on the part of the judge, but noted merely that justice must satisfy the appearance of impartiality. *Id., citing State v. Romano,* 34 Wash.App. 567, 662 P.2d 406 (1983); *Brister v. Council of City of Tacoma,* 27 Wash.App. 474, 619 P.2d 982 (1980); *Chicago, Milwaukee, St. Paul and Pac. R.R. Co. v. Washington State Human Rights Comm'n,* 87 Wash.2d 802, 557 P.2d 307 (1976) (judiciary should avoid even mere suspicion of irregularity, or appearance of bias or prejudice).

In *State v. Talley*, a case was reassigned to a different judge after the original trial judge had made a statement, prior to holding an evidentiary hearing, indicating that she had prematurely formed an opinion regarding sentencing. *State v. Talley*, 83 Wash.App. 750, 763, 923 P.2d

721 (1996). The Court of Appeals held that such a statement indicated court may have prejudged the matter. Id. at 763.

Here, there are several objective facts in the case which rather pointedly call into question the trial judge's impartiality.

1. The court prematurely announced, prior to the sentencing hearing, and before hearing arguments from counsel, as provided in RCW 9.94A.500(1), that it was leaning toward ordering a deferred sentence, thereby depriving the State of its right to a neutral, fair, and impartial sentencing hearing.

Both sides in a criminal case are entitled to a hearing in front of a neutral and impartial tribunal, both during the fact-finding phase and during the sentencing phase of a criminal trial. "Trial judges have weighty responsibilities in conducting a trial which is fair to both sides." *State v. Kroll*, 87 Wash.2d 829, 831, 558 P.2d 173 (1977).

RCW 9.94A.500(1) provides that, in sentencing decisions, the court must allow for arguments from the prosecutor as well as from the defense attorney as to the sentence to be imposed. Yet here, the court prejudiced the matter prior to the sentencing hearing by stating, at the January 23, 2009, motion hearing, that he was leaning toward a deferred sentence for Ms. Gardner. 2 RP 9-10. The court remarked, with regard to a deferred sentence, "frankly, I think that's the way to go." 2 RP 10, lines 4-7. And the court linked its inclination to grant a deferred sentence

directly to the defense counsel's "fairness" argument with respect to the Motion to set Aside Oral Verdict. Id at 10-11. Judge Sullivan commented, "...I just think your argument hold a lot of weight, Mr. Janhunen, in terms of just that gut feeling inside myself as a judge about what's fair." 3 RP 10, lines 10-12. Once the court stated publicly what he thought would be a "fair" sentence in the case, he tainted the subsequent sentencing hearing. The situation is analogous to that of *State v. Talley*, supra, wherein the court prematurely indicated what sentence it would order before engaging in the requisite fact finding hearing.

Here, the State's proposed sentencing recommendations turned out to be considerably harsher than what the court had advocated. And immediately after hearing the State's recommendation, the court announced that it would reconsider the defendant's Motion to Set Aside Oral Verdict. The sequence of events is one that would lead a reasonable person to conclude that it was the State's position on sentencing and restitution, so disparate from the court's own previously-expressed notions, that prompted the court to set aside the verdict. The State was prejudiced by the court's prior expression of intent with regard to sentencing because the court reversed its ruling on the defendant's Motion to set Aside Oral Verdict immediately upon hearing the State's sentencing recommendations.

2. The trial judge erred by stating, prior to the restitution hearing, that the State would have an "uphill battle" on its restitution request.

At the sentencing hearing, the trial judge indicated several times his displeasure with the State's restitution request. 3 RP 4-7; 3 RP 24-27. The trial judge also created an appearance of bias and partiality against the victim in the case, a state agency, by indicating that, when awarding restitution, he distinguishes between crime victims that are private persons and those victims that are governmental agencies, and by advocating against the State's restitution request, on behalf of the defendant, before the State had any opportunity to present testimony or to fully explain the basis of the restitution request in fact and in law. Id. The court's expressed bias against crime victims that are State agencies is not supported by the law. As recently as 2007, the Washington Supreme Court unanimously upheld the awarding of investigative costs to a governmental agency when such costs were a direct result of the criminal activity in question. *State v. Tobin,* 161 Wash.2d 517, 166 P.3d 1167 (2007).

3. The trial judge created the appearance of partiality and bias by citing his 25-year acquaintance with the defense counsel as a reason for denying the State's motion for presentencing release conditions.

On December 19, 2009, immediately after the court announced its verdict, the State moved the court to enter a standard Order for Pre-Sentencing

Release Conditions. 1 RP 12. The court cited his 25-year acquaintance with the defense attorney in denying the State's motion. 1 RP 14. The court's exact words were: "I've known Mr. Janhunen for almost 25 years and if he says his client is—is no problem staying in contact, I really don't need to go there." Although this statement was by no means a blatant expression of favoritism, a reasonable person sitting in the courtroom and hearing it would easily have come away with the impression that the judge was treating this defendant differently because of who her attorney was. That same reasonable person might well have concluded that, had Ms. Gardner been represented by a different attorney, the court might have ruled differently on the State's motion. Clearly, a defendant should not receive more favorable treatment simply because her attorney happens to be especially well-acquainted with the trial judge.

4.) The trial judge created the appearance of partiality and bias by questioning the prosecutor, at the sentencing hearing, as to why it had taken the Parks Department so long to prepare restitution figures, when the matter had not yet been scheduled for a restitution hearing and when the court had never given the State any deadline for filing a restitution estimate.

The Sentencing Reform Act restitution statute, RCW 9.94A.142, requires that restitution be set within 180 days after sentencing is imposed. The Sentencing Reform Act of 1981, RCW 9.94A, only applies to felonies. RCW 9.94A.010; *State v. Whitney*, 78 Wash.App. 506, 517, 897

P.2d 374, review denied, 128 Wash.2d 1003 (1995). "An award of restitution for a misdemeanor offense is authorized under RCW 9.92.060(2) and RCW 9.95.210(2), both of which allow the court to require the defendant 'to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question ." *State v. Soderholm*, 68 Wash. App. 363, 377, 842 P.2d 1039 (1993). Since Ms. Gardner would have been eligible, as a convicted misdemeanant, to receive a suspended sentence and probation, RCW 9.92.060(2) and RCW 9.95.210(2) were the applicable statutes. Unlike RCW 9.94A.142, neither of these imposes a time limit. Moreover, there is no local court rule in Pacific County requiring that restitution determinations in misdemeanor cases be made within a specified time period.

The court had never discussed restitution prior to Ms. Gardner's sentencing hearing. Similarly, the court had never set a deadline for the State to file a restitution request. In light of these facts, the court's preoccupation with the alleged lateness of the State's filing was inappropriate.

At the beginning of the February 6, 2009, sentencing hearing the court questioned the prosecutor as to when he had received the information from the State [Parks Department] regarding the restitution

figures. 3 RP 5. The court asked whether the Parks Department had given any reason why it had taken them so long. Id. The court said, "It seems like an awful long time for the State to sit around and not present anything like that." Id. In view of the surrounding context, these remarks show bias against the victim in the case, the Washington Parks Department, because, if anything, the Parks Department had submitted the figures earlier than they were required to; whereas the trial judge's comments suggested that the information was submitted late.

5. The totality of circumstances suggests that the trial judge is no longer able to render an impartial decision in this matter.

During the sentencing hearing, at CP 22, the judge stated: "Well, I've thought a lot about this case. It sort of—it's just sort of sticking in my craw, so to speak." Yet, the only thing that had changed between the January 23, 2009, motion hearing and the February 6, 2009, sentencing hearing was that, at the earlier hearing, the court had not yet heard the State's sentencing recommendations and restitution request. The ineluctable conclusion to be drawn from this sequence of events is that this trial judge was having great difficulty in separating his role a finder of fact from his role in imposing punishment. The judge's apparent intent was to compensate Ms. Gardner for his unfavorable ruling on her Motion to set

Aside Oral Verdict by treating her more leniently at sentencing—and this in spite of the fact that the one decision should not have had anything to do with the other. For these reasons, this Court should remand the case with instructions that the matter be reassigned to a different judge for sentencing and for a ruling on the State's restitution request.

VII. APPELLANT WAIVES ORAL ARGUMENTS AND MOVES THE COURT TO DECIDE THIS APPEAL ON THE BRIEFS ALONE.

The State's position is that the issues presented herein are best decided on the basis of the briefs filed by each side. In the interest of promoting judicial economy, the State respectfully requests that no oral arguments be heard in this matter.

VIII. CONCLUSION

As argued above, the question in this case is not whether the court would have erred had it never considered the lesser included offense at all. The question is rather, given that the court, in its role as trier of fact, *did* consider the lesser included offense, and given that the court *found* the lesser included to have been committed beyond a reasonable doubt, was it appropriate, or even lawful, for the court to retroactively apply a newly created procedural rule, three months after the fact, in order to justify the

undoing of a verdict that was perfectly valid *at the time that it was rendered.* The answer to the latter question is a resounding "no."

When a trial court improperly grants a CrR 7.4 motion to arrest judgment, the remedy is reversal and reinstatement of the original conviction. *State v. Linden*, 138 Wash.App. 110, 120, 156 P.3d 259 (2007).

The Court should remand this case to the trial court with instructions to reinstate the conviction for theft in the third degree. The Court should also provide instructions to the lower court to reassign the case to a different judge for sentencing and for a ruling on the State's restitution request.

Finally, the Court should award the State reasonable attorney's fees and costs arising from the filing and prosecuting of this appeal.

DATED this 16th day of July, 2009.

Respectfully submitted,

DAVID J. BURKE
PACIFIC COUNTY PROSECUTING ATTORNEY

BY: David Bustamante
DAVID BUSTAMANTE, WSBA #30668

FILED
COURT OF APPEALS
DIVISION II

09 JUL 17 AM 11:00

STATE OF WASHINGTON
BY_____
DEPUTY

CERTIFICATE OF SERVICE

I, David Bustamante, do solemnly declare and affirm, under penalty of perjury under the laws of the State of Washington, that I personally served the attached Appellant's Opening Brief by mailing a true copy, postage prepaid, to the Respondent, Joanne Gardner, at the following address of record: 4477 Flower Street, Tokeland, WA 98590; and also, by mailing a true copy to her attorney of record, Curtis Janhunen, Brown Lewis Janhunen & Spencer, P.O. Box 1806, Aberdeen, WA 98520.

Signed at South Bend, Pacific County, Washington, this 16th day of July, 2009.

David Bustamante

DAVID BUSTAMANTE
DECLARANT

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Signed at South Bend, Pacific County, Washington, this 16th day of July, 2009.

David Bustamante

DAVID BUSTAMANTE
DECLARANT