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STATEMENT OF THE CASE

Except as noted here, and in the argument section that follows, and without waiving the right to challenge facts later, Appellant's statement of the case is adequate for purposes of responding to this appeal.

In the argument section of her opening brief, Bertrand states in the argument heading that the "firearm enhancement must be stricken." Brief of Appellant 4. However, there is no firearm enhancement in this case. Instead, the special verdict was for delivery of a controlled substance within 1000 feet of a school bus stop. CP 5-6.

In addition, in her statement of the case, Bertrand leaves out a crucial portion of the jury instruction she takes issue with. Brief of Appellant. In reality, Instruction No. 13 states, in pertinent part:

If you find the defendant not guilty of Delivery of a Controlled Substance, do not use the special verdict form. If you find the defendant guilty, you will complete the special verdict. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

If you find from the evidence that the state has proved beyond a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict "yes."

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict "no."

CP 33 (emphasis added)(the last paragraph was left out of Ms.

Bertrand's quote from the instruction); Brief of Appellant 2,3; RP 133

(Court reading the instruction to the jury).

ARGUMENT

A. THE COURT'S INSTRUCTION REGARDING THE AGGRAVATING FACTOR FOR THE SPECIAL VERDICT WAS PROPER AND IS NOT A MANIFEST CONSTITUTIONAL ERROR THAT CAN BE RAISED FOR THE FIRST TIME ON APPEAL.

Bertrand also claims for the first time on appeal that the jury instruction for the special verdict form is flawed, citing State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1082 (2003) But Bertrand did not object to this instruction below, nor did she propose her own instruction as to this factor. Nor is this alleged error a "manifest constitutional error" that can be raised for the first time on appeal. Accordingly, this Court should affirm the jury's finding that the offense was committed within 1000 feet of a school bus route stop.

Bertrand argues for the first time on appeal that the alleged error in the "special verdict" instruction on the aggravating factor

requires that the special verdict be "vacated." Bertrand relies on the Bashaw case and the Goldberg case for this argument. Bashaw relied on Goldberg to hold that a unanimous jury decision is not required to find the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Bashaw, 169 Wn.2d at 146. The Court in Bashaw overturned a special verdict based on an instruction similar to Instruction number 13 in this case, stating the instruction erroneously required the jury agree on their answer to the special verdict even if they did not unanimously find the presence of the special finding. Id. at 147.

In the instant case, the language regarding the special verdict in instruction 13 reads as follows:

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant delivered the controlled substance to a person within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict "no."

Instruction No. 13(emphasis added). Thus, the language of this instruction clearly told the jury if it had a "reasonable doubt" about the school bus enhancement that it should answer "no" on the special verdict. Accordingly, this instruction did not tell the jury it had to be "unanimous" before it could answer "no" on the special

verdict form--as in Bashaw. As such, this instruction appears proper.

Furthermore, Ms. Bertrand did not object to this instruction at trial, nor did she submit any jury instructions below. RP 122. Generally, appellate courts do not consider issues raised for the first time on appeal. RAP 2.5(a), State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An error which was not objected to at the trial level may be considered by the court if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3), State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Whether the Court will consider an asserted error under these circumstances is determined by a four part analysis set out in Lynn.

First, reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Lynn, 67 Wn. App. at 345.

This Court should decline to consider the issue pertaining to

the special verdict in this case because Ms. Bertrand cannot identify any constitutional provision implicated by the instruction given in this case. Moreover, this instruction at issue here does not appear to have the same error as the instruction in Bashaw. The rule which the Court in Bashaw relied on to find the special verdict instruction in that case was erroneous is not compelled by double jeopardy protections. Bashaw, 169 Wn.2d at 146, n. 7. Since it is not readily apparent that the issue raised by Ms. Bertrand in this case implicates the constitution, the Court should decline to consider this issue for the first time on appeal. That said, it is also true that Courts have recognized that “instructional errors may implicate constitutional due process.” Lynn, 67 Wn. App. at 343. However, even if due process is implicated by the instruction given the jury here¹, no manifest error exists. “Manifest” within the meaning of RAP 2.5(a)(3) requires the defendant to show that he was actually prejudiced. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The actual prejudice standard differs from the harmless error standard in that under the former test the focus is on “whether the error is so obvious on the record that the error

¹ The State does not concede that the defendant’s due process rights were violated by the special verdict instruction. However, it is addressed for the sake of argument.

warrants appellate review.” O’Hara, 167 Wn.2d at 99-100.

To show actual prejudice the defendant must show that the error had a practical and identifiable consequence in the trial of the case. Id. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333. Only after the Court concludes that manifest constitutional error has occurred does the Court then engage in a harmless error analysis. O’Hara, 167 Wn.2d at 99. Any error in this case does not satisfy the manifest requirement to justify review.

The evidence in the instant case established beyond a reasonable doubt that Ms. Bertrand delivered a controlled substance within 1000 feet of a school bus stop. Here, on March 24, 2009, the police set up a "controlled buy" using a confidential informant. RP 28. The informant's name (CI) was Devon Edens. RP 27. On March 24, 2009, officers searched the CI's person and searched his vehicle before having him carry out the buy. RP 30, 42, 43, 45-47, 48. The CI had no money on him so the police provided the CI with "buy funds," and the police also recorded the serial numbers of the money RP 31. The CI also wore a "wire." RP 32, 49, 52, Ex.2.

On March 24, 2009, after thoroughly searching the CI and searching his vehicle, officers followed the CI to Ms. Bertrand's residence. RP 33,41,48, 94,95. The CI had arranged ahead of time by telephone to buy the controlled substance from Ms. Bertrand. RP 33, 34, 45,46. The police followed the CI to Ms. Bertrand's home where the police parked in an unmarked vehicle. RP 34. The police had an unobstructed view of the CI as he walked to Ms. Bertrand's door. RP 34. Officers saw the CI knock on Bertrand's front door and saw that he was let inside Bertrand's home for "about five minutes or so. It wasn't very long." RP 35, 51. The CI's wire picked up the sale of the pills between the CI and Ms. Bertrand. RP 54,55-58. Officers then saw the CI exit Ms. Bertrand's home, get into his vehicle, and then the CI drove past the officers, giving them the "okay sign" that the buy was "good." RP 34, 43. When the CI got back to the police station, the police strip searched the CI again, and then they searched the CI's vehicle, finding a small cellophane packet containing "about 15 pills." RP 35. The pills were placed into evidence at the Centralia Police Department, and later sent for analysis at the State Crime Lab. RP 35,36,37; Ex. 3. The crime laboratory found that the pills contained Oxycodone. RP 68,69, 71,72, 73, Ex. 4. Officers also

removed the recording device from the CI and reviewed the tape and then the officers "up-loaded" the recording to a data system on their computers. RP 39. Officers were not able to recover the "buy money" because shortly after the buy, Ms. Bertrand was evicted from the residence, which made a search warrant impossible to get. RP 40

As for the school bus stop enhancement, the assistant director of transportation for the Centralia School District, Dale Dunham, testified regarding the location of the school bus stop. RP 75. Mr. Dunham said that it is his duty to designate the location of school bus stops for the school district. RP 75. Mr. Dunham had been asked to identify a school bus stop at 3632 Cristom Place, and Mr. Dunham located the bus stop at Ives and Lamar. RP 76. Mr. Dunham pointed out the bus stop on a map. RP 75,76. Mr. Dunham said that bus stop was a daily bus stop and that it was in existence on Marcy 24, 2009. Next, Steve Spurgeon, an engineering tech for the City of Centralia testified about the map on which he measured the 1,000 feet to the bus stop measurement. RP 78-84. Mr. Spurgeon pointed out Ms. Bertrand's property on the map and pointed out the 1,000 foot measurement--and Ms. Bertrand's property was within 1,000 feet of the school bus stop.

RP 84, 85, 88. Thus, the State presented overwhelming evidence--complete with a recording--of the drug transaction between the CI and Ms. Bertrand. Furthermore, the evidence regarding the subject matter of the special verdict form--the school bus enhancement--is also overwhelming, as just noted. This is in contrast to the situation in the Bashaw case where there was conflicting evidence regarding the school zone enhancement. Bashaw, 169 Wn.2d at 138-39. Thus, in Bashaw, one or more jurors may not have been convinced that the facts supporting the enhancement were credible. Id. But in the present case there is no indication that the jury was confused or undecided about the school bus stop enhancement. Where there is no evidence the jury was actually hung on the special verdict question, or that there would have been a basis for disagreement on that finding, Bertrand cannot show that she was prejudiced by the instruction.

Not only can Bertrand not show prejudice, but her total failure to object to the special verdict instruction--or to propose her own instruction-- deprived the trial court (and the State) of the opportunity to prevent the instructional error she now raises. Kirkman, 159 Wn.2d at 935. Had Ms. Bertrand argued the holding in Goldman applied to the special verdict instruction in this case,

the court could have easily modified the instruction to ensure jurors were not required to be unanimous on a "no" vote. Indeed, this extremely-routine practice of defense counsel's complete failure to ever offer any jury instructions whatsoever in these criminal cases, and/or failing to object to the instructions is, in a word, inexcusable. See e.g., In re Crace, 157 Wn.App. 81, 276 P.3d 914 (2010)(dissent) where Judge Quinn-Brintall, in her *excellent* dissent comments on this questionable-but-common "practice" by defense counsel thusly:

. . . . ordinary, reasonably competent defense counsel routinely ignores rules requiring the presentation of defense proposed instructions as required under CrR 6.15(a) and, to a lesser extent, the taking of exceptions to the trial court's jury instructions as required under CrR 6.15(c). This decision appears to be based on the fact that the invited error doctrine has been pretty consistently enforced, see, e.g., *State v. Momah*, 167 Wash.2d 140, 153-55, 217 P.3d 321 (2009) (discussing application of the invited error doctrine), cert. filed, 78 USLW 3745 (June 7, 2010), while the ineffective assistance of counsel argument has undermined normal preservation requirements and resulted in appellate courts *reviewing the merits* of issues never presented to or decided by the trial court. As such, in my opinion, the failure to propose or except to instructions has become either a tactical decision or has become conduct so pervasive that the ordinary, reasonably prudent defense counsel intentionally fails to comply with court rules requiring issue preservation to provide what amounts to de novo review of the trial on appeal. . . .

In re Crace 157 Wash.App. at 117-118 (dissent)(all emphasis added). This abuse of the rules pertaining to the defense's obligation to either propose its own jury instructions or make timely objections to the instructions should end. Here, Ms. Bertrand neither proposed her own instructions regarding the special verdict nor did she object to any of the instructions. RP 86, 87, As such, this Court should find she has waived her right to object to the instructions now and should affirm the special verdict in all respects.

Finally, even if this Court considers the issue and reverses the special verdict, this Court should decide what the appropriate remedy should be. The usual remedy for erroneous jury instructions is remand for a new trial. See, e.g., State v. Jackman, 156 Wn.2d 736, 745, 132 P.2d 136 (2008); State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). This reflects fundamental considerations of justice:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964)(emphasis added). This observation is particularly applicable to the present case, where no objection was raised to the alleged error and the evidence was overwhelming.

In Bashaw, the court set out policy reasons why a weapon enhancement should not be retried after a jury fails to agree on the special verdict. The court said that allowing retrials would violate the “policies of judicial economy and finality.” Bashaw, 163 Wn.2d at 146-47. When, however, a defendant successfully challenges his conviction, he loses any right to have that conviction treated as final. See State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006). As for “judicial economy,” it is not a waste of time for a court to determine whether a person who sold a controlled substance within 1000 feet of a school bus stop deserves to have her sentence enhanced because of that aggravating factor. Thus, if this Court reverses the aggravating factor considered on the special verdict, then the remedy should be remand for a jury trial solely to allow a jury to consider only that aggravating factor. RCW 9.94A.535.

**B. THE LEGAL FINANCIAL OBLIGATIONS WERE
LAWFULLY AND PROPERLY IMPOSED.**

Ms. Bertrand also complains about the legal financial obligations imposed against her at the time of sentencing. This argument is without merit. The bottom line is that under current law, the trial court properly assessed all of the costs imposed against Ms. Bertrand. In addition, Ms. Bertrand did not object to the assessment of these costs against her, nor did she complain that she would not be able to pay the \$25 per month towards payment of the costs. RP 161, 162, 163.

The Superior Court has discretion to impose legal financial obligations as part of a convicted criminal defendant's judgment and sentence pursuant to RCW 9.94A.760. Imposition of such fines "is within the trial court's discretion. [And] [a]mple protection is provided from an abuse of that discretion[:]. The court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified." State v. Curry, 118 Wn.2d 911, 916 (1992). The authority to impose LFO's against convicted criminal defendants is statutory. RCW 10.01.160 authorizes a trial court to impose costs on a convicted indigent defendant if he is able to pay

or will be able to pay. RCW 10.01.160(3); State v. Eisenman, 62 Wn.App. 640, 644, 810 P.2d 55, 817 P.2d 867 (1991).

This statute further notes that "[i]n determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3)(part). This statute survived a constitutional challenge in State v. Barklind, 87 Wn.2d 814, 557 P.2d 314 (1976). In Barklind, the Court discussed the parameters of constitutionally permissible costs and fees system, and decided that the following requirements must be satisfied:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

Barklind, 87 Wn.2d at 818, citing Eisenman, supra.

Ripeness

Perhaps most importantly as it relates to the present case, although criminal defendants can challenge the imposition of LFO's, it is also true that "[h]e *imposition of the penalty assessment, standing alone*, is not enough to raise constitutional concerns." Curry at 918(emphasis added). Rather, "constitutional principles will be implicated . . . only if the government seeks to enforce collection of the [costs] 'at a time when [the defendant is] unable, *through no fault of his own*, to comply.'" State v. Crook, 146 Wn.App. 24, 27, 189 P.3d 811(2008)(emphasis added); Curry, 62 Wn.App. at 681(*quoting United States v. Pagan*, 785 F.2d 378, 381 (2nd Cir. 1986)). In other words, "[t]he unconstitutionality of a law is not ripe for review unless the person seeking review is harmed by the part of the law alleged to be unconstitutional." State v. Ziegenfuss, 118 Wn.App. 110, 113, 74 P.3d 1205 (2003); State v. Smits, 152 Wn.App. 514, 216 P.3d 1097(2009)("the time to examine a defendant's ability to pay is when the government seeks to collect the obligation"). In other words, a defendant is "not an 'aggrieved party' . . . 'until the State seeks to enforce payment and contemporaneously determines his ability to pay.'" Smits, *supra*, *quoting State v. Mahone*, 98 Wn.App. 342, 347-348, 989 P.2d

583(1999)((citing State v. Blank, 131 Wn.2d 230,242,930 P.2d 1213 (1997)). Indeed, "[i]t is at the point of enforced collection . . . , where an indigent may be faced with the alternatives of *payment or imprisonment*, that he 'may assert a constitutional objection on the ground of his indigency.'" Crook at 27 (other citations omitted); Mahone, 98 Wn.App. at 348.

In the present case, Ms. Bertrand's complaints regarding the LFO's is not ripe for review because the State has not yet sought to enforce collection of the costs imposed. Blank, supra. Furthermore, all of the costs imposed are allowed by statute and the judgment and sentence contains the statutory citation for authority to assess each of the costs imposed--*including attorney fees*. CP 19-27. And again, neither Ms. Bertrand nor her counsel voiced any objection to these costs or said anything about Ms. Bertrand's "inability" to pay. RP 161, 162. The fact that Ms. Bertrand is "indigent" does not preclude the court from assessing costs as the court does against every convicted defendant--and the vast majority of defendants are "indigent" after all. The statutes currently allow the court to assess the costs that it assessed in this case. Ms. Bertrand can bring a motion to reduce or modify these costs at any time. Period. Accordingly, this Court should uphold

the trial court's imposition of fees and costs as part of Ms.
Bertrand's sentence

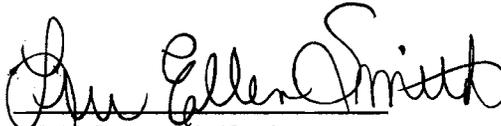
CONCLUSION

For all of the foregoing reasons, this Court should affirm.

RESPECTFULLY SUBMITTED this 2nd day of December, 2010.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

by:


LORI SMITH, WSBA 27961
Deputy Prosecutor

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Declaration of Service

The undersigned certifies that on this date a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

Dated this 2nd day of December, 2010, at Chehalis, Washington.

