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SUPREME COURT
STATE OF WASHINGTON
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NO. 95374-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTHUR IDOWU THOMAS,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMY R. MECKLING
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUE PRESENTED

A jury found Petitioner Arthur Thomas guilty of second-degree assault but was unable to agree unanimously whether he was armed with a firearm when he committed the assault. Did the superior court have authority under the relevant statutes, court rules and case law to empanel a second jury to consider the firearm enhancement allegation?

B. STATEMENT OF THE CASE

Bruce Golphenee worked as an armed, uniformed security guard at a Seattle branch of Bank of America. 12/3/15 RP 51-53. In July of 2014, Thomas approached Golphenee and hit him on the side of the face with a backpack. Id. at 58-59. Thomas punched Golphenee repeatedly. Id. at 59. Golphenee's left leg was broken during the struggle with Thomas. Id.

Thomas also grabbed Golphenee's holstered revolver. 12/3/15 RP 60. When Golphenee realized that Thomas had his hand on the gun, Golphenee drew it and fired twice at the ceiling, hoping to empty the pistol of its six rounds before Thomas could take it. Id. at 60-61.

But Thomas was able to squeeze the trigger, firing a bullet into Golphenee's hand. 12/3/15 RP 61. After more struggle over the gun, Thomas took control of it, and shot Golphenee in the back. Id. As Golphenee fell wounded, Thomas shot himself in the face and jaw, but

survived. Id. at 62-66. Golphenee lost his finger and endured several surgeries for severe internal injuries. Id. at 71-73, 75.

The State charged Thomas with first-degree assault in King County Superior Court. CP 35. The State also alleged that Thomas was armed with a firearm during the assault. Id. A jury deadlocked on the first-degree assault charge but found Thomas guilty of the lesser crime of second-degree assault. CP 109-10; 10/29/15 RP 3-20. The jury was unable to agree unanimously on the firearm enhancement allegation and left the special verdict form blank. CP 111; 10/29/15 RP 20.

The trial court empaneled a second jury for the sole purpose of considering the firearm enhancement allegation. CP 132; 11/6/15 RP 42-43; 12/1/15 RP 11, 13. Thomas objected, arguing that the initial jury's failure to agree on the enhancement was an implied acquittal and that his double jeopardy and due process rights prohibited a second jury from considering the enhancement. CP 153; 10/29/15 RP 30-43. The new jury determined that Thomas was armed with a firearm during the assault. CP 123. The trial court imposed a standard-range sentence of 42 months in custody and 18 months of community custody. CP 146-47.

Thomas appealed, abandoning his previous constitutional claims, instead arguing that the trial court did not have authority to empanel a

second jury to consider the firearm allegation after the first jury was unable to agree unanimously. CP 153, 166.

In an unpublished opinion, the court of appeals rejected Thomas's argument and affirmed his conviction and sentence. State v. Thomas, No. 74733-9-1 (Wash. Ct. App. Nov. 20, 2017). This Court accepted review.

C. SUMMARY OF ARGUMENT

Thomas asserts that the trial court lacked authority to empanel a jury to consider the firearm enhancement allegation independent of the underlying assault charge. His argument ignores the relevant statutes, court rules, and case law.

The deadly weapon enhancement statute explicitly directs the question to be submitted to a jury by special verdict, and does not require the finding to be made by the same jury that found the defendant guilty of the underlying crime. But even if the deadly weapon statute were silent or ambiguous on the procedure for determining a firearm enhancement separately from the underlying crime, trial courts have the power to infer procedures necessary to meet constitutional requirements and to implement legislative intent.

The trial court here properly exercised its authority to empanel a second jury solely to consider whether Thomas was armed with a firearm

at the time of his crime. This Court should affirm the decision of the court of appeals.

D. ARGUMENT

TRIAL COURTS HAVE THE AUTHORITY TO EMPANEL JURIES TO CONSIDER ANY FACT THAT INCREASES PUNISHMENT WHEN THERE IS NO CONTRARY LEGISLATIVE DIRECTIVE.

The court's authority to empanel a jury is a question of law, which this Court reviews *de novo*. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007) (citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002)).

Within constitutional limits, the legislature fixes the penalties for criminal offenses and sets the sentencing process. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986); State v. Monday, 85 Wn.2d 906, 909-10, 540 P.2d 416 (1975). Certain factual findings automatically increase a defendant's punishment in Washington. The range of these mandatory enhancements is broad. For example, defendants who were armed with a firearm or other deadly weapon during the commission of most felonies receive an enhanced sentence, determined by the class of

felony committed.¹ RCW 9.94A.533(3), (4). Similarly, first-degree murder committed with one or more statutory aggravating circumstances, for adult defendants, requires a sentence of either life without the possibility of release or death. RCW 10.95.020; RCW 10.95.030(1), (2).

In addition to facts that lead to mandatory sentence enhancements, some factual findings require mandatory minimum terms. See RCW 9.94A.507(3)(c)(ii) (certain sex offenses deemed “predatory,” or committed against victims under fifteen years old or against vulnerable victims); RCW 9.94A.540(1)(b) (first-degree assault or first-degree assault of a child using force or means likely to result in death or committed with intent to kill). Still other factual findings provide a trial court with discretion to impose an exceptional sentence above or below the standard range. RCW 9.94A.535(1), (2), (3); RCW 9.94A.537(6).

¹ Automatically enhanced sentences also flow from findings that a defendant committed: (1) certain drug offenses in a county jail or state correctional facility, or within certain distances from schools, school bus stops and other locations, or in the presence of a minor; (2) vehicular homicide while under the influence if he or she has qualifying prior drug and alcohol driving offenses; (3) most felonies committed with sexual motivation; (4) certain sex offenses that were also engaged in, agreed to, or offered in exchange for a fee; (5) certain felonies committed by an adult in which he or she compensated, threatened, or solicited the involvement of a minor; (6) an attempt to elude a police vehicle in a manner that endangered others; (7) an assault of a law enforcement officer or law enforcement agency employee if committed with what appears to be a firearm; (8) certain impaired driving felonies committed with child passengers; and (9) robbery of a pharmacy. RCW 9.94A.533(5)-(14).

Any factual finding that increases the applicable punishment must be found unanimously by a jury, unless explicitly waived by the defendant. U.S. CONST. amend. VI; CONST. art. I, § 21; Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 313-14, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

If the legislature is silent or ambiguous about the proper sentencing procedure, trial courts long have had statutory authority to infer the existence of procedures for enforcing the defendant's constitutional right to a jury trial and to implement legislative intent:

When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, *if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.*

RCW 2.28.150 (emphasis added). This statutory provision has been in place for more than a century. LAWS OF 1891, ch. 54, § 12; Pillatos, 159 Wn.2d at 485 (Chambers, J., concurring).

In addition to the statutory authority supplied by RCW 2.28.150, court rules provide the trial courts additional power to empanel juries to determine sentence enhancements or aggravators. Under CrR 6.1(a), matters “required to be tried by jury shall be so tried unless the defendant

files a written waiver of a jury trial, and has consent of the court.” The rules further specify the procedure by which juries can make special findings, such as the firearm enhancement allegation in this case:

The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict.

CrR 6.16(b).

In State v. Thomas, the jury’s original finding of aggravating circumstances under RCW 10.95.020 was reversed for instructional error, but the defendant’s first-degree murder conviction was affirmed. 166 Wn.2d 380, 384, 208 P.3d 1107 (2009) (Thomas II). On remand, the trial court empaneled a jury solely to consider the aggravating circumstances. Id. at 392. Thomas appealed again, arguing that no statutory authority allowed the trial court to create a procedure for “empaneling aggravating factor juries.” Id.

However, this Court, citing to CrR 6.1(a), recognized that “the power to empanel a jury to consider aggravating factors is a court mandated component of the power to hear cases ‘required to be tried by a jury.’” Thomas II, 166 Wn.2d at 393. This Court recognized that if it were to conclude that the trial court lacked authority to empanel a jury on the aggravating factors, then it would have “to say the court had no power

to uphold Thomas’s constitutional right to a jury.” Id. at 394. This Court dismissed Thomas’s argument because courts have the power to enforce constitutional rights. Id.

In State v. Nunez, this Court noted that the legislature has enacted factors that increase punishment in multiple different statutory provisions, spanning several titles of the revised code. 174 Wn.2d 707, 711-12, 285 P.3d 21 (2012). This Court concluded that unanimity was required for juries to reject the various aggravating sentencing factors at issue in that consolidated case, noting that it made “little sense” to apply its unanimity rule to aggravators under RCW 9.94A (firearm enhancements) and RCW 10.95 (first-degree murder aggravating circumstances) but not to aggravators under RCW 69.50 (school bus zone enhancements). Id. at 716.

Here, likewise, it would make no sense to conclude that this Court’s reasoning in Thomas II — that the court rules authorize trial courts to empanel juries solely to consider aggravating factors under RCW 10.95 — does not apply to the firearm enhancements found in RCW 9.94A.

Thomas cites to this Court’s decisions in State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), and Pillatos, supra, as the only support for his argument that the trial court lacked the power to empanel a jury to

consider the firearm enhancement allegation alone. Thomas cites to those cases for a sweeping assertion that “trial courts lack inherent authority to empanel sentencing juries,” without acknowledging the marked distinction between the firearm enhancement at issue here and the former statutory aggravating factor scheme at issue in Hughes and Pillatos.

In both Hughes and Pillatos, this Court considered the exceptional sentence aggravating factors found in former RCW 9.94A.535. At the time, that statute explicitly directed *trial courts* to make the necessary factual findings on the statutory aggravating factors. Former RCW 9.94A.535 (LAWS OF 2003, ch. 267, § 4 (eff. Jul. 27, 2003)).

But after Blakely held judicial fact-finding for exceptional sentences unconstitutional, this Court refused to infer a procedure to empanel juries in direct contradiction of the explicit language of the statute that directed trial courts to make those required factual findings. Hughes, 154 Wn.2d at 151; Pillatos, 159 Wn.2d at 469-70. Because the setting of sentencing procedures is a legislative function, this Court concluded that trial courts did not have authority to adopt sentencing procedures in direct contradiction to the legislature’s expressed intent. Id. “To create such a procedure out of whole cloth would be to usurp the power of the legislature.” Hughes, 154 Wn.2d at 151-52.

However, this Court has clearly distinguished that pronouncement from the situation where a statute is silent or ambiguous as to the procedure and the trial court then infers the necessary procedure. Hughes, 154 Wn.2d at 151; see also State v. Davis, 163 Wn.2d 606, 613, 184 P.3d 639 (2008) (contrasting statutes that are silent or ambiguous with the exceptional sentencing statute's explicit directive of judicial fact-finding).

Unlike the former exceptional sentencing statute considered by Hughes and Pillatos, the firearm enhancement statute at issue here has *always* authorized a jury finding. In State v. Recuenco, this Court rejected the defendant's post-Blakely argument that there was no statutory procedure for a jury to return a firearm enhancement special verdict, stating, "We hold that a procedure did and does exist whereby the jury can be asked to make a firearm finding." 163 Wn.2d 428, 437-39, 180 P.3d 1276 (2008) (Recuenco III).

Indeed, RCW 9.94A.825 requires that if a jury trial is held, the jury shall, if it finds the defendant guilty, separately determine whether the defendant was armed with a deadly weapon at the time of the crime. The statute defines the term "deadly weapon" to include a "pistol, revolver, or any other firearm." Because the definition of deadly weapon includes firearms, it follows that the jury may be asked whether the defendant was armed with a deadly weapon that was a firearm. Recuenco III, 163 Wn.2d

at 439; see also State v. Nguyen, 134 Wn. App. 863, 870-71, 142 P.3d 1117 (2006).

This is not a situation as in Hughes and Pillatos, where a legislatively-created procedure, explicitly directing judges to make factual findings, is found unconstitutional and the court is later asked to create a jury procedure “from whole cloth.” Instead, the deadly weapon enhancement statute has always authorized a jury finding.

In State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), this Court refused to read into the death penalty statute a certain sentencing procedure when the statute expressly directed a different one. The statute at issue explicitly required the *same* jury that had determined the defendant’s guilt to also determine his sentence. 94 Wn.2d at 8. This Court concluded that empaneling a second jury was prohibited by the explicit language of the statute. Id. But no such express prohibitory language appears in the deadly weapon statute, which refers to “the jury,” not “the same jury.” RCW 9.94A.825.

At most, the deadly weapon statute could be considered ambiguous as to whether a second jury can be empaneled after the first jury is unable to agree unanimously. But, as discussed above, when a particular statute is silent or ambiguous regarding the proper procedure, RCW 2.28.150, CrR 6.1(a), and CrR 6.16(b) all authorize trial courts to employ procedures

to protect a defendant's constitutional rights and to implement legislative intent. Thomas II, 166 Wn.2d at 393-94.

Indeed, the court of appeals previously has held that when a firearm enhancement is reversed due to instructional error, the trial court may empanel a second jury upon remand to consider the enhancement alone. State v. Reyes-Brooks, 165 Wn. App. 193, 202, 267 P.3d 465 (2011).² Thomas tries to discredit Reyes-Brooks by averring that the court of appeals based its holding solely on the text of the post-Blakely amendments to the exceptional sentencing statute, which, by its terms, does not apply to firearm enhancements under RCW 9.94A.533.³

² After this Court concluded in Nunez, *supra*, that the alleged instructional error in Reyes-Brooks was not error after all, the court of appeals merely affirmed Reyes-Brooks' conviction in an unpublished opinion on remand. State v. Reyes-Brooks, 2012 WL 5477830, 171 Wn. App. 1028 (2012).

³ RCW 9.94A.537 currently states, in relevant part:

(2) In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the previous sentence, at the new sentencing hearing.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(4) 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, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence

But Thomas's characterization of Reyes-Brooks is incorrect. Reyes-Brooks did not rely on the *text* of the post-Blakely exceptional sentence legislation. Instead, it found this Court's reasoning in Thomas II persuasive, that the court rules and constitutional right to a jury trial authorize trial courts to empanel juries solely to consider aggravating factors on remand. Reyes-Brooks, 165 Wn. App. at 203.

The court of appeals did discuss the exceptional sentencing statute amended by the legislature post-Blakely, but only to point out the statement of legislative intent that accompanied the amendments:

The legislature intends that the superior courts shall have the authority to impanel juries to find aggravating circumstances *in all cases* that come before the courts for trial or sentencing, regardless of the date of the original trial or sentencing.

Reyes-Brooks, 165 Wn.2d at 206 (quoting LAWS OF 2007, ch. 205, § 1 (emphasis added)). Reyes-Brooks conceded that the Blakely-fix statute only applied to certain aggravating factors, but it nonetheless found

supporting the aggravating fact is not part of the *res gestae* of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(5) If the superior court conducts a separate proceeding to determine the existence of aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t), the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

compelling the legislature's statement expressing "a guiding public policy applicable to sentence enhancements generally." 165 Wn. App. at 206.

Thomas's claim that Reyes-Brooks premised its holding on the text of the so-called "Blakely-fix" statute is wrong. Instead, the court of appeals' reasoning is sound: the legislature intended courts to have broad authority to empanel juries to make necessary factual findings regarding all sentencing enhancements.

Thomas also argues that Reyes-Brooks conflicts with State v. McNeal, 156 Wn. App. 340, 231 P.3d 1266 (2010), and State v. Ryan, 160 Wn. App. 944, 252 P.3d 895 (2011), rev'd sub nom. Nunez, 174 Wn.2d 707. But McNeal considered whether a trial court had the authority to empanel a jury to determine the "free-crimes" aggravator when the plain language of the statute expressly directed that factual finding to be made by the court. 156 Wn. App. at 353-54. In contrast, the issue presented both here and in Reyes-Brooks is the court's authority to empanel a jury to retry a sentencing enhancement under a statute that explicitly permits a jury finding.

Notably, this Court reversed Ryan in Nunez, abandoning its earlier holding in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), that a jury did not need to be unanimous in order to reject aggravating sentencing factors. Nunez, 174 Wn.2d at 719. Implicit in Nunez's

conclusion — that non-unanimity does not equal acquittal — is the presumption that the enhancement can be retried. In fact, one of the reasons Nunez gave for repudiating Bashaw was that the non-unanimity rule did not serve the policies it claimed to. In declaring that juries did not have to be unanimous to reject aggravating factors, the Bashaw court had stated that such a rule would serve the “core concerns” of judicial economy and finality. 169 Wn.2d at 146. But Nunez recognized that the non-unanimity rule “would only serve judicial economy and finality *if it prevented retrial on the aggravating circumstance alone,*” which it did not. Nunez, 174 Wn.2d at 717-18 (emphasis added).

Thomas does not argue here that double jeopardy precluded his retrial on the firearm enhancement. Nor could he. See e.g., State v. Ervin, 158 Wn.2d 746, 757, 147 P.3d 567 (2006) (when the record establishes jurors were unable to agree, no acquittal operates to terminate jeopardy); Nunez, 174 Wn.2d at 717-18 (except for death penalty cases, State’s failure to prove aggravating sentencing factors beyond a reasonable doubt does not preclude a stand-alone retrial of those factors at a new proceeding). Instead, Thomas argues that the trial court lacked authority to empanel a second jury to decide the enhancement alone. But Thomas does not contend that the court lacked power to empanel a jury in the first place. And he makes no persuasive argument that, in the absence of

contrary legislation or double jeopardy concerns, the superior court lost its authority to empanel a jury simply because the original jurors were unable to agree. Instead, Nunez's conclusion that a jury must unanimously agree in order to reject aggravating sentencing factors, and that retrial is allowed if there is no agreement, shows that the trial court acted properly here.

When a defendant has a constitutional right to a jury determination, and the legislature has not given a clear directive to the contrary, the law authorizes trial courts to empanel juries. Courts have the power and the duty to employ procedures designed to protect the defendant's constitutional rights and effectuate legislative intent. The legislature has stated its clear intent that trial courts have broad authority to empanel juries to make necessary factual findings as to all sentencing factors, regardless of where those factors are found in the code. LAWS OF 2007, ch. 205, § 1.

There is no legislation explicitly directing a contrary procedure with respect to firearm enhancements. The trial court properly empaneled the second jury.

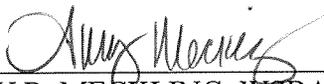
E. CONCLUSION

The trial court was authorized to empanel a second jury solely to consider the firearm enhancement allegation after the original jury was unable to agree unanimously. The State respectfully requests that this Court affirm Thomas's conviction and sentence.

DATED this 4th day of June, 2018.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
AMY R. MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

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