SUPREME COURT NO. _____
COA NO. 84609-4-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RIGOBERTO GALVAN,

Petitioner.

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

The Honorable Evan Jones, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 3

E. WHY REVIEW SHOULD BE ACCEPTED 9

1. The lack of unanimity instruction combined with the lack of election in closing argument violated Galvan's constitutional right to a unanimous jury verdict, and the Court of Appeals decision holding otherwise conflicts with precedent 9

2. The Court of Appeals decision conflicts with precedent, while the trial court misapplied the law and violated the constitutional prohibition against cruel punishment in imposing a sentence of life without parole.....20

a. Monschke protection against cruel sentences should encompass young adults in their early twenties such as Galvan; it is not limited to those between the ages of 18 and 20 20

b. The trial court misapplied the law in requiring Galvan to prove the mitigating circumstance of youth by a preponderance of the evidence 24

TABLE OF CONTENTS

Page

c. The trial court violated constitutional mandate in failing to meaningfully consider all relevant factors of youth in making its sentencing decision.....27

d. A different judge should resentence Galvan to preserve the appearance of fairness.....32

F. CONCLUSION 33

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Personal Restraint of Monschke,
197 Wn.2d 305, 482 P.3d 276 (2021) ……2, 20-24, 27, 32

State v. Brooks,
77 Wn. App. 516, 892 P.2d 1099 (1995).....13

State v. Carter,
__Wn.3d__, 548 P.3d 935, 940 (2024).....21, 26, 27

State v. Coleman,
159 Wn.2d 509, 150 P.3d 1126 (2007) 17

State v. Delbosque,
195 Wn.2d 106, 456 P.3d 806 (2020).....25, 28

State v. Fernandez-Medina,
141 Wn.2d 448, 6 P.3d 1150 (2000).....14

State v. Gregg,
196 Wn.2d 473, 474 P.3d 539 (2020).....25

State v. Handran,
113 Wn.2d 11, 775 P.2d 453 (1989).....13

State v. Hanson,
59 Wn. App. 651, 800 P.2d 1124 (1990).....14

State v. Houston-Sconiers,
188 Wn.2d 1, 391 P.3d 409 (2017)…
.....27, 31

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Irby,
187 Wn. App. 183, 347 P.3d 1103 (2015).....12

State v. Kitchen,
110 Wn.2d 403, 756 P.2d 105 (1988).....6, 10, 17

State v. Love,
80 Wn. App. 357, 908 P.2d 395 (1996)..... …13

State v. McEnroe,
181 Wn.2d 375, 333 P.3d 402 (2014)… 33

State v. Meza,
22 Wn. App. 2d 514, 512 P.3d 608 (2022).....21, 22

State v. Murbach,
68 Wn. App. 509, 843 P.2d 551 (1993).....11

State v. O'Dell,
183 Wn.2d 680, 358 P.3d 359 (2015).....23, 30

State v. Ortega-Martinez,
124 Wn.2d 702, 881 P.2d 231 (1994).....9

State v. Petrich,
101 Wn.2d 566, 683 P.2d 173 (1984).....9, 12-14, 19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Price,
126 Wn. App. 617, 109 P.3d 27 (2005),
abrogated on other grounds by
State v. Hampton,
184 Wn.2d 656, 361 P.3d 734 (2015) 19

State v. Rogers,
17 Wn. App. 2d 466, 487 P.3d 177 (2021) 26

State v. Simonson,
91 Wn. App. 874, 960 P.2d 955 (1998) 15

State v. Solis-Diaz,
187 Wn.2d 535, 387 P.3d 703 (2017) 32

State v. Whitaker,
195 Wn.2d 333, 459 P.3d 1074 (2020) 19

State v. Williams,
136 Wn. App. 486, 150 P.3d 111 (2007) 12

FEDERAL CASES

Miller v. Alabama,
567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)
..... …25, 27

Ramos v. Louisiana,
590 U.S. 83, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) .. 9

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

RAP 13.4(b)(1) 10

RAP 13.4(b)(2) 10, 21

RAP 13.4(b)(3) 10, 21

RCW 9A.04.110(5) 11

RCW 9.94A.535(1) 25, 26

RCW 10.95.020(11) 18, 19

RCW 10.95.030(3) 25

Sentencing Reform Act 24-26

U.S. Const. amend. VI 9

Wash. Const. art. I, § 14 ..... 20, 28

Wash. Const. art. I, § 21 9

A. IDENTITY OF PETITIONER

Rigoberto Galvan asks the Supreme Court to accept review of the Court of Appeals decision designated below.

B. COURT OF APPEALS DECISION

Glavan requests review of the decision in State v. Rigoberto Galvan, Court of Appeals No. 84609-4-I (slip op. filed June 3, 2024).

C. ISSUES PRESENTED FOR REVIEW

1. Galvan was charged with first degree burglary and aggravated first degree murder based on the burglary for his actions in either of two separate buildings. Jurors were not instructed that they must unanimously agree as to the building in which the burglary occurred, and the prosecutor did not elect which unlawful entry formed the basis for the burglary. Was Galvan denied his constitutional right to a unanimous jury verdict, as jurors were not required to be unanimous as to which act formed the basis

for the burglary? Does the Court of Appeals decision, in holding this is a continuous course of conduct case for which no unanimity instruction or election was needed, conflict with precedent requiring the evidence be looked at in the light most favorable to the defendant?

2. Galvan, 22 years old at the time of offense, sought a mitigated sentence based on youth. The trial court imposed a sentence of life without parole. The Court of Appeals affirmed on the basis that Galvan was not a youthful offender under the Supreme Court's decision in In re Pers. Restraint of Monschke, 197 Wn.2d 305, 482 P.3d 276 (2021) and therefore the trial court did not have any discretion to consider youthfulness as a mitigating factor. Does the Court of Appeals decision conflict with precedent and should the protection against cruel punishment afforded by Monschke be formally extended to include young adults in their early twenties?

3. Did the trial court abuse its discretion in denying the exceptional sentence request because it wrongly placed the burden of proving the mitigating circumstance of youth on Galvan?

4. Is resentencing required because the trial court did not fully and meaningfully consider Galvan's request for a mitigated sentence based on youth?

5. In a case where the sentencing judge has already expressed his view of the appropriateness of a life sentence and would be tasked with exercising his discretion on remand, is resentencing in front of a different judge required to preserve the appearance of fairness?

D. STATEMENT OF THE CASE

Rigoberto Galvan and Stephanie Cresswell-Brenner were in a dating relationship, which eventually deteriorated. RP 567-68, 573, 977. She ended the relationship in the spring of 2019. RP 567. Galvan hoped to reconcile. RP 1420. He drove to Cresswell-Brenner's

residence on August 11, emotionally distraught. RP 977-79. He went inside; Cresswell-Brenner was upset that he was there. RP 1469. He asked for another chance. RP 1469. She refused. RP 1470.

On August 12, Galvan noticed that Aiden Kuhne followed Cresswell-Brenner on Instagram. RP 1227-28. He was suspicious of the relationship between them. RP 1484. He was jealous and angry. RP 1507. Cresswell-Brenner blocked Galvan from her Instagram on August 14. RP 1486-87. Galvan later reported that the Instagram drama provided the impetus for him to confront Cresswell-Brenner at her residence. RP 1605, 1611.

Cresswell-Brenner lived in a duplex. RP 454-55. The duplex was divided into two units with separate entrances: Unit A and Unit B. RP 454, 498, 501, 671, 674, 745, 813, 859-61, 1035; Ex. 10, 31, 32, 272. Cresswell-Brenner had a bedroom in Unit A. RP 503-04, 540-43. Kuhne lived in Unit B. RP 454-55.

On August 14, Galvan drove to her residence uninvited. RP 1228. He wanted to talk to her about their relationship, hoping for a resolution. RP 1228. Galvan used a spare key to enter Unit A and went to Cresswell-Brenner's bedroom. RP 502, 1488-89. She was not there. RP 1228. Galvan stayed in her bedroom for about one hour. RP 1228. He heard Cresswell-Brenner and Kuhne talking in Unit B. RP 1228, 1489. He wondered if she was cheating on him; he felt betrayed. RP 1612.

Galvan texted her and tried to call her multiple times. RP 1229, 1489. She did not respond to his calls but did text him. RP 1494. Galvan was highly emotional; distraught, vacillating between hurt and anger, caught up in an emotional storm. RP 1605. She told him that he needed to leave or she was going to report him. RP 1229, 1494. He decided he would leave because he did not want to get into trouble. RP 1229, 1494.

He saw that Kuhne had moved to the kitchen in Unit B and Cresswell-Brenner had moved to the spot on the couch where Kuhne had been sitting. RP 1495. Unit A's upstairs bathroom window led to Aiden's Unit B balcony, which in turn provided ingress into Unit B's living room. RP 460-62, 509-10; Ex. 3, 74, 75, 225. Galvan climbed through the window and onto the balcony and entered Unit B. RP 462, 481-82, 1230, 1495. They asked how he got in and what he was doing there. RP 482. Galvan and Cresswell-Brenner began arguing. RP 462. Galvan drew his gun and said "Aiden, run away. Call 911, she is going to die." RP 462.

Galvan fired 15 rounds from his gun. RP 752, 832. 10 bullets hit Cresswell-Brenner, killing her. RP 960-62. Galvan did not recall making a decision to pull out his gun and shoot anyone. RP 1230. He was shocked when it happened. RP 1230. It was an "out of control experience

for him." RP 1230. He thought about killing himself but there were no bullets left in the gun. RP 1230.

Galvan left and called 911, telling the operator that he had killed his girlfriend, asking "have you ever been jealous?" RP 658, 1114, 1502, 1735. Galvan left the empty gun on Cresswell-Brenner's bed on his way out. RP 628, 644-45, 750, 1230, 1499.

The State charged Galvan with aggravated first degree murder, with burglary as the aggravator, and first degree burglary. CP 1-2.

Galvan presented a diminished capacity defense. Dr. Packard, a licensed psychologist, diagnosed Galvan with bipolar disorder. RP 1175, 1313-14. Packard testified that Galvan's capacity to form premeditated intent was impaired due to a bipolar episode that interfered with his brain processing. RP 1339, 1346, 1533. Dr. McClung, testifying for the State, opined Galvan did not suffer from

bipolar disorder and that he likely had the capacity to form premeditated intent to kill. RP 1633, 1651.

The jury returned guilty verdicts, including a special verdict that Galvan committed the murder in the course of the burglary. CP 75-80.

At sentencing, the defense asked the court to exercise its discretion not to impose a sentence of life without parole based on youth. CP 101-05; RP 2010-14. Galvan was 22 years old at the time of the offense. CP 103; RP 2011. The court declined the request, ruling Galvan had not proved by a preponderance of the evidence that the mitigating circumstance of youth justified a lesser sentence. RP 2026. The court sentenced Galvan to life in prison without parole. CP 83.

On appeal, Galvan argued he was denied his right to a unanimous jury verdict on both charges and that his life sentence constituted unconstitutionally cruel

punishment. The Court of Appeals rejected these arguments. Slip op. at 1.

E. WHY REVIEW SHOULD BE ACCEPTED

1. The lack of unanimity instruction combined with the lack of election in closing argument violated Galvan's constitutional right to a unanimous jury verdict, and the Court of Appeals decision holding otherwise conflicts with precedent.

The accused has a constitutional right to a unanimous jury verdict in criminal prosecutions. Ramos v. Louisiana, 590 U.S. 83, 93, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); U.S. Const. amend. VI; Wash. Const., art. 1, § 21. A defendant may thus be lawfully convicted "only when a unanimous jury concludes that the criminal act charged in the information has been committed." State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

Galvan's right to jury unanimity was violated in the absence of a unanimity instruction or election from the

prosecutor regarding which unlawful entry formed the basis for the burglary. The Court of Appeals, in holding no unanimity error occurred because the offense was a continuing course of conduct, looked at the evidence in the light most favorable to the State. Slip op. at 11-14. This approach conflicts with precedent that requires the facts be looked at in the light most favorable to the defendant. Review is warranted under RAP 13.4(b)(1), (b)(2) and (b)(3).

In multiple acts cases, several acts are alleged and any one of them could constitute the crime charged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). To ensure jury unanimity in a multiple acts case, either the State must elect the act upon which it will rely for conviction or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proven beyond a reasonable doubt. Id.

To obtain a conviction for first degree burglary, the State needed to prove that Galvan "entered or remained unlawfully in a building" and "the entering or remaining was with intent to commit a crime against a person or property therein." CP 65.

There were two buildings in the duplex: Unit A and Unit B. RP 454-55. Cresswell-Brenner's apartment was in Unit A and Kuhne's apartment was in Unit B. RP 454, 498, 501, 671, 674, 745, 813, 859-61, 1035; Ex. 10, 31, 32, 272. Each unit constituted a separate building for the burglary charge. RCW 9A.04.110(5); State v. Murbach, 68 Wn. App. 509, 513, 843 P.2d 551 (1993).

Galvan first unlawfully entered Unit A. RP 1488-89. He subsequently unlawfully entered Unit B, where he killed Cresswell-Brenner. RP 462-63, 481-82, 1230, 1495. Entry into each separate building could form the basis for the burglary conviction. Despite there being two separate buildings at issue, jurors were never instructed that they

needed to be unanimous regarding which unlawful entry into which building constituted the basis for the burglary conviction.

The purpose of a unanimity instruction is to ensure all members of the jury rely on the same act in finding guilt. Petrich, 101 Wn.2d at 570. In the absence of a unanimity instruction, the State must expressly and specifically elect the criminal act it relies upon to establish guilt. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). The prosecutor did not elect a single building for consideration. On the contrary, the prosecutor told the jury in closing argument: "he committed two burglaries; he entered unlawfully with a firearm into Stephanie's home, then he entered Aiden's home unlawfully with a firearm. Those are both burglary one." RP 1895.

Without an election, the absence of a Petrich instruction violated Galvan's constitutional right to jury unanimity. See State v. Irby, 187 Wn. App. 183, 197-99,

347 P.3d 1103 (2015) (right to unanimity on burglary charge violated where evidence showed entries into two separate buildings); State v. Brooks, 77 Wn. App. 516, 520-21, 892 P.2d 1099 (1995) (same).

The Court of Appeals agreed there was no election but held there was no unanimity violation because the evidence showed a continuing course of conduct. Slip op. at 10-14. The Petrich rule does not apply to a "continuous course of conduct." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). "A continuing course of conduct requires an ongoing enterprise with a single objective." State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). "Where evidence involves conduct at different times and places, or different victims, then the evidence tends to show several distinct acts." Id.

The Court of Appeals looked at the evidence in the light most unfavorable to Galvan in holding the evidence showed a continuous course of conduct and therefore no

Petrich instruction was required. Its decision conflicts with precedent requiring the evidence be looked at in the light most favorable to Galvan.

In applying Petrich rule, the evidence must be looked at in the light most favorable to the proponent of the unanimity instruction in determining the existence of multiple acts. State v. Hanson, 59 Wn. App. 651, 656, 800 P.2d 1124 (1990). This accords with the general rule that courts must interpret the evidence in the light most favorable to the proponent of a jury instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Taking the evidence in the light most favorable to the defendant as the proponent of a unanimity instruction requires a determination of "whether the evidence is such that jurors *could* find more than one event sufficient to convict." Hanson, 59 Wn. App. at 657, n.6. Thus, "[a] unanimity instruction is required, whether requested or not,

when a jury *could find* from the evidence that the defendant committed a single charged offense on two or more distinct occasions." State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998) (emphasis added).

This is not a matter of an appellate court looking at the evidence from its own perspective in the light most favorable to denying the instruction. This is a jury question. The question is whether a rational juror could find two separate acts that could form the basis for the charge.

The evidence shows Galvan's acts occurred in different places: Unit A and Unit B. Galvan's acts occurred at different times. One hour separated his entry into Unit A and his entry into Unit B. RP 1228. The burglary of Unit A involved multiple victims — Brenner and everyone else who lived there or were present. RP 498, 503-04, 510, 540-43, 578-79. The burglary of Unit B involved two victims — Kuhne and Brenner — as well as everyone else who lived there or was present. RP 1100-13.

When the evidence in the light most favorable to Galvan, a jury could find that he engaged in distinct acts with different objectives. There was evidence that he unlawfully entered Unit A with the objective of confronting and talking with Cresswell-Brenner about the state of their relationship, not to kill her. RP 489, 1228, 1605, 1611.

Galvan and Cresswell-Brenner exchanged texts while Galvan was in her bedroom and she was in Kuhne's apartment. RP 1229, 1346, 1489. Galvan was trying to get her to come back to her apartment so "we don't have to put on this whole show in front of somebody else." RP 1613. Galvan was experiencing a great deal of psychological turmoil. RP 1605. He was confused but wanted some sort of resolution. RP 1228-29. He did not know what to do; he felt ambivalent. RP 1229. He was vacillating, caught in a loop of indecision. RP 1229, 1346. After texting Cresswell-Brenner that he was in her home, he first decided to leave to avoid trouble but ultimately

changed his mind and entered Unit B when he saw that Kuhne had moved to the kitchen and Cresswell-Brenner had moved to the spot on the couch where Kuhne had been sitting. RP 1229, 1494-95. Galvan did not decide to enter Unit B until he was already inside Unit A and perceived Cresswell-Brenner with Kuhne inside Unit B; he had become consumed with overwhelming jealousy. RP 1228, 1489, 1493, 1612. The objective changed from confronting Cresswell-Brenner about their relationship. Given the shooting that quickly followed (RP 462, 482), it can be said he entered or remained in Unit B with the objective of killing her.

"Without the election or instruction, each juror may arrive at a guilty verdict by responding to testimony about discrete incidents — incidents which, if an election were made, the jury may not all agree occurred." State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). The error is presumed prejudicial, which is overcome "only

if no rational juror could have a reasonable doubt as to any of the incidents alleged." Id.

A rational juror could entertain doubts regarding the unlawful entry element of the burglary charge as applied to Unit A. A rational juror could find Galvan did not enter or remain in Unit A with the intent to commit a crime against person or property, but rather had the intent to speak with Brenner about their relationship. RP 1228 (Galvan's account to Dr. Packard of why he went over there). The evidence does not necessarily show Galvan committed the crime of first degree burglary in Unit A. As a result, the first degree burglary conviction must be reversed.

Furthermore, the jury's special verdict finding the aggravator predicated on burglary (CP 76) cannot stand and, without the aggravator, the conviction for aggravated first degree murder must be reversed.

To obtain a conviction for aggravated first degree murder under RCW 10.95.020(11), the jury needed to find

that "The murder was committed in the course of or in furtherance of Burglary in the First Degree. For this aggravating circumstance to exist, the State must prove that the burglary began before the killing." CP 54. When a defendant is charged with aggravated first degree murder under RCW 10.95.020(11), "the State is required to prove, as an element of the murder charge, that the murder was committed 'in the course of, in furtherance of, or in immediate flight from' the underlying felony." State v. Whitaker, 195 Wn.2d 333, 339, 459 P.3d 1074 (2020)

The Petrich unanimity rule applies to multiple acts that could form the basis for the aggravating circumstance in an aggravated murder charge. State v. Price, 126 Wn. App. 617, 647, 109 P.3d 27 (2005), abrogated on other grounds by State v. Hampton, 184 Wn.2d 656, 361 P.3d 734 (2015). Galvan was denied his right to juror unanimity for aggravated first degree murder based on the burglary for the same reason he was denied his right to juror

unanimity on the burglary charge. The unanimity error affecting the burglary taints the conviction for aggravated first degree murder because the burglary is an element of that murder charge.

2. The Court of Appeals decision conflicts with precedent, while the trial court misapplied the law and violated the constitutional prohibition against cruel punishment in imposing a sentence of life without parole.

a. Monschke protection against cruel sentences should encompass young adults in their early twenties such as Galvan; it is not limited to those between the ages of 18 and 20.

The Supreme Court in Monschke held that article I, section 14 of the Washington Constitution requires sentencing courts to consider the mitigating qualities of youth in deciding whether to impose a sentence of life without parole (LWOP) on those who were 18 to 20 years old at the time of offense. In re Personal Restraint of Monschke, 197 Wn.2d 305, 306-07, 321, 329, 482 P.3d

276 (2021). Although Monschke was a plurality decision, the Supreme Court recently dispelled any doubt about the continued viability of its holding. State v. Carter, __Wn.3d__, 548 P.3d 935, 940 (2024).

Galvan was 22 years old at the time of offense. CP 103. The Court of Appeals held the constitutional protection afforded by Monschke does not extend to young adults who are older than age 20 at the time of offense. Slip op. at 17-19. This decision conflicts with precedent and presents a significant question of constitutional law, warranting review under RAP 13.4(b)(2) and (b)(3).

In State v. Meza, the Court of Appeals rejected the State's argument that Monschke should not extend to those who committed murder beyond age 20, such as the 21-year-old at issue there. State v. Meza, 22 Wn. App. 2d 514, 544, 512 P.3d 608 (2022). "[W]hile Monschke did not specifically extend mitigation for youthfulness to 21-year-

olds, the opinion is clear that there is no bright line rule, and that it is up to the discretion of the sentencing judge to apply youthfulness principles on a case-by-case basis." Id. at 545.

The Court of Appeals in Galvan's case described Meza as "holding that Monschke did not categorically extend leniency based on mitigating factors of youth to 21-year-old defendant." Slip op. at 18. This ignores Meza's affirmation of the trial court's discretion to extend leniency to those older than 20. The Court of Appeals decision conflicts with Meza. Consistent with Meza, the judge in Galvan's case recognized he had discretion to not impose an LWOP sentence on Galvan. RP 2023.

More than that, sentencing judges *must* exercise their discretion to all youthful offenders in their early twenties who are subject to LWOP sentences. Monschke and the authority it relies upon show there is no meaningful dividing line between juveniles and young

adults in their early twenties in terms of neurological development. Monschke, 197 Wn.2d at 321-22. "[M]any youthful defendants older than 18 share the same developing brains and impulsive behavioral attributes as those under 18. Thus, we hold that these 19- and 20-year-old petitioners must qualify for some of the same constitutional protections as well." Id. at 313.

In reaching its holding, Monschke relied on State v. O'Dell and cited its conclusion that "age may well mitigate a defendant's culpability, even if that defendant is over the age of 18." Monschke, 197 Wn.2d at 321 (quoting State v. O'Dell, 183 Wn.2d 680, 693, 358 P.3d 359 (2015)). O'Dell relied on scientific research revealing "fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure" that extend into the early twenties. O'Dell, 183 Wn.2d at 692-93.

The Supreme Court has never held constitutional protection stops at age 20. In terms of age at the time of offense, Monschke set a floor, not a ceiling. Monschke, 197 Wn.2d at 306-07. The constitutional protection given in Monschke should be categorically extended to young adults in their early twenties.

b. The trial court misapplied the law in requiring Galvan to prove the mitigating circumstance of youth by a preponderance of the evidence.

The trial court declined to impose a mitigated sentence on the ground that the defense failed to establish by a preponderance of the evidence that youthfulness or immaturity played a role in the crime. RP 2026. No appellate court has decided who, if anyone, has the burden of proof for a mitigated sentence under Monschke.

The Sentencing Reform Act (SRA) requires a mitigating circumstance in support of an exceptional

sentence be "established by a preponderance of the evidence." RCW 9.94A.535(1). The defendant bears the burden of proving there are substantial and compelling reasons justifying an exceptional sentence downward under this SRA provision. State v. Gregg, 196 Wn.2d 473, 478, 474 P.3d 539 (2020).

The burden of proof applicable to exceptional SRA sentences does not transfer to other statutory sentencing schemes. In State v. Delbosque, the Supreme Court compared the SRA provision and the Miller-fix[1] statute under RCW 10.95.030(3) and held the SRA burden of proof "does not extend to sentencing hearings pursuant to the Miller-fix statute, which unlike the SRA, does not impose a burden of proof on either party." State v. Delbosque, 195 Wn.2d 106, 123, 456 P.3d 806 (2020).

[1] Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

The trial court applied the SRA's allocation and burden of proof under RCW 9.94A.535(1). But no SRA provision applies to those like Galvan who are convicted of aggravated first degree murder and subject to a mandatory sentence of life without parole under RCW 10.95.030. Carter, 548 P.3d at 953 (citing State v. Rogers, 17 Wn. App. 2d 466, 477-78, 487 P.3d 177 (2021)). Young adults who commit aggravated first degree murder are "constitutionally entitled to a sentencing court's discretion unfettered by provisions of the SRA." Rogers, 17 Wn. App. 2d at 478. The court abused its discretion in denying Galvan's request for a mitigated sentence on the basis that he had failed to prove one was justified by a preponderance of the evidence. The court wrongly imposed a burden of proof on Galvan.

c. The trial court violated constitutional mandate in failing to meaningfully consider all relevant factors of youth in making its sentencing decision.

Trial courts must consider the mitigating qualities of youth in deciding whether to impose an LWOP on young adults. Monschke, 197 Wn.2d at 306-07, 321, 326, 329. These qualities include the defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences," "the nature of the juvenile's surrounding environment and family circumstances," "the way familial and peer pressures may have affected" them, and "any factors suggesting that the child might be successfully rehabilitated." Carter, 548 P.3d at 948 (quoting State v. Houston-Sconiers, 188 Wn.2d 1, 23, 391 P.3d 409 (2017) (quoting Miller, 567 U.S. at 477).

The court did not properly consider mitigating youth factors before declining Galvan's request for a mitigated sentence. For this reason, the LWOP sentence

constitutes cruel punishment under article I, section 14 of the Washington Constitution.

In assessing Galvan's individual characteristics, the court altogether failed to address his capacity for change. The court purported to look at the "functional characteristics of Mr. Galvan" and concluded they did not demonstrate a youthful disposition that should be used to mitigate the sentence. RP 2025-26. This finding is erroneous because one of the individual characteristics that must be considered is Galvan's capacity for rehabilitation. Letters of support from family and friends showed Galvan is not an incorrigible monster; he had formed healthy relationships with others, he was a positive force for good in their lives, and his horrific offense was an anomaly in relation to the person they knew him to be. CP 106-25.

Further, the sentencing court should not oversimplify or disregard mitigation evidence. Delbosque,

195 Wn.2d at 118-19. The court found Galvan was a "functional young adult" and was in an "adult relationship" with Cresswell-Brenner. RP 2023-24. These superficial findings do not accurately reflect the full context of what happened and why it happened.

Galvan moved out of Cresswell-Brenner's residence after she broke up with him in May 2019 and went back to live with his parents. RP 567, 1123, 1207. Galvan's reversion to living with his parents is symptomatic of the emotional crisis that overwhelmed Galvan in the months leading up to the shooting. RP 1339-41, 1420, 1424.

Galvan challenges the court's finding that youthfulness or immaturity played no role in the crime. RP 2025-26. The court overlooked evidence that Galvan was consumed with jealousy and was unable to control his emotions at the time of the offense. Galvan lacked emotional maturity. His jealousy fueled the crime. This was the State's theory of the case. RP 528 (State's

opening statement); RP 1808, 1813, 1850-51, 1894-96 (State's closing argument). Galvan's statements to the 911 operator and Dr. Packard, and Packard's expert testimony, supported this theory. RP 1340-41, 1349, 1418, 1420-21, 1502-03, 1507, 1509, 1528, 1603, 1734-35. Galvan's jealousy demonstrated an inability to responsibly handle a relationship with his once-intimate partner. This shows the immaturity of youth, not the maturity of a fully formed adult.

Galvan was in the midst of an emotional crisis at the time of offense and lacked the coping mechanisms to responsibly deal with it. RP 1341, 1602-05, 1612,1651-52. Young people generally "have less ability to control their emotions" until they reach full neurological development. O'Dell, 183 Wn.2d at 692. The court, in sentencing Galvan to die in prison, ignored this evidence. Galvan killed Cresswell-Brenner because he was unable to control his emotions.

The court stressed that Galvan had time to consider what he was going to do and he deliberately committed the crime, which did not demonstrate impulsiveness or any characteristic of youth. RP 2025. In doing so, the court at sentencing did not consider Galvan's emotional state at the time of the offense. According to Dr. McClung, Galvan was caught up in an emotional crisis while he deliberated what to do. RP 1607, 1649, 1749. In considering how youth may have played a role in the crime, the court must determine whether there is a "failure to appreciate risks and consequences." Houston-Sconiers, 188 Wn.2d at 23. The court in Galvan's case gave no meaningful consideration to that factor.

Further, the court's focus on deliberative action has little meaning in an aggravated murder case. All such murders are premeditated. To focus as the court did here on the deliberateness of the murder as a reason to impose an LWOP sentence on a young adult is

tantamount to reasoning that no young adult convicted of aggravated murder deserves less than life without parole because the murder is premeditated. The court's reasoning amounts to a categorical exclusion of young adults convicted of this crime from receiving the benefit of Monschke and the constitutional right to individualized sentencing based on youth.

d. A different judge should resentence Galvan to preserve the appearance of fairness.

Under the appearance of fairness standard, remand to a different judge is appropriate where facts in the record show "the judge's impartiality might reasonably be questioned." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). A party may thus seek reassignment where the trial judge "will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion as to the

merits, or otherwise prejudged the issue." Id. (quoting State v. McEnroe, 181 Wn.2d 375, 387, 333 P.3d 402 (2014)).

Reassignment to a different judge on remand is required here to preserve the appearance of fairness. Whether to impose a sentence of less than life without parole based on youth is entirely discretionary. The judge expressed an opinion as to the merits of the original sentence imposed and has already judged it to be appropriate. From a neutral observer's perspective, this judge cannot be expected to put that aside and come to a different conclusion on remand. A different judge should preside over further proceedings to comply with the appearance of fairness.

F. CONCLUSION

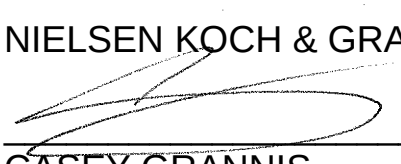
For the reasons stated, Galvan respectfully requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4986 words excluding those portions exempt under RAP 18.17.

DATED this 3rd day of July 2024.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RIGOBERTO GALVAN, Appellant.	No. 84609-4-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Rigoberto Galvan broke into his ex-girlfriend Stephanie Cresswell-Brenner's apartment and waited for her to return home. When she did not answer his texts and calls, Galvan crawled through a bathroom window and onto the balcony of the unit next door where he knew Cresswell-Brenner was visiting with a neighbor. He entered through the balcony doors, announced that Cresswell-Brenner was going to die, and proceeded to shoot her 15 times at close range. Galvan was later charged with and convicted of aggravated murder in the first degree, with a domestic violence and deadly weapon enhancement, and burglary in the first degree with a deadly weapon enhancement.

On appeal, Galvan contends that his right to a unanimous jury verdict was violated because the State submitted evidence that two robberies occurred, but did not require the jury to agree on which act supports its conviction. He also asserts that he is a youthful offender and that the trial court violated our state constitution's prohibition against cruel punishment by imposing a sentence of life

without the possibility of parole. To this point, he maintains that the trial court violated the appearance of fairness doctrine by remarking that his sentence was appropriate. Finally, Galvan requests that this case be remanded for the trial court to waive restitution interest and strike several legal financial obligations from the judgment and sentence.

We find no violation of Galvan's right to a unanimous jury, nor to the prohibition of cruel punishment, nor to the appearance of fairness doctrine. However, we agree that remand is appropriate for the trial court to strike certain fees from the judgment and sentence and to consider waiving restitution interest.

FACTS

While attending Western Washington University, Rigoberto Galvan and Stephanie Cresswell-Brenner dated and lived together from July 2018 until May 2019. However, in early 2019, their relationship began to deteriorate. Galvan had cheated on Cresswell-Brenner several times and the two were fighting more frequently. Galvan also closely monitored Cresswell-Brenner's social media presence and forbade her from following male friends during the relationship. Cresswell-Brenner's roommates testified that Galvan was "mean," "condescending," and "controlling." One roommate, Kaylie Gerald, recalled a verbal fight that ended with a "loud thud." Gerald noted that Cresswell-Brenner was "doing everything" for Galvan, including his laundry and cooking, but that Galvan "wasn't talking to her" and "he wasn't being kind to her."

In spring of 2019, Cresswell-Brenner ended the relationship. Galvan moved out shortly afterwards, in May 2019. After the breakup, Galvan continued

to show up at Cresswell-Brenner's house unannounced and uninvited.[1] Despite these unwelcome appearances, Cresswell-Brenner's roommates and friends noticed that she was happier and more social.

On August 11, 2019, Galvan asked his friend, Taylor Cameron, for a ride to Bellingham so he could break things off with Cresswell-Brenner. When they arrived at Cresswell-Brenner's house, Galvan told Cameron to wait in the car. When he emerged 45 minutes later, Galvan's demeanor was different. While Galvan had been emotionally distraught and crying before, he now appeared anxious and closed off. Galvan later relayed that he had asked Cresswell-Brenner for a second chance and that she said no. Galvan also asked Cresswell-Brenner to not date anyone else for a while.

The next day, Cameron reached out to Galvan and asked him to meet for lunch. Over lunch, Galvan repeatedly asked Cameron, "Would you be mad at me?" but did not explain further.

Around the same time, Galvan noticed that Cresswell-Brenner had unfollowed him on social media. He also noticed that she had started to follow her next door neighbor, Aiden Kuhne, on social media and became jealous.

On August 13, 2019, Galvan had dinner with his parents and told them that he and Stephanie were no longer dating. After dinner, he worked his shift as a volunteer firefighter. His coworker testified that he did not notice anything

[1] Kaylie Gerald testified that Galvan would "walk in the house, not knock, ever, very entitled in that way, just walk in."

unusual about Galvan's demeanor and that Galvan had no difficulties performing his duties.

Later that evening, however, Galvan drove to Cresswell-Brenner's house, armed with a gun tucked into his waistband. He parked his car in a nearby alleyway to avoid being seen. When he arrived, Galvan stood outside, listening to Cresswell-Brenner and Kuhne talking in Kuhne's unit next door. Galvan then proceeded to enter Cresswell-Brenner's unit unannounced, using a hidden spare key that Cresswell-Brenner and her roommates kept outside to unlock the front door. Galvan went upstairs to Cresswell-Brenner's room and continued to listen to Cresswell-Brenner and Kuhne talking next door. As he waited and listened, Galvan repeatedly called and texted Cresswell-Brenner in an attempt to get her to come back to her unit. After looking through the bathroom window and seeing Cresswell-Brenner and Kuhne sitting on the couch, Galvan texted Cresswell-Brenner that he was in her room. Cresswell-Brenner texted back that he needed to leave or she would call the police.

Shortly thereafter, Galvan crawled through Cresswell-Brenner's bathroom window and onto the balcony of Kuhne's adjoining apartment. He entered Kuhne's apartment, drew his gun, and told Kuhne: "Aiden, run away. Call 911, she is going to die." Kuhne fled and immediately called the police. As he ran, he heard between 12 to 15 gunshots, punctuated by Cresswell-Brenner screaming. Kuhne later recalled that Galvan was "scarily calm" while Cresswell-Brenner screamed and cried.

Galvan fired 15 rounds from his gun, emptying the magazine. Ten bullets hit Cresswell-Brenner, killing her. After he shot Cresswell-Brenner, Galvan left Kuhne's unit and crawled back through Cresswell-Brenner's bathroom window and into her room. He deposited the empty gun on her bed and left. Once outside, Galvan called 911. Galvan told the 911 operator: "Hey, I'm at 939 20th Street, you need to send out here as many cops as you can. I just killed my girlfriend." When the operator told Galvan that help was on the way, Galvan replied: "She's dead, so there is no help. You don't need to send medics, trust me." Galvan then asked the operator, "Have you ever been jealous?" Galvan's 911 call was placed approximately one minute after Kuhne's.

Kuhne's roommate, Ian Stewart, was downstairs at the time. He heard arguing upstairs, followed by a male voice saying "run and I shoot" and then a female screaming. Cassidy Schlicke-Perez, one of Cresswell-Brenner's roommates, was home asleep when she heard gunshots. Shortly after the gunshots, she heard someone enter the unit and then heard a male voice start talking.

Police arrived on the scene to find Galvan walking in the middle of the street with his hands in the air. Galvan told the responding officers, "I'm the one you're looking for. I shot my girlfriend."

When officers reached Kuhne's unit, they immediately began administering aid to Cresswell-Brenner. Paramedics arrived shortly after and pronounced Cresswell-Brenner dead on the scene. Officers later described Galvan's demeanor as a "completely blank affect" and "unemotional." Despite

being trained to provide medical aid, Galvan later relayed that he did not make any attempt to provide Cresswell-Brenner aid.

The State charged Galvan with aggravated murder in the first degree, with a domestic violence and deadly weapon enhancement, and burglary in the first degree with a deadly weapon enhancement. The jury convicted Galvan as charged. Galvan appeals.

ANALYSIS

Jury Unanimity

Galvan contends that the lack of a unanimity instruction as to the burglary charge combined with the State's failure to make an election as to which unlawful entry it was relying on for the charge violated his constitutional right to a unanimous jury verdict. We disagree. Because Galvan's actions constituted a continuing course of conduct, no unanimity instruction was necessary.

Before reaching the issue of jury unanimity, we must first address two threshold issues raised by the State. First, whether Galvan may raise jury unanimity for the first time on appeal, and second, even if he can, whether the invited error doctrine precludes him from doing so. We conclude that neither precludes Galvan from arguing jury unanimity on appeal.

1. Raised for the First Time on Appeal

The State contends that Galvan may not argue jury unanimity on appeal because he did not object to the absence of a unanimity instruction before the trial court. Because jury unanimity is a constitutional issue, we disagree.

Under RAP 2.5(a), an "appellate court may refuse to review any claim of error which was not raised in the trial court." However, "a party may raise . . . manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). Issues concerning jury unanimity are constitutional in nature and may be raised for the first time on appeal under the manifest constitutional error standard. State v. Aguilar, 27 Wn. App. 2d 905, 918, 534 P.3d 360 (2023).

Here, the lack of a unanimity instruction is an issue of manifest constitutional error that Galvan may raise for the first time on appeal.

2. Invited Error Doctrine

The State also argues that, under the invited error doctrine, Galvan may not address jury unanimity on appeal because he invited the jury to find him guilty of burglary in the first degree. We are unconvinced.

The invited error doctrine precludes a party from seeking appellate review of an error they helped create, even when the alleged error involves constitutional rights. State v. Mercado, 181 Wn. App. 624, 629-30, 326 P.3d 154 (2014). To determine whether the invited error doctrine applies, we consider whether the party affirmatively assented to the error, materially contributed to it, or benefitted from it. Mercado, 181 Wn. App. at 630. "To be invited, the error must be the result of an affirmative, knowing, and voluntary act." Mercado, 181 Wn. App. at 630. An appellant "must materially contribute to the error challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error." Mercado, 181 Wn. App. at 630. A lack of objection to jury instructions does not constitute invited error. State v.

Richardson, 12 Wn. App. 2d 657, 666, 459 P.3d 330 (2020); cf., State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (invited error precludes defendant from challenging their own erroneous jury instruction on appeal).

Here, neither party requested a unanimity instruction or objected to the instructions given. Both the State and Galvan specifically declined to add further detail to the instructions on the burglary charge, despite the court's concern regarding the definition of burglary and despite the parties' disagreement about whether Galvan committed two burglaries or whether his actions constituted a continuing course of criminal conduct.

Still, the State contends that certain statements by Galvan's counsel during closing constituted invited error. During closing, Galvan's counsel told the jury that Galvan was not contesting the burglary charge:

> And then you have Count II, which is Burglary in the First Degree. It's not in question folks, we're not contesting Count II either.

These remarks, without more, do not constitute invited error. Galvan did not affirmatively propose an erroneous jury instruction or relieve the jury of its requirement to reach unanimity. In fact, during closing, Galvan told the jury:

> So you've heard and you know that you have to be unanimous in your verdict. You can't have a verdict with half of you saying not guilty on Count I and half saying guilty on Count I. At least you can't have a verdict on that count, so you all have to be unanimous.

Galvan's request that the jury find him guilty of burglary is more appropriately characterized as a tactical decision on counsel's part given the evidence presented at trial. It was not invited error.

3. Specific Act and Continuing Course of Criminal Conduct

Galvan contends that because the State identified multiple acts, any one of which could serve as the basis for the burglary charge, the State needed to elect a single act. Alternatively, Galvan contends that the court needed to give a Petrich[2] instruction. The State asserts that the prosecutor did make such an election during closing. We agree that the State failed to make an election. However, such an election was unnecessary because Galvan's actions constituted a continuing course of conduct.

Criminal defendants have a right to a unanimous jury verdict. WASH. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the State presents evidence of multiple acts that could serve as the basis for the crime charged, it must either tell the jury which act to rely on in its deliberations, or the court must instruct the jury that it has to unanimously agree on which act supports the conviction. State v. Kitchen, 110 Wn.2d 403, 409-11, 756 P.2d 105 (1988). The former is known as an "election," and the latter is known as giving a "Petrich" instruction, after the case in which the instruction originated. Kitchen, 110 Wn.2d at 411 ("election"); State v. Carson, 184 Wn.2d 207, 228-29, 357 P.3d 1064 (2015) ("Petrich instruction"). An election must " 'clearly identif[y]' " which act the charge in question is based upon. Carson, 184 Wn.2d at 227 (quoting State v. Thompson, 169 Wn. App. 436, 474-75, 290 P.3d 996 (2012)).

[2] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

Whether a unanimity instruction is required is a question of law that we review de novo. Aguilar, 27 Wn. App. 2d at 924. Failure to either make an election or give a Petrich instruction may be constitutional error because of "the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411.

The State contends that it elected a single unlawful entry to serve as the basis for the burglary charge during closing. We disagree.

During closing argument, the State told the jury:

> And by the way, he committed two burglaries; he entered unlawfully with a firearm into Stephanie's home, then he entered Aiden's home unlawfully with a firearm. Those are both burglary one. And the burglary one was absolutely committed, and by the way this is Verdict Form B, it was absolutely committed before the murder because he entered unlawfully with the intent to commit a crime therein and he was armed with a firearm. That happened before because we know he had a firearm and we know he entered unlawfully.
>
> He announced what he was going to do before he committed the fatal act. That's, his announcement are his thoughts. That is an expression of his thoughts. That is the premeditation, that is the premeditated design to kill.

It is unclear from these statements whether the State is relying on the first or second unlawful entry as the basis of the burglary charge. What is clear, however, is that there were two unlawful entries, either one of which could have served as the basis for the charge of burglary in the first degree. The record demonstrates that the State failed to make an election.

However, despite the State's failure to elect a single act, no Petrich instruction or election was necessary because Galvan's actions constituted a continuing course of conduct.

An election or Petrich instruction is not required where the evidence indicates a " 'continuing course of conduct.' " State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 452 (1989) (quoting Petrich, 101 Wn.2d at 571). A continuing course of conduct is "an ongoing enterprise with a single objective." State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). "Common sense is the guiding light of this analysis." Aguilar, 27 Wn. App. 2d at 925. To determine whether a defendant's actions constituted a continuing course of conduct, we "evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose." State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010). "[E]vidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred," while "evidence that a defendant engage[d] in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct." State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

The evidence here supports that Galvan's actions are properly characterized as a continuing course of criminal conduct. The day before the murder, Galvan hinted to a friend that he was planning something nefarious. Galvan asked the friend multiple times, "Would you be mad at me?" but did not

finish his thought. Around the same time, Galvan became upset when he learned that Cresswell-Brenner had unfollowed him on social media and that she had started following her neighbor, Aiden Kuhne.

The night of the murder, Galvan confessed to his parents that his relationship with Stephanie was over. After working his shift as a volunteer firefighter, Galvan loaded his gun with hollow point bullets and drove to Cresswell-Brenner's house. Rather than holstering his gun, as he typically did, Galvan hid the gun in the waistband of his pants. And instead of parking where he typically would, Galvan parked in an alleyway so that his car would not be seen. Galvan then entered Cresswell-Brenner's house and waited in her room. While in Cresswell-Brenner's room, Galvan texted and called her repeatedly. Galvan later explained that he was "trying to get [Cresswell-Brenner] to come over so [they] don't have to put on this whole show in front of somebody else." Eventually, Galvan texted Cresswell-Brenner that he was in her room. Cresswell-Brenner told him to leave. Shortly thereafter, Galvan crawled through the bathroom window and onto the balcony of the unit next door, where Cresswell-Brenner and Kuhne were inside talking. When he entered the unit, he instructed Kuhne to run away and informed him that Cresswell-Brenner was "going to die."

These facts are consistent with a continuing course of conduct. Galvan engaged in a series of actions intended to secure the singular objective of killing Cresswell-Brenner. Although the crimes charged involved two distinct locations—Cresswell-Brenner and Kuhne's units—the series of events indicates

that Galvan's actions were committed with an ultimate purpose in mind. Even while he was waiting in Cresswell-Brenner's unit, Galvan continued to contact her to try to draw her out of the neighboring unit.

Galvan contends that this is a multiple acts case rather than a continuous course of conduct case. In support of this assertion, he relies on State v. Irby, 187 Wn. App. 183, 347 P.3d 1103 (2015) and Aguilar, 27 Wn. App. 2d 905. Neither case is persuasive here.

In Irby, the defendant appealed the State's failure to make an election as to which of the defendant's two acts of allegedly unlawful entry constituted the charged burglary. 187 Wn. App. at 197-98. This court concluded that this failure was reversible error because a juror could have entertained a reasonable doubt that the defendant burglarized the first location. Irby, 187 Wn. App. at 199. But neither party in Irby argued that the defendant's actions were a continuing course of conduct and this issue was not discussed on appeal. Therefore, Irby is unhelpful here.

The next case, Aguilar, is also distinguishable. In Aguilar, this court concluded that the facts were more consistent with multiple acts rather than a continuing course of conduct. 27 Wn. App. 2d at 927. The timeline of events was unclear and the testimony indicated that there were intervening events between the charged criminal acts. Aguilar, 27 Wn. App. 2d at 927. Significantly, the defendant's state of mind and behavior did not demonstrate the existence of an ongoing enterprise with a single objective—Aguilar "acted erratically under the influence of intoxicants, his focus shifting rapidly from one

thing to another." Aguilar, 27 Wn. App. 2d at 927. Unlike the defendant in Aguilar, Galvan was not under the influence and did not act erratically when he committed the crimes in question. Rather, the timeline of events and Galvan's actions before and afterwards demonstrate that he thoughtfully planned the burglary and murder.

Galvan's assertion that he engaged in acts with different objectives is similarly unconvincing. In support of this assertion, Galvan claims that there was evidence that he entered Cresswell-Brenner's unit with the objective of confronting her and talking with her about the state of their relationship. He also maintains that he was experiencing a great deal of psychological turmoil and felt caught in "a loop of indecision." But these claims are belied by evidence showing that Galvan carefully planned his actions that evening: he took care to park his car where it would not be seen, to hide his gun in his waistband, to load his gun with hollow point bullets, to leave the empty gun on Cresswell-Brenner's bed, and to call the police and tell them where he would be, walking with his arms raised and not resisting arrest. We conclude that Galvan's actions here constituted a continuing course of conduct.

Sentencing

Galvan contends that the trial court violated our state constitution's prohibition against cruel punishment by imposing a sentence of life without the possibility of parole. He maintains that the court failed to properly consider his youthfulness at sentencing and that the court erred by requiring him to prove youthfulness as a mitigating factor by a preponderance of the evidence.

We disagree. Galvan was an adult when he committed the crimes in question and the court did not possess the discretion to consider youthfulness as a mitigating factor. Therefore, the court erred by considering youthfulness and by requiring Galvan to prove youthfulness as a mitigating factor by a preponderance of the evidence.

We review questions of constitutional law de novo. State v. Ramos, 187 Wn.2d 420, 433, 387 P.3d 650 (2017). And we review a sentencing court's decision for an abuse of discretion, reversing "only if we find 'a clear abuse of discretion or misapplication of the law.' " State v. Delbosque, 195 Wn.2d 106, 116, 456 P.3d 806 (2020) (internal quotation marks omitted) (quoting State v. Blair, 191 Wn.2d 155, 159, 421 P.3d 937 (2018)). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds." State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). However, sentencing errors generally do not require remand if the reviewing court is satisfied that the trial court would have imposed the same sentence based on proper factors. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

In sentencing juvenile and youthful offenders, trial courts have discretion to depart from the standard range under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, when a defendant's youthfulness impairs their capacity to appreciate the wrongfulness of their conduct, or to conform their conduct to the requirements of the law. State v. O'Dell, 183 Wn.2d 680, 696, 698-99, 358 P.3d 359 (2015). The sentencing court must exercise its discretion to decide when a defendant's youthfulness has such an effect. O'Dell, 183 Wn.2d at 699. The

SRA places the burden of proving that substantial and compelling reasons justify the imposition of an exceptional sentence on the defendant. RCW 9.94A.535. "However, once a sentencing court has considered youth and determined that it is a mitigating factor, the exceptional sentencing requirements imposed by the SRA are simply no longer applicable." State v. Rogers, 17 Wn. App. 2d 466, 476, 87 P.3d 177 (2021).

However, the SRA is not the only means by which a sentencing court may exercise discretion to properly account for a defendant's youthfulness. The prohibition on cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution provides additional protections for juveniles and youthful offenders at sentencing. In re Pers. Restraint of Monschke, 197 Wn.2d 305, 311 n.6, 482 P.3d 276 (2021) (plurality opinion). For example, it is constitutionally impermissible to impose mandatory life sentences without the possibility of parole on juveniles under the age of 18. Miller v. Alabama, 567 U.S. 460, 472-73, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Likewise, for defendants younger than 18, "[t]rial courts must consider mitigating qualities of youth at sentencing," such as " 'immaturity, impetuosity, and failure to appreciate risks and consequences[,]' . . . along with any other factors suggesting that the child might be successfully rehabilitated." State v. Houston-Sconiers, 188 Wn.2d 1, 21, 23, 391 P.3d 409 (2017) (quoting Miller, 567 U.S. at 477). Trial courts must also have "full discretion to depart from the sentencing guidelines and any otherwise mandatory sentence enhancements."

Houston-Sconiers, 188 Wn.2d at 34. More recently, our Supreme Court extended the discretion of sentencing courts to permit consideration of the mitigating qualities of youth for defendants who were 19- and 20-years-old at the time of their offenses. Monschke, 197 Wn.2d at 311.

Under either the SRA or the federal and state constitutions, a trial court engages in a two-part test during sentencing. First, the court must determine whether the defendant is a juvenile or youthful offender. See Houston-Sconiers, 188 Wn.2d at 21-23; Monschke, 197 Wn.2d at 311. If the defendant is not a juvenile or a youthful offender, the court is bound by the discretion provided for in the SRA or in the applicable sentencing statute. If the defendant is a juvenile or a youthful offender, the court must then determine whether the defendant's youthfulness impaired their capacity to appreciate the wrongfulness of their conduct, or to conform their conduct to the requirements of the law. O'Dell, 183 Wn.2d at 696, 698-99.

Because Galvan was 22 years old at the time he committed his crimes, he is not a youthful offender and the trial court could not consider youthfulness as a mitigating factor at sentencing.

In Monschke, our Supreme Court held that sentencing courts must exercise the same discretion in sentencing 18-, 19-, and 20-year-olds as when sentencing juvenile offenders. 197 Wn.2d at 329.[3] But in the years following Monschke, Washington courts have repeatedly declined to extend its holding to

[3] Although the lead opinion in Monschke notes that youthful offenders can be between 17- and 25-years-old, the majority's holding only extends to 18-, 19-, and 20-year-old defendants. 197 Wn.2d at 329.

other factual scenarios. See, e.g., State v. Meza, 22 Wn. App. 2d 514, 545, 512 P.3d 608 (holding that Monschke did not categorically extend leniency based on mitigating factors of youth to 21-year-old defendant), review denied, 200 Wn.2d 1021, 520 P.3d 978 (2022); State v. Zwede, 21 Wn. App. 2d 843, 862-63, 508 P.3d 1042 (declining to address constitutionality of indeterminate sentence for youthful offender), review denied, 200 Wn.2d 1006 (2022); State v. Kruger, 28 Wn. App. 2d 549, 556, 540 P.3d 126 (2023) (declining to reach whether prohibition on de facto life sentences applies to 20-year-old defendant), review denied, No. 102732-0 (Wash. May 8, 2024).

Here, Galvan was charged with aggravated murder in the first degree under RCW 10.95.030(1). Sentencing for aggravated murder in the first degree is not provided for within the SRA and neither the provisions of the SRA nor the provisions of any other statute authorize a sentencing court to exercise discretion when sentencing a defendant convicted of aggravated murder in the first degree. See RCW 10.95.030 (". . . any person convicted of the crime of aggravated first degree murder *shall* be sentenced to life imprisonment without possibility of release or parole.") (emphasis added); ch. 9.94A RCW. Because Galvan is not a youthful offender under Monschke, the trial court could not exercise discretion during sentencing. Therefore, the court was required, under RCW 10.95.030, to sentence Galvan to life without the possibility of parole.

We decline to extend the holding in Monschke to Galvan, who was 22 years old when he committed the offenses at issue. We also conclude that the court erred by considering youthfulness as a mitigating factor because the court

did not possess the discretion to impose a sentence other than life without the possibility of parole.

Appearance of Fairness

Galvan next asserts that the trial court violated the appearance of fairness doctrine because it determined that Galvan's sentence was appropriate. We disagree.

Under the appearance of fairness doctrine, judges should disqualify themselves "in a proceeding in which their impartiality might reasonably be questioned." Sherman v. State, 128 Wn.2d 164, 188, 905 P.2d 355 (1995). "The party asserting a violation of the appearance of fairness must show a judge's actual or potential bias." State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts." Solis-Diaz, 187 Wn.2d at 540.

Here, Galvan points to no statements or actions by the trial court judge that suggest actual or potential bias. Instead, he generally asserts that the judge "obviously expressed an opinion as to the merits of the original sentence imposed and has already judged it to be appropriate." That the judge believed Galvan's sentence to be appropriate does not indicate bias. We conclude that reassignment to a new judge on remand is not warranted.

Legal Financial Obligations

Galvan argues that the DNA collection fee, victim penalty assessment (VPA), crime lab fee, and domestic violence assessment should be stricken from the judgment and sentence. The State does not contest remand to strike the majority of the fees imposed. We remand for Galvan to move the court to strike these fees.

While Galvan's appeal was pending, the legislature amended RCW 7.68.035 to prohibit the imposition of a victim penalty assessment if the court finds that the defendant is indigent at the time of sentencing. See LAWS OF 2023, ch. 449, § 1. The legislature also eliminated the DNA collection fee from RCW 43.43.7541. Under newly amended RCW 43.43.7541, the court must waive any DNA collection fee imposed prior to July 1, 2023 upon a motion by a defendant. Although these amendments did not take effect until after Galvan was sentenced, recent amendments to statutes governing legal financial obligations apply retroactively to matters pending on direct appeal. See State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

Here, the State concedes that the DNA collection fee, VPA, and crime lab fee should be stricken but does not address the domestic violence assessment. We therefore remand for Galvan to move the trial court to strike the agreed upon fees. And because the domestic violence assessment is not mandatory, Galvan may move the trial court to reconsider that fee on remand as well.

Restitution Interest

Galvan asserts that remand is necessary for the trial court to consider whether to strike restitution interest from the judgment and sentence. We agree.

In 2022, the legislature amended RCW 10.82.090, effective January 1, 2023. See LAWS OF 2022, ch. 260, § 12. The newly amended statute permits trial courts to "elect not to impose interest on any restitution the court orders." RCW 10.82.090(2). The court must also consider whether a defendant is indigent before determining whether to impose interest on restitution. RCW 10.82.090(2).

Because this amendment took effect while Galvan's direct appeal was pending, it applies to him. Ellis, 27 Wn. App. 2d at 16. Although the State contends that no case has ever addressed whether restitution interest may be waived on the basis of indigency, this argument ignores this court's recent opinion in Ellis, which directly addressed this issue.

We affirm and remand for the court to consider whether to impose restitution interest. On remand, Galvan may also move the court to reconsider the previously imposed legal financial obligations.

Smith, C.J.

WE CONCUR:

Díaz, J.

Birk, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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