No. 29658-0-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

LEONARD WILLIAM BOSTON,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Boston's motion to suppress statements he made to Detective Manke at the jail.

2. The trial court erred in finding Detective Manke had returned to the jail for the second interview at Mr. Boston's request. CrR 3.5 Finding of Fact "H"; CP 275.

3. The trial court erred in concluding Mr. Boston waived his *Miranda* rights by implication; that he was informed of his rights, he understood his rights, and then chose to volunteer information; that the waiver was evident on May 14 and 15; and that Mr. Boston never indicated anything other than a willingness to speak to Detective Manke, until May 16 or May 17, 2010. CrR 3.5 Conclusion of Law "B"; CP 275-76.

4. The trial court erred in concluding, "The state has proved by a preponderance of the evidence that Leonard Boston knowingly, intelligently and voluntarily waived his Miranda rights - he at no point prior to May 16 or May 17, made even an equivocal assertion of his rights. The defendant's background, experience and conduct - the totality of the circumstances - show he waived his Miranda rights. . . . .He wanted to

explain to Detective Manke that he was only a small-time dealer." CrR 3.5 Conclusion of Law "C"; CP 276.

5. The trial court erred in instructing the jury it had to be unanimous in its answer to the special verdict.

6. The evidence was insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was there not a valid waiver of Mr. Boston's *Miranda* rights, implied or otherwise, because after Mr. Boston invoked his right to remain silent at the first interview, the detective did not provide fresh *Miranda* warnings at the second interview? Therefore, were Mr. Boston's statements inadmissible?

2. Should the sentence and special verdict be vacated because the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict?

(a) A sentence enhancement is illegal or erroneous when based upon an invalid special verdict. May illegal or erroneous sentences be

challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court?

(b) Was the illegal or erroneous sentence based upon an invalid special verdict not harmless error?

3. Was the evidence insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses?

C. STATEMENT OF THE CASE

Police conducted three controlled buys of heroin from Gail Remington at her residence using a confidential informant (CI). The CI never purchased any heroin directly from Mr. Boston, who was Ms. Remington's brother. RP 208-59. The CI testified when she arrived at the residence for the third buy, Mr. Boston was outside working with a friend. After the CI went inside and asked to buy heroin, Ms. Remington said they would have to wait for Mr. Boston. About 15 minutes later, Mr. Boston came inside the residence, pointed to a little box on the wall and said, "It's in there." Ms. Remington then retrieved a piece of heroin from the box and sold it to the CI. RP 362-68.

Several weeks later the police obtained and executed a search warrant at the residence. RP 263. Mr. Boston was one of the four occupants of the residence. RP 444-48, 451, 542. Mr. Boston was handcuffed and brought into the living room with the other occupants where a detective read the group *Miranda* warnings. Mr. Boston was then transported to jail. RP 450-53.

Detective Manke went to the jail to interview Mr. Boston. He notice Mr. Boston looked like he was ill and slightly agitated. He appeared pale and unable to concentrate very well. Mr. Boston said he was scared to death of going through the withdrawal from heroin. RP 266-69. Detective Manke was familiar with what people experience when going through heroin withdrawal. They experience nausea, cramping and it is painful. In the detective's opinion, Mr. Boston was already in the early stages of withdrawal. RP 269-70.

Detective Manke did not read *Miranda* warnings to Mr. Boston. He advised Mr. Boston why he was arrested and what charges would be forthcoming. Mr. Boston said he wanted to talk but his head was presently not clear and asked the detective to come back the next day. The detective then left the interview room. RP 270-71.

Detective Manke returned the next day. He did not read *Miranda* warnings to Mr. Boston. Mr. Boston said, "Let's cut to the chase; what do you want from me." RP 273. Detective Manke responded, "I want to know about your heroin dealings." Mr. Boston said he was just a small-time dealer and not a huge dealer like the police thought he was. He added, "I'm just a junkie keeping other junkies well." RP 273-74.

Mr. Boston moved to suppress his statements arguing there was no voluntary waiver of his *Miranda* rights and Detective Manke never read him *Miranda* warnings before the two interviews. RP 89-98. The court denied the motion finding there was an implied waiver of *Miranda* rights. RP 137-38; CP 275-76. The court found Detective Manke's statement, "I want to know about your heroin dealings," was a guilt seeking question, i.e., it was interrogation. CP 276.

On his cross-examination the prosecutor questioned Mr. Boston extensively about his statement that he was just a small-time dealer and not a huge dealer like the police thought he was, as well as his statement, "I'm just a junkie keeping other junkies well." RP 894-98. In his closing argument, the prosecutor argued these statements amounted to an admission of guilt to the delivery charge. RP 962-63

Mr. Boston was convicted by a jury of delivery of a controlled substance, possession with intent to deliver a controlled substance, use of drug paraphernalia, and bail jumping. CP 265-67. The jury was asked to find by special verdict No. 1 that the delivery and possession with intent to deliver occurred within 1000 feet of a school bus stop. CP 254. The jury was instructed in pertinent part regarding the special verdict:

> If you find the defendant guilty of these crimes you will then use the special verdict form and fill in the blanks with the answer "yes" or "no" according to the decision you reach. The special verdict for these offenses has two questions. Because this is a criminal question, all twelve of you must agree in order to answer each question.

CP 254.

The jury answered "yes" to special verdict No. 1. CP 268-69. The court imposed a total sentence of 120 month that included 48 months for the two special verdict enhancements. CP 283-94.

This appeal followed. CP 295-307.

D. ARGUMENT

Issue No. 1. There was not a valid waiver of Mr. Boston's *Miranda* rights, implied or otherwise, because after Mr. Boston invoked his right to remain silent at the first interview, the detective did not provide fresh *Miranda* warnings at the second interview. Therefore, Mr. Boston's statements were inadmissible.[1]

To counter the inherently compelling nature of custodial interrogation, the U.S. Supreme Court has required that an accused be advised of his rights to remain silent and to have an attorney present during interrogation. *Miranda v. Arizona*, 384 U.S. 436, 468-70, 86 S.Ct. 1602, 1624-26, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The *Miranda* Court also stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda, 384 U.S. at 473-74, 86 S.Ct. at 1627-28.

Miranda did not decide when, after an accused has invoked his rights, the police may seek a waiver of those rights. *State v. Cornethan*, 38 Wn.App. 231, 233, 684 P.2d 1355 (1984). Subsequent Supreme Court

[1] Assignments of Error 1-4.

decisions have distinguished between the procedural safeguards triggered by a request to remain silent and those following a request for an attorney. *Id.* If an accused invokes the right to remain silent, the police may resume questioning after a "significant period" of time has passed, but only if the accused's original request to cut off questioning was "scrupulously honored" and he is provided with a fresh set of Miranda warnings on re-questioning. *Cornethan*, 38 Wn.App. at 233-34 (citing *Michigan v. Mosley*, 423 U.S. 96, 104-106, 96 S.Ct. 321, 326-328, 46 L.Ed.2d 313 (1975)).

Here, Detective Manke properly ceased the interrogation at the first jail interview after Mr. Boston invoked his right to remain silent in compliance with *Miranda*. However, he did not provide fresh *Miranda* warnings at the second interview. Consequently, he did not receive a valid waiver of Mr. Boston's *Miranda* rights. Therefore, the statements were inadmissible and should have been suppressed.

Harmless Error. A court's error in admitting a defendant's statement in violation of Miranda is harmless only "if the untainted evidence alone is so overwhelming that it necessarily leads to a finding of guilt." *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988) (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S.

1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)); see *State v. Reuben*, 62 Wn.App. 620, 626-27, 814 P.2d 1177, rev. denied, 118 Wn.2d 1006, 822 P.2d 288 (1991).

In this case, evidence of the two serious drug charges was not overwhelming. The CI never purchased any heroin directly from Mr. Boston. She purchased all the drugs from Ms. Remington. The only evidence implicating Mr. Boston was during the third buy when he came inside the residence, pointed to a little box on the wall and said, "It's in there." Moreover, the prosecutor questioned Mr. Boston extensively about his statement that he was just a small-time dealer and not a huge dealer like the police thought he was, as well as his statement, "I'm just a junkie keeping other junkies well," in order to portray Mr. Boston as a drug dealer. In his closing argument, the prosecutor argued these statements amounted to an admission of guilt to the delivery charge. Without the inadmissible statements, the prosecutor would not have been able to make this argument and/or establish this point.

Therefore, this error was not harmless. The appropriate remedy is reversal and remand for entry of an order of suppression. *State v. Valdez*, 82 Wn.App. 294, 298, 917 P.2d 1098, rev. denied, 130 Wn.2d 1011, 928 P.2d 416 (1996).

Issue No. 2. The sentence and special verdict should be vacated because the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict.[2]

A criminal defendant may not be convicted unless a twelve-person jury unanimously finds every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Williams-Walker*, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 213 (1994); *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer "no." *State v. Bashaw*, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010); *Goldberg*, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is "no." Id.

In this case as in *Bashaw*, the jury was incorrectly instructed, "Since this is a criminal case, all twelve of you must agree on the answer

[2] Assignment of Error No. 5.

to the special verdict." *Bashaw,* 169 Wn.2d at 139; CP 21. Citing *Goldberg*, the *Bashaw* court held:

> Applying the *Goldberg* rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see *Goldberg*, 149 Wn.2d at 893, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.

Bashaw, 169 Wn.2d at 147.

The instructions in the present case incorrectly required jury unanimity for the jury to answer "no" to the special verdict, contrary to *Bashaw* and *Goldberg*. The remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. *Williams-Walker,* 167 Wn.2d at 899-900; *State v. Recuenco,* 163 Wn.2d 428, 441-42, 180 P.3d 1276 (2008).

(a). A sentence enhancement is illegal or erroneous when based upon an invalid special verdict. Illegal or erroneous sentences may be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court.

In *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011), the Court of Appeals found the trial court erred when it required the jury to be unanimous to find the State had not proven the special allegation.

However, the Court ruled the error was not a manifest constitutional error and thus could not be raised for the first time on appeal. *Nunez*, 160 Wn. App. 150, 248 P.3d at 110. The decision in *Nunez* directly conflicts with *Bashaw* and *Goldberg*, which found such an error is manifest constitutional error and can be raised for the first time on appeal. *Bashaw*, 169 Wn.2d at 146-47; *Goldberg*, 149 Wn.2d at 892-94; accord *State v. Ryan*, ___ Wn. App. ___, (No. 64726-1 Apr. 04, 2011).

"[I]llegal or erroneous sentences may be challenged for the first time on appeal," regardless of whether defense counsel registered a proper objection before the trial court. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), *quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). A sentence enhancement must be authorized by a valid jury verdict. *Williams-Walker*, 167 Wn.2d at 900. Error occurs when a trial court imposes a sentence enhancement not authorized by a valid jury verdict. See *Recuenco*, 163 Wn.2d at 440, 180 P.3d 1276 (the error in imposing a firearm enhancement where the jury found only a deadly weapon, occurred during sentencing, not in the jury's determination of guilt).

Similarly, the error here occurred not just in the use of the invalid instruction, but more importantly, when the trial court imposed the

sentence it did based upon the invalid special verdict. Thus, contrary to *Nunez*, Mr. Boston could raise this issue for the first time on appeal because it involved the imposition of an illegal or erroneous sentence which was based upon an invalid special verdict -- itself the product of an improper jury instruction.

(b). The illegal or erroneous sentence based upon an invalid special verdict was not harmless error.

In order to hold that a jury instruction error was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195 (citing *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). The *Bashaw* court found the erroneous special verdict instruction was an incorrect statement of the law. *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195. A clear misstatement of the law is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (citing *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

In finding the instructional error not harmless the *Bashaw* court stated the following:

> The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury

> and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In *Goldberg*, the error reversed by this court was the trial court's instruction to a nonunanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.
>
> The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." *Id.* at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless. As such, we vacate the remaining sentence enhancements and remand for further proceedings consistent with this opinion.

Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195.

The situation in the present case is indistinguishable from *Bashaw*. It is impossible to speculate about what the jury would have decided if it had been given the correct instruction. Therefore, the error was not harmless.

Issue No. 3: The evidence was insufficient for any rational trier of fact to find an essential element of the special verdict regarding the school bus route stop enhancement, where there was no proof of the seating capacity of the school buses.[3]

RCW 69.50.435(1)(c) orders an enhanced penalty for persons selling drugs within 1000 feet of a school bus route stop. RCW 69.50.435(6)(c) defines "school bus route stop" as any stop designated by a school district. In addition, the jury herein was instructed in pertinent part that "school bus" means:

> a vehicle that meets the following requirements: (1) has a seating capacity of more than ten persons including the driver . . . .

Instruction No. 27; CP 255

Herein, the State presented no evidence as to the seating capacity of the school buses for which stops were officially designated by the school district within 1000 feet of Ms. Remington's home. Whether seating capacity is viewed as an element of the crime or as an added element under the law of the case doctrine, the evidence was insufficient to support the special verdict. For this additional reason, the special verdict must be stricken.

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[3] Assignment of Error No. 6.

E. CONCLUSION

For the reasons stated, the convictions should be reversed or in the alternative the special verdict should be stricken and the sentence reduced accordingly.

Respectfully submitted August 1, 2011.

David N. Gasch
Attorney for Appellant
WSBA #18270