

64742-3

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NO. 64742-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD MOORE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
2010 SEP 21 PM 4:01

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

The Honorable Charles R. Snyder, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in instructing the jury it must be unanimous to answer “no” to the special verdict form.

Issue Pertaining to Assignment of Error

A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Did the court err in instructing the jury it must be unanimous to answer “no” to the special verdicts?

B. STATEMENT OF THE CASE

A jury found Richard Moore guilty of second-degree assault with a deadly weapon. CP 23. The jury also answered yes to the special verdict form asking whether he was armed with a deadly weapon. CP 24.

The jury instructions pertaining to the special verdict form stated, “In order to answer the special verdict form C ‘yes,’ you must unanimously be satisfied beyond a reasonable doubt that ‘yes’ is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer ‘no.’” CP 41. The court imposed standard range sentence including the mandatory enhancement. CP 17. Additional facts included in the opening Brief of Appellant are incorporated by this reference. Brief of Appellant 1-5.

C. ARGUMENT

THE COURT ERRED IN INSTRUCTING THE JURY IT MUST BE UNANIMOUS TO ANSWER “NO” TO THE SPECIAL VERDICT FORM.

The jury instruction accompanying the special verdicts in this case informed the jury as follows:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form C. In order to answer the special verdict form C “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 41. “[A]n alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal.” State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000). Under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), this instruction was in error.

When a jury cannot reach a unanimous decision on a special verdict, this is equivalent to a final determination that the State has not proved the special finding beyond a reasonable doubt. Bashaw, 169 Wn.2d at 146. While the jury must be unanimous to answer “yes” to a special verdict, unanimity is not required to find that the State failed to prove its case. Id. at 147. Because unanimity was not required to answer “no” to the special verdict form, the jury instructions in this case were erroneous. Id.

This error is not harmless merely because this jury apparently reached unanimity. Id. at 147-48. The error is the procedure by which the jury arrived at its verdict. Id. at 147. “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.” Id. Thus, despite the jury’s unanimous “yes” answer to the special verdict in Bashaw, the court could not conclude the error was harmless beyond a reasonable doubt and vacated the sentence enhancements. Id. at 148. The same result is compelled here. Moore’s deadly weapon sentence enhancement should be reversed.

D. CONCLUSION

Moore requests this Court reverse his sentence enhancement because the jury was incorrectly instructed it must be unanimous to answer “no.”

DATED this 21st day of September, 2010.

Respectfully submitted,

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