

NO. 65952-9-1

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

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STATE OF WASHINGTON,

Respondent,

v.

EFRAIN M. BARRAZA,

Appellant.

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

The Honorable Steven J. Mura, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury that it must be unanimous to answer the special verdict forms.

2. Appellant's sentence for attempted robbery exceeds the statutory maximum allowable sentence.

Issues Pertaining to Assignments of Error

1. It is reversible error to instruct jurors they must be unanimous in order to find that the State has failed to satisfy the requirements of a sentencing enhancement. Appellant's jury received such an instruction. Must the special verdicts be vacated?

2. Although the maximum sentence for attempted robbery is 120 months in prison, the court sentenced appellant to 156 months. Must this illegal sentence be vacated?

B. STATEMENT OF THE CASE

1. Substantive Facts

The Whatcom County Prosecutor's Office charged Efrain Barraza with four criminal offenses: (count one) Attempted Robbery in the First Degree; (count two) Attempted Possession of a Controlled Substance with Intent to Deliver; (count three) Assault in the Second Degree; and (count four) Assault in the Second Degree. Each charge included a firearm enhancement allegation. CP 65-67.

Evidence at trial revealed the following. In 2003, the Special Investigations Unit of the Bellingham Police Department engaged in an undercover operation designed to catch large-scale purchasers and distributors of marijuana. Police instructed an informant to spread the word that an individual sought to sell 20 lbs. of marijuana for \$44,000.00. RP 15-20. Detective Brock Crawford was selected to pose as the seller. RP 69.

An individual named Chris Lawlor contacted Crawford and indicated he had a potential purchaser and wished to broker the deal. RP 20-21. Crawford arranged to meet Lawlor and the buyer in the parking lot of a Bellingham Home Depot Store on the evening of May 15, 2003. RP 22, 70. Several police officers were posted in and around the parking lot for surveillance and to ensure Crawford's safety. RP 23.

Detective Crawford arrived in a Ford Expedition with British Columbia plates. RP 24. Inside the Expedition, he had a duffle bag containing 20 vacuum-sealed bags of marijuana that had been confiscated during other operations. RP 26, 70-71. Lawlor arrived in a black Honda, followed by the buyer in a maroon or purple Honda. RP 71. The buyer walked to the back of the Expedition, where

Crawford showed him a sample of the marijuana and allowed him to inspect the contents of the duffel. RP 72-73.

The buyer suggested they go to a nearby motel room to exchange the marijuana for the money, but Crawford insisted the transaction take place in a public location. RP 73-74. After further discussion, the parties agreed to meet again in ten minutes at a nearby Haggen grocery store parking lot. RP 74, 94. Detective Crawford alerted other officers to the new location and they established surveillance positions at the store. RP 25-29, 74.

At the Haggen parking lot, Lawlor arrived in his black Honda and the buyer arrived in his maroon Honda. This time, however, the buyer had a passenger. RP 75. The buyer showed Crawford several stacks of bills to demonstrate he had the money. RP 77. The buyer again suggested they move to a more private location for the transaction, but Crawford said no. RP 75-76.

Ultimately, the parties decided to move to a different location in the same parking lot. Crawford drove himself and Lawlor in the Expedition. The buyer and his passenger followed them in the maroon Honda. RP 79-80. Once parked again, Crawford removed the duffel from the back of the Expedition and placed it on the ground. The buyer placed the cash in a backpack and brought it to Crawford,

who told him to put it on the Expedition's rear passenger seat. RP 81-82.

The buyer tried to convince Crawford to come near so that he could confirm all the money was in the backpack, but Crawford kept his distance. The buyer then reached into the backpack, pulled out a black pistol, and pointed it at Crawford's face. RP 82-83. Crawford put his hands up and then ran away. RP 83. Surveillance officers saw what was happening, and all units in the vicinity moved in. RP 32-33, 145-146, 192, 205, 225-226.

Officer Rubin Baca, who was just one parking spot away, exited his vehicle, drew his weapon, and identified himself as a police officer. RP 223-226. In response, the buyer pointed his pistol directly at Officer Baca while the individual who had been his passenger in the maroon Honda approached Baca and attempted to distract him. RP 226-227. Baca repeatedly told the buyer to drop his weapon, and eventually the buyer dropped or threw the gun to the ground before running away. RP 227-228. As he ran away, he yelled, "get the shit" to his passenger. RP 84.

Baca gained control of the passenger, later identified as Guillermo Cienfuegos, and placed him under arrest. RP 227-228. Lawlor also was arrested. RP 33, 147. Officers determined that a

maroon Saturn was connected to the purchase and arrested all three of its occupants. RP 190-194, 205-207. On the floorboard of that car, in the back seat, officers found a loaded assault rifle, box of ammunition, and ammunition clip. RP 149-150, 152, 208.

Officers recovered the pistol that the buyer had discarded. It was a .45 caliber Smith & Wesson. RP 228. There was a round in the chamber, with additional rounds in the clip, and the hammer was back. It appeared fully functional. RP 36-37. Inside the maroon Honda, officers found a wallet. RP 229. The wallet contained a Washington State ID and Visa card bearing the name "Efrain Barraza." Documents in the glove box also bore Barraza's name. RP 230-234. At trial, both Officer Crawford and Officer Baca identified Barraza as the buyer and individual who pointed the .45 pistol at them. RP 73, 81-83, 226-227.

Barraza, who has several prior convictions for crimes of dishonesty, testified in his own defense. RP 252-254. He conceded the maroon Honda belonged to his family in May 2003 and that he had left his wallet in the car. But he explained that a friend – named "Angel" – borrowed the car the evening of May 15, 2003 to purchase marijuana and never returned it. RP 254, 256-264, 269-271. In response to questions on cross-examination, he denied knowing

Guillermo Cienfuegos and denied seeing his picture on television during a news story shortly after the attempted robbery. RP 274.

To impeach Barraza, the State called his former wife – Iyenika Ramirez – as a rebuttal witness. She testified that Barraza and Cienfuegos were friends and that she and Barraza saw the news story together. RP 295-297. Moreover, according to Iyenika, one of the other individuals arrested in connection with the incident was Barraza’s cousin. RP 63, 295.

## 2. Instructions, and Sentencing

Because each charge included a firearm enhancement allegation, jurors were given a special verdict form for each of the four counts, asking: “Was the defendant, Efrain Munguia Barraza armed with a firearm at the time of the commission of the crime . . . .?” CP 29-32.

In addition, instruction 24 informed jurors how to decide the special verdict questions:

You will also be given special verdict forms for the crimes charged in counts I, II, III and IV. If you find the defendant not guilty of the crimes alleged in counts I, II, III or IV, do not use the special verdict form associated with that count. If you find the defendant guilty of any of these crimes, you will then use the special verdict form associated with this count and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is

a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “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 61 (emphasis added).

Jurors convicted on all counts and answered “yes” on all four special verdict forms. CP 29-34. The court imposed a composite sentence of 246 months in custody, and Barraza timely filed his Notice of Appeal. CP 3-15, 20.

C. ARGUMENT

1. THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICTS REQUIRES THAT BARRAZA'S FIREARM ENHANCEMENTS BE VACATED.

Instruction 24, which stated all 12 jurors must agree on an answer to the special verdicts, was an incorrect statement of the law. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). An instruction containing the same improper requirement was given in Bashaw. Bashaw, 169 Wn.2d at 139 (“Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.”). A unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Id. at

146-147 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

The State proposed this erroneous instruction. Supp CP \_\_\_ (sub no. 37, Plaintiff's Proposed Instructions to the Jury, 6/7/10). Defense counsel did not object, but the error can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). The defendant in Bashaw did not object to this instruction, either,<sup>1</sup> but the Supreme Court still reversed after applying the harmless error test applicable to constitutional violations. Bashaw, 169 Wn.2d at 147-48.

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). In order to find an instructional error harmless, the reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d

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<sup>1</sup> State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

at 147. The deliberative process is different when the jury is properly given the option of not returning a unanimous verdict. "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.

In Bashaw, the defendant was convicted of three counts of delivering a controlled substance. The jury entered special verdicts finding all three crimes occurred within 1,000 feet of a school bus route stop, increasing Bashaw's maximum sentence. Id. at 137-139. The verdict on one count was vacated based on the erroneous admission of certain evidence. Id. at 140-144. For the remaining counts, however, although *all* of the trial evidence indicated the sentencing enhancement had been proved, in light of the "flawed deliberative process," the court refused to find the error harmless. Id. at 138-139, 143-148.

The Bashaw court explained that given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. "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." Id. at 147-48.

The same holds true here. On the special verdicts, one or more jurors may have entertained doubts whether the prosecution had proved beyond a reasonable doubt that Barraza was armed with a firearm during each of the offenses, but – given the unanimity requirement for answering “no” – they may have abandoned their positions or failed to raise their concerns. Jurors may not have reached unanimity had they not been required to do so. Because the instructional error impacted the procedure jurors used, it is impossible to determine the “flawed deliberative process” had no impact whatsoever.

2. BARRAZA’S SENTENCE ON COUNT I EXCEEDS THE STATUTORY MAXIMUM.

Even if this Court did not remand to have the firearm enhancements stricken, remand would still be necessary to correct Barraza’s sentence on count I.

Attempted Robbery in the First Degree is a class B felony with a maximum authorized sentence of 120 months. See RCW

9A.56.200(2) (completed offense a class A felony); RCW 9A.28.020(3)(b) (attempt to commit a class A felony is a class B offense). “For a class B felony,” no person “shall be punished by confinement . . . exceeding . . . a term of ten years.” RCW 9A.20.021(1)(b). Yet, Barraza was sentenced to 156 months on this one count alone. CP 20. This is clearly a mistake.

At the sentencing hearing, the prosecutor cited State v. Thomas, 113 Wn. App. 755, 54 P.3d 719 (2002), aff'd, 150 Wn.2d 666, 80 P.3d 168 (2003), for the proposition that “the enhancements are not constrained by the statutory maximum.” RP 336. The sentencing court therefore believed it could add a 36-month firearm enhancement to the top of the 120-month statutory maximum sentence on count I and then add firearm enhancements for each of the other three counts. Based on that belief, it imposed a combined sentence of 246 months (120 plus 36 plus 18 plus 36 plus 36).

But Thomas does not and could not stand for that proposition. Rather, this Court made it clear that “the total confinement imposed for each offense, including any enhancement for that offense, must not exceed the maximum.” Thomas, 113 Wn. App. at 757. Thomas was convicted of two counts of Robbery in

the Second Degree, a class B felony with a 120-month statutory maximum sentence. The sentencing court imposed concurrent 84-month sentences plus a 36-month firearm enhancement on each count. Thus, Thomas' sentence on each count was 120 months and did not exceed the statutory maximum. Because the two 36-month enhancements had to be served consecutively, however, his total combined sentence was 156 months (84 plus 36 plus 36). Id. at 757-758. But this was proper because the total confinement ordered for a single offense never exceeded 120 months. Id. at 758-762.

In contrast, the total confinement ordered for count I in Barraza's case exceeds 120 months by 36 months. Because the sentencing court could only impose 120 months on that count, the maximum combined sentence Barraza could serve was 210 months (120 plus 18 plus 36 plus 36) rather than the 246 months imposed.

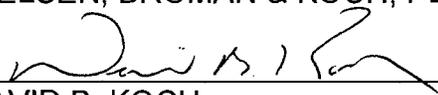
D. CONCLUSION

Under Bashaw, this Court should vacate all four of the firearm sentencing enhancements. Alternatively, this Court should vacate the sentence on count I because it exceeds the statutory maximum sentence by 36 months.

DATED this 16<sup>th</sup> day of February, 2011.

Respectfully Submitted,

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DIVISION I**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65952-9-1
	)	
EFRAIN BARRAZA,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16<sup>TH</sup> DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2011.

x *Patrick Mayovsky*