

No. 65952-9-1

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

STATE OF WASHINGTON, Respondent,

vs.

EFRAIN MUNGIA BARRAZA, Appellant.

2011 MAY 10 10:50
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BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Whether a defendant may raise for the first time on appeal the issue of an instruction not informing the jury that it did not have to be unanimous in order to answer no to the firearm enhancement special verdict form.
2. Whether a special verdict instruction stating that the jury had to be unanimous to answer the special verdict form "yes" or "no" was a correct statement of law where the deadly weapon statute requires the trier of fact to make a finding "whether *or not*" the defendant was armed with a deadly weapon.
3. Whether the failure to inform the jury that it did not have to be unanimous to answer the firearm enhancement verdict form "no" was harmless error beyond a reasonable doubt where the jury unanimously found the defendant guilty of two counts of assault in the second degree with a firearm and attempted first degree robbery, where defense did not dispute that the offense was committed with a firearm but asserted that it was a case of mistaken identity, and where the jury answered the special verdict form yes.
4. Whether the sentencing judge erred in imposing a 36 month firearm enhancement on top of 120 months of confinement time on the offense of the attempted robbery in the first degree where the deadly weapon statute requires the statutory maximum to be the presumptive sentence if the addition of an enhancement would result in the sentence exceeding the statutory maximum for the offense.

C. FACTS

The State accepts the statement of facts set forth in the Appellant's opening brief, but supplements it with the following facts.

Barraza stipulated and/or testified that at the time of the offense he went by the name Efrain Barraza and that is his real name. RP 12-13, 219, 252. At the time he testified he was incarcerated on a federal bank robbery conviction under the name of Pablo Ortega and admitted that he had used a couple of other names. RP 253-54, 266, 277, 280.

The backpack that was found at the scene only had approximately \$1700 in it, not \$44,000, the amount agreed upon. The bundles of money had \$100 bills and \$50 bills on top and then \$1 bills in between. RP 34-35, 62, 151.

The firearm that Barraza dropped when he ran away was found ten feet from the Ford Explorer. The gun was loaded, with rounds in the magazine and hammer back, fully functional and could have immediately been fired. RP 36-37, 209, 228.

In addition to identifying Barraza at trial as the one who pointed the gun at them, Crawford and Baca both testified that they determined at the time of the incident that Barraza's photo I.D. found in the car was a picture of the person who had pulled a gun on them. RP 87, 230.

The jury was instructed in relevant part:

... Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form “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 (Inst. No. 24). Barraza did not object or except to the wording of this instruction. RP 304.¹ The jury did not submit any questions regarding the special verdict form or instructions. Supp. CP ___, Sub. Nom. 36 at 9. The jury was polled and was unanimous in its verdicts. Id. at 11.

D. ARGUMENT

1. Barraza’s belated challenge to the special verdict form instruction should be rejected.

Barraza claims the trial court’s instruction regarding the firearm special verdict violates the Supreme Court’s ruling in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), because it informed the jury that it had to be unanimous in order to answer the special verdict question “no.” However, Barraza failed to object to the special verdict forms instruction below. As the claimed error is not of constitutional magnitude, he waived the issue by failing to raise it below. Furthermore, the statutory language for the deadly weapon/firearm enhancement procedure requires a jury to determine “whether *or not*” the defendant was armed with a deadly

¹ Defense objected to special verdict forms C and D, the two assault enhancements, based on double jeopardy grounds.

weapon. Therefore, the jury instruction was not erroneous in informing the jury that it had to be unanimous to find that the defendant was armed or not armed with a firearm in this case, distinguishing this enhancement from the one at issue in Bashaw. Even if the jury did not have to be unanimous in order to answer the special verdict form “no” and Barraza may assert this non-constitutional issue for the first time on appeal, any error was harmless because the jury unanimously found that he was armed with a firearm and the evidence was overwhelming that Barraza was armed with a firearm.

a. Barraza failed to preserve his non-Constitutional Bashaw claim of instructional error.

Barraza waived his issue regarding the special verdict form instruction by failing to raise it below.² RAP 2.5(a) permits the Court to consider an issue raised for the first time on appeal only when it involves a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). In order to raise an error for the first time on appeal under this rule, the appellant must demonstrate that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). “ ‘Manifest’ under RAP 2.5(a) requires a showing of actual

² This issue is currently pending before the Washington State Supreme Court in two petitions for review, State v. Nunez, Sup. Ct. No. 85789-0 and State v. Ryan, Sup Ct. No. 85947-7.

prejudice.” State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

In order to show actual prejudice appellant must demonstrate that the asserted error had practical and identifiable consequences in the trial of the case. *Id.*

An alleged unpreserved instructional error must be analyzed on a case by case basis to determine whether it was a manifest error affecting a constitutional right. *See, O'Hara*, 167 Wn.2d at 100. The Supreme Court in Bashaw noted that its decision was not compelled by constitutional protections against double jeopardy, but rather by common law precedent. Bashaw, 169 Wn.2d at 146 n.7. Since the error is not of constitutional dimension, and Barraza did not object below, he did not preserve the error. Moreover, Barraza has failed even to attempt to demonstrate that it is a manifest error of constitutional magnitude - he simply asserts that he can assert it for the first time on appeal because the defendant in Bashaw was permitted to raise it for the first time on appeal and the court applied the constitutional harmless error test there. Barraza has presented no evidence or argument identifying a practical consequence to his trial. The jury never indicated it was deadlocked on the enhancement. There was no suggestion that it ever reached any decision other than a unanimous finding that Barraza was armed with a firearm. The jury was polled and

was unanimous in the verdicts. This Court should decline to review this claim.

The State acknowledges that this Court in State v. Ryan held otherwise, stating that “Bashaw compels the conclusion [such an instructional] error is both manifest and constitutional.” Ryan, ___ Wn. App. ___ at ¶10, 2011 WL1239796 (2011). In so holding, the court rejected the contrary conclusion and analysis in Div. III’s case State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011). While the State believes this Court erred in its conclusion in Ryan, and asserts that the rationale set forth Nunez that such error is not manifest error of constitutional magnitude is correct, the State recognizes that this Court is bound by its precedent in Ryan. The State asserts this argument because it does not believe that such error falls under RAP 2.5 as manifest constitutional error and in order to preserve the issue for further review.

b. The Special Verdict Instruction Correctly Stated the Law Regarding Deadly Weapon Findings.

Even if Barraza did not waive the issue, the instruction given was a correct statement of the law regarding deadly weapon findings. Former RCW 9.94A.602, which set forth the deadly weapon findings procedure, required the jury or trier of fact to determine “whether or not” the defendant was armed with a deadly weapon. The instruction here,

informing the jury that it had to be unanimous to find that the defendant was armed and that it had to unanimous to find that he was not armed, was not error. This statutory requirement distinguishes this case from Bashaw and State v. Goldberg³, relied upon by the Supreme Court in Bashaw.

The courts have long acknowledged that “the determination of penalties for crimes is a legislative function.” State v. Thorne, 129 Wn. 2d 736, 767, 921 P.2d 514 (1996). “[I]t is the function of the legislature and not of the judiciary to alter the sentencing process.” State v. Pillatos, 159 Wn. 2d 459, 469, 150 P.3d 1130 (2007). The legislature may only alter the sentencing process when necessary to protect an individual from excessive fines or cruel and inhuman punishment. State v. Ammons, 105 Wn. 2d 175, 180, 713 P.2d 719, *cert. den.*, 479 U.S. 930 (1986).

The construction of a statute is a question of law that is reviewed de novo. State v. Rice, 116 Wn. App. 96, 99-100, 64 P.3d 651 (2003). The primary objective in interpreting a statute is to give effect to the intent of the legislature. In re Vasquez, 108 Wn. App. 307, 312, 31 P.3d 16 (2001) *rev. denied*, 152 Wn.2d 1035 (2004). Generally, if statutes are clear on their face, the courts give effect to the plain meaning of the language. State v. Chapman, 140 Wn.2d 436, 450, 998 P.2d 282 (2000) *cert. denied*, 531 U.S. 984 (2000). In interpreting a statute, the courts

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

should give effect to all the language used. State v. Lilyblad, 163 Wn. 2d 1, 6, 177 P.3d 686 (2008).

The legislature set forth the process for determining deadly weapon penalties in former RCW 9.94A.602 and former 9.94A.533(3), (4). State v. Nguyen, 134 Wn. App. 863, 870, 142 P.3d 1117 (2006), *rev. den.*, 163 Wn.2d 1053, *cert. den.* 129 S.Ct. 664 (2008); State v. Tessema, 139 Wn. App. 483, 495, 162 P.3d 420 (2007), *rev. den.*, 163 Wn.2d 1018 (2008) (enhancement statutes amply authorize firearm finding). Under former RCW 9.94A.602⁴, the legislature provided:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, or *if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.*

RCW 9.94A.602 (2003) (emphasis added). Via the use of the language “whether or not,” the legislature directed the trier of fact, whether judge or jury, to determine if the defendant was, or was not, armed with a deadly weapon. In order for the jury to affirmatively determine that a defendant had, or had not been, armed with a weapon, the jury would need to be

⁴ Currently RCW 9.94A.825.

unanimous. *See, State v. Stephens*, 93 Wn. 2d 186, 190, 607 P.2d 304 (1980) (“Washington requires unanimous jury verdicts in criminal cases.”).

The special verdict form jury instruction given in this case was based on WPIC 160.00, and informed the jury that:

... 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 (Inst. No. 24). Therefore, WPIC 160.00, as applied and used in this case, properly required the jury to determine, unanimously, whether or not the defendant was armed with a deadly weapon, in this case a firearm.

This specific statutory language distinguishes this enhancement from those that were at issue in *Bashaw* and *State v. Goldberg*, 149 Wn. 2d 888, 72 P.3d 1083 (2003). Otherwise, the State acknowledges that this Court is bound by *Bashaw* and this Court’s precedent *State v. Ryan*. The enhancement at issue in *Bashaw* was a school bus stop zone enhancement based on RCW 69.50.345(1)(c). *Bashaw*, 169 Wn.2d at 137. That statute was silent as to whether a jury had to be unanimous before they may answer no to special verdict question and was silent as to whether the jury had to make an affirmative finding one way or the other as to whether *or*

not it occurred within a school bus stop zone. RCW 69.50.435. Goldberg was an aggravated first degree murder case involving an exceptional sentence aggravating circumstance governed by RCW 10.95.020. Goldberg, 149 Wn. 2d at 893. That statute likewise is silent as to whether a jury had to be unanimous before they could answer no as to whether the aggravating circumstance existed and did not direct the jury to make an affirmative finding as to whether *or not* the circumstance existed. RCW 10.95.020.

This Court in Ryan determined that the statutory language for exceptional sentence aggravating factors did not require the jury to be unanimous as to render any verdict about aggravating factors, whether affirmative or not. Ryan, ___ Wn. App. ___, 2011 WL1239796 ¶¶14-15. It determined that the plain language of the statute “contemplates the possibility that the jury will not be unanimous, in which case the court may not impose the aggravated sentence.” *Id.* at ¶16. Here, the plain language of the statute contemplates that the jury will make an affirmative finding if the defendant was, or was not, armed with a deadly weapon. Given that the statute directs the jury to make such an affirmative finding, that finding must be unanimous.

The jury instruction here correctly required the jury to be unanimous in order to make a finding, one way or the other, as to whether

or not the defendant was armed with a deadly weapon, under the specific language of the deadly weapon enhancement statute. Therefore Barraza is not entitled under Bashaw or Ryan to have the firearm enhancements vacated.

c. Since the verdict on the underlying offense necessarily reflected a unanimous finding that the defendant was armed with a firearm, any error in the special verdict instruction was harmless.

Even if Barraza can raise this issue for the first time on appeal, and the instruction was in error, any error was harmless. Bashaw holds that such an error can be harmless if the court can “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.”⁵ Bashaw, 169 Wn.2d at 147. Bashaw goes on to hold that the existence of a unanimous verdict is not sufficient to render the instruction harmless because the instruction could affect the procedure by which unanimity was reached. *Id.* at 202-03. Barraza does not point to any specific prejudice or harm, but relies upon this speculative holding in

⁵ It is hard to understand why the court applied the “beyond a reasonable doubt” harmless error standard in Bashaw. This standard is ordinarily applied only to constitutional error. *See State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). As noted above, Bashaw expressly states that its holding is not compelled by constitutional protections, but rather by common law precedent. Non-constitutional error is ordinarily considered harmless if, within reasonable probabilities, the error did not materially affect the outcome of the trial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The State, however, acknowledges that this Court is bound to follow the standard applied in Bashaw.

Bashaw. This type of speculation regarding prejudice was recently disapproved in State v. Grier, 171 Wn. 2d 17, 246 P.3d 1260 (2011) in the context of an ineffective assistance of counsel claim. Grier, 171 Wn.2d at 41-42, 44-45 (in context of ineffective assistance of counsel claim regarding failure to request lesser included instruction, court must presume that jury followed the law in returning its verdict, finding that the State had met its burden of proof).

In the present case, however, there is no such concern regarding the procedure by which the jury reached unanimity. In its general verdict the jury found, beyond a reasonable doubt, that Barraza committed the assaults and attempted robbery with a deadly weapon, specifically a firearm. The jurors were told that they could convict only if the State proved all of the elements beyond a reasonable doubt. CP 40, 49, 57, 58 (Inst. No. 3, 12, 20, 21). They were also told that they could convict only if they unanimously agreed on a verdict. CP 39, 61 (Inst. No. 2, 24). Thus, the guilty verdicts on the second degree assault and attempted robbery convictions necessarily reflect a unanimous determination that Barraza committed the assaults and attempted robbery with a deadly weapon, specifically a firearm. The only weapon involved in this case was a firearm, this was not disputed by the defense at trial, and Barraza's defense was solely that this was a case of mistaken identity. RP 322-28.

Under the evidence in this case, there is no way that any rational jury could find that the defendant was guilty of the second degree assault and attempted first degree robbery charges and then answer the special verdicts “no.” The special verdict instruction could not have affected the jury’s deliberative process because the jury’s general verdict demonstrates that they had already unanimously found that Barraza was armed with a firearm. Consequently, any error in the instruction was harmless.

If this Court nevertheless reverses the special verdicts here, the final issue is the proper remedy. Barraza simply indicates that the deadly weapon enhancement must be reversed. In Bashaw the court “vacated” or “reversed” the special verdicts and remanded for “further proceedings consistent with this opinion.” Bashaw, 169 Wn.2d at 147-48. It did not specify what those “proceedings” would be. The usual remedy for erroneous jury instructions is remand for a new trial. *See, e.g., State v. Jackman*, 156 Wn.2d 736, 745, 132 P.2d 136 (2006).

If this Court considers the defendant’s claims and concludes that the instructions were prejudicially erroneous, the State submits the proper remedy is a new trial on the firearm enhancements. It would be unfair and unjust under the circumstances presented here to allow Barraza to obtain outright dismissal of four firearm enhancements where he did not object below, there was no question regarding the special verdict forms or

instructions, and the evidence was overwhelming that the offenses were committed with firearms.

2. If the firearm enhancements are upheld, the State concedes that the sentence on count I must be reduced so that the total sentence including the firearm enhancement does not exceed the statutory maximum of 120 months.

Barraza also contends the sentencing judge erred in imposing sentence on count I, the attempted robbery. Specifically he asserts that the statutory maximum on that count, as a class B felony, was 120 months and that the firearm enhancement when combined with the underlying sentence cannot exceed the statutory maximum on that offense. The State agrees that the underlying sentence must be reduced to accommodate the firearm enhancement of 36 months, pursuant to RCW 9.94A.533(3)(g). The State also agrees that the statutory maximum for attempted first degree robbery does not affect the consecutive nature of the firearm enhancements on the other counts, such that the maximum sentence that could be imposed is “210 months, (120 plus 18 plus 36 plus 36)”. See Appellant’s Opening Brief at 12.

The firearm enhancement statutory provisions specifically address the situation where an enhancement and the underlying sentence exceed the statutory maximum for the offense:

If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

RCW 9.94A.533(3)(g)⁶. In State v. Thomas, referenced by the prosecutor at sentencing, the Court of Appeals held:

When several sentences are sentenced together, the statutory maximum is applied to each offense separately. Thus, the total confinement imposed for each offense, including any enhancement for that offense, must not exceed the maximum. The fact that base sentences are served concurrently, while firearm enhancements are served consecutively, does not affect this determination.

Thomas, 113 Wn. App. 755, 757, 54 P.3d 719 (2002), *aff'd*, 150 Wn.2d 666 (2003). While the court in that case did uphold a sentence in which the enhancement on the second count would run consecutively to the enhancement and underlying sentence on the first count, for a total of 13 years, the total sentence on each count, including the firearm enhancement, did not exceed the statutory maximum of 10 years for each offense. *Id.* at 761-62. On review, the Supreme Court affirmed the Court of Appeals and upheld the sentence imposed by the trial court, noting that: “While the 10-year statutory maximum for second degree robbery

⁶ Former RCW 9.94A.310(3)(g) (1998) and RCW 9.94A.510(3)(g) (2001).

provided a maximum sentence for each of Thomas's firearm-enhanced second degree robbery convictions, former RCW 9.94A.310(3)(g) did not cap at 10 years Thomas's total period of confinement." State v. Thomas, 150 Wn.2d 666, 674, 80 P.3d 168 (2003); *see also*, State v. DeSantiago, 149 Wn.2d 402, 41 68 P.3d 1065 (2003) (if the total sentence on an offense including enhancements exceeds the statutory maximum, the underlying sentence, not the enhancement, must be reduced).

Therefore, the State concedes that the sentence on count I, the attempted robbery, is limited to the statutory maximum of 120 months including the firearm enhancement. The court imposed 156 months on count I, for a total sentence of 246 months. CP 20. The judgment and sentence should be amended to reflect that the total confinement time on count I is 120 months, 36 months of time on the enhancement and 84 months on the underlying sentence, and that the total sentence is 210 months.

E. CONCLUSION

The State respectfully requests that this Court affirm the jury's special verdicts on the firearm enhancements and remand the matter for the judgment and sentence to be amended to reflect that the total confinement time, including the firearm enhancement, on count I is 120 months.

Respectfully submitted this 17th day of May, 2011.



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CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, David B. Koch, addressed as follows:

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Legal Assistant

05/17/2011
Date