

67239-8

67239-8

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2012 JAN 13 PM 2:32

NO. 67239-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN DUNN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

---

**BRIEF OF RESPONDENT  
RE: SUPPLEMENTAL ASSIGNMENT OF ERROR**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

BRIAN M. McDONALD  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>ARGUMENT</u> .....	1
1. THE COURT SHOULD DISMISS THE CLAIM OF ERROR BECAUSE THE TRIAL COURT DID NOT RULE ON THE JURY INSTRUCTIONS AT THE RESENTENCING HEARING .....	1
2. DUNN MAY NOT CHALLENGE THE JURY INSTRUCTIONS FOR THE FIRST TIME ON APPEAL BECAUSE HE DID NOT OBJECT TO THEM AT TRIAL.....	4
3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY .....	6
4. ANY ERROR WAS HARMLESS.....	7
5. THE REMEDY IS REMAND FOR RETRIAL ON THE AGGRAVATING CIRCUMSTANCE .....	9
C. <u>CONCLUSION</u> .....	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Barberio, 121 Wn.2d 48,  
846 P.2d 519 (1993)..... 2, 3, 4

State v. Bashaw, 169 Wn.2d 133,  
234 P.3d 195 (2010)..... 4, 5, 6, 7, 8, 9

State v. Bertrand, 2011 WL 6097718  
(No. 40403-6-II, filed Dec. 8, 2011) ..... 5

State v. Eggleston, 164 Wn.2d 61,  
187 P.3d 233, cert. denied, \_\_\_ U.S. \_\_\_,  
129 S. Ct. 735, 172 L. Ed. 2d 736 (2008)..... 5

State v. Goldberg, 149 Wn.2d 888,  
72 P.3d 1083 (2003)..... 4, 5, 7

State v. Kilgore, 167 Wn.2d 28,  
216 P.3d 393 (2009)..... 3

State v. Morgan, 163 Wn. App. 341,  
261 P.3d 167 (2011)..... 5

State v. Nunez, 160 Wn. App. 150,  
248 P.3d 103, rev. granted,  
172 Wn.2d 1004 (2011)..... 5, 6

State v. O'Hara, 167 Wn.2d 91,  
217 P.3d 756 (2009)..... 4

State v. Reyes-Brooks, 2011 WL 6016155  
(No. 64012-7-I, filed December 5, 2011) ..... 10

State v. Ryan, 160 Wn. App. 944,  
252 P.3d 895, rev. granted,  
172 Wn.2d 1004 (2011)..... 5, 6

Statutes

Washington State:

RCW 9.94A.537 ..... 9

Rules and Regulations

Washington State:

RAP 2.5..... 2, 4

**A. ISSUES PRESENTED**

1. Whether this Court should dismiss defendant Richard Dunn's challenge to the aggravating circumstance jury instructions given in his 2004 trial because this appeal arises out of his 2010 resentencing hearing and the trial court did not make any ruling about these instructions at that hearing.

2. Whether Dunn may not challenge the aggravating circumstance jury instructions for the first time on appeal because he did not object to them at trial.

3. Whether the aggravating circumstance jury instructions correctly stated the law with respect to the need for jury unanimity.

4. Whether any error in the jury instructions was harmless.

5. Whether the proper remedy for the alleged error is retrial on the aggravating circumstances.

**B. ARGUMENT**

**1. THE COURT SHOULD DISMISS THE CLAIM OF ERROR BECAUSE THE TRIAL COURT DID NOT RULE ON THE JURY INSTRUCTIONS AT THE RESENTENCING HEARING.**

In this second appeal, Dunn challenges the jury instructions for the sexual motivation aggravating circumstance. However, this

is Dunn's *second* appeal, and it is an appeal of his resentencing hearing. Dunn cannot assert a new claim of *trial* error in this appeal because the trial court never addressed or ruled on the jury instructions at the resentencing hearing. This Court should dismiss this claim of error.

State v. Barberio, 121 Wn.2d 48, 846 P.2d 519 (1993) controls Dunn's claim. In Barberio, the trial court imposed exceptional sentences on Barberio's two convictions. In his first appeal, Barberio succeeded in having one conviction reversed; however, he did not challenge the exceptional sentences. Id. at 49. After the trial court again imposed an exceptional sentence on the remaining count, Barberio challenged the exceptional sentence in his second appeal. Id. at 49-50. The Washington Supreme Court upheld this Court's dismissal of the appeal. The court first cited RAP 2.5(c)(1), which provides: "If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." Id. at 50. However, the Court limited this rule as follows:

This rule does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question.

Id. The Court held that Barberio could not challenge the exceptional sentence in his second appeal because at the resentencing hearing the trial court did not independently reconsider the grounds for the exceptional sentence. Id. at 51-52.

The appellate courts have repeatedly reaffirmed the rule in Barberio. Most recently, the Supreme Court has held that an intervening change in the law does not allow an exception to this rule. State v. Kilgore, 167 Wn.2d 28, 35-43, 216 P.3d 393 (2009).

In this appeal of his 2010 resentencing hearing, Dunn cannot challenge the jury instructions given in his 2004 trial. At the resentencing hearing, the trial court did not review or make any ruling about the jury instructions. In fact, it is not clear how Dunn could have even raised such a challenge at the resentencing hearing, other than through a collateral attack. Because the propriety of the jury instructions was not before the trial court at the

resentencing hearing, this Court should dismiss Dunn's supplemental claim of error.<sup>1</sup>

**2. DUNN MAY NOT CHALLENGE THE JURY INSTRUCTIONS FOR THE FIRST TIME ON APPEAL BECAUSE HE DID NOT OBJECT TO THEM AT TRIAL.**

Even if he could raise the issue in a second appeal, Dunn cannot challenge the jury instructions because he did not object to them at trial. 30RP 106-07.<sup>2</sup> Under RAP 2.5(a), the court may consider an issue raised for the first time on appeal 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).

---

<sup>1</sup> Though not necessary to dispose of Dunn's claim, Dunn could have raised his challenge to these instructions in his first appeal. Dunn's claim is based upon State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010). In Bashaw, the Supreme Court stated that it was simply applying the rule set forth in State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003): that a nonunanimous jury decision on a special verdict is a final determination that the State has failed to meet its burden of proof. Bashaw, 169 Wn.2d at 146. Goldberg was decided in 2003, before Dunn was convicted and before his first appeal.

<sup>2</sup> The transcripts of the trial are not currently part of the record in this appeal. The State has filed a motion to supplement the record with the transcripts because they are relevant to the RAP 2.5 and harmless error issues. If this Court dismisses this assignment of error under Barberio, it will be unnecessary to grant the motion.

In State v. Bashaw, 169 Wn.2d 133, 145-47, 234 P.3d 195 (2010), the Supreme Court held that an instruction was erroneous because it told the jury that it had to be unanimous to answer "no." However, the court further stated that the right to a nonunanimous "no" special verdict was not of constitutional dimension, but came from common law precedent. The court explained:

This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg.

169 Wn.2d at 146 n.7.

Currently, there is a split of authority in the Court of Appeals as to whether a Bashaw claim presents a constitutional issue that can be raised for the first time on appeal. Divisions II and III have held that a defendant may not assert a Bashaw claim for the first time on appeal. State v. Bertrand, 2011 WL 6097718 (No. 40403-6-II, filed Dec. 8, 2011); State v. Nunez, 160 Wn. App. 150, 157-63, 248 P.3d 103, rev. granted, 172 Wn.2d 1004 (2011). Judges in Division I are split on the issue. State v. Morgan, 163 Wn. App. 341, 350, 261 P.3d 167 (2011); State v. Ryan, 160 Wn. App. 944,

252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011). The Washington Supreme Court has accepted review of Nunez and Ryan, consolidated the two cases, and will likely resolve this split of authority. In the meantime, this Court should hold that Dunn cannot raise this issue for the first time on appeal.

**3. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.**

Even if the claim is not waived, Dunn has not shown that the jury instructions incorrectly stated the law. Unlike Bashaw, the instructions in this case did not tell the jury that they must be unanimous in order to answer "no" to the special verdict.

The aggravating circumstance jury instructions in Dunn's case do not contain the same error that was present in Bashaw. In Bashaw, the special verdict form for the sentencing enhancement affirmatively told the jury that it must be unanimous to answer no. It stated: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 169 Wn.2d at 139.

In contrast, in Dunn's case, the jury was not told that it had to be unanimous to answer "no." The instruction on the

aggravating circumstance was silent on that issue. Instead, it stated only that the jury needed to be unanimous to answer "yes."

If you unanimously agree that a specific aggravating circumstance has been proven beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance.

Supp. CP \_\_\_\_ (Sub No. 271). In State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the Washington Supreme Court characterized a similar instruction as not requiring unanimity for a negative answer.<sup>3</sup> Dunn has not shown that the instruction was in error.

#### **4. ANY ERROR WAS HARMLESS.**

If this Court concludes that Dunn can challenge the instructions and that they are incorrect, the Court should hold that any error in the instruction was harmless. An instructional error is harmless if the court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error."

Bashaw, 169 Wn.2d at 147. In Bashaw, the instructional error was not harmless because it resulted in a "flawed deliberative process"

---

<sup>3</sup> In Goldberg, the jury was instructed that, "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 have a reasonable doubt as to the question, you must answer 'no'." 149 Wn.2d at 893.

based on the court's erroneous instruction to the jury that it had to be unanimous to acquit on the special verdict. Id. at 147. The special verdict in Bashaw required the jury to determine whether the defendant delivered a controlled substance within 1,000 feet of a school bus stop. Id. at 137. The defendant objected to the State's measurements and there was conflicting evidence about the distance involved in one of the drug transactions. Id. at 138, 144.

In contrast, in this case, any error is clearly harmless. With respect to the kidnapping and possession of child pornography charges, the evidence was overwhelming that Dunn committed the crimes in order to satisfy his sexual gratification. The testimony established that Dunn had a strong sexual interest in young boys and that he kidnapped D.C. in order to molest him. Brandon Walcutt testified that Dunn was obsessed with child pornography, spent hours viewing images on his computer, and, when stressed, would ask Walcutt to "go find me a boy." 21RP 146-53. Similarly, Dean Stockwell testified that Dunn masturbated to child pornography and offered Stockwell money to introduce him to children "like in the pictures." 29RP 29-37. An examination of Dunn's computer revealed that, at the same time D.C. was in Dunn's apartment, the computer was used to access and download numerous images of

child pornography. 28RP 70-86, 90-91. After D.C. was rescued, Dunn's spermatozoa was found on D.C.'s underpants and perineal swabs. 23RP 103-05; 27RP 97-128. Based upon this evidence, the jury also convicted Dunn of child molestation.

Unlike the jury in Bashaw, which had to resolve a contested factual issue for the first time during special verdict deliberations, this jury necessarily found the sexual motivation aggravating circumstances when finding that Dunn committed the charged crimes. This Court can conclude beyond a reasonable doubt, in light of these circumstances, that the error did not impact the jury's special verdicts.

**5. THE REMEDY IS REMAND FOR RETRIAL ON THE AGGRAVATING CIRCUMSTANCE.**

In a brief argument, Dunn suggests that he is entitled to resentencing without the enhancement. This is incorrect. RCW 9.94A.537(2) provides, "In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in

imposing the previous sentence, at the new sentencing hearing." This statute permits the State to reprove the aggravating circumstances at a new sentencing hearing. In a recent decision, this Court held that the proper remedy for Bashaw error is to remand for retrial on the aggravating circumstances. State v. Reyes-Brooks, 2011 WL 6016155 (No. 64012-7-I, filed December 5, 2011). Should this Court conclude that Dunn is entitled to relief, the Court should remand for retrial on the aggravating circumstances.

**C. CONCLUSION**

For the reasons cited above, this Court should affirm Dunn's sentence.

DATED this 12<sup>th</sup> day of January, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
BRIAN M. McDONALD, WSBA #19986  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent Re: Supplemental Assignment of Error, in STATE V. RICHARD DUNN, Cause No. 67239-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*J. Brame*  
Name  
Done in Seattle, Washington

1/13/12  
Date