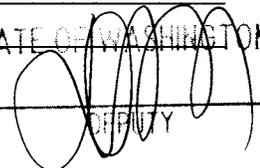


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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH CAMPBELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 08-1-05783-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the special verdict instruction proper where it correctly informed the jury that they did not need to be unanimous in order to answer “no” on the special verdict forms?
2. Did the trial court abuse its discretion by referring the jury back to their instructions in answer to their question?
3. Was any error in the special verdict instruction harmless where the jury found not only the firearm enhancements but also unanimously found defendant guilty of two counts of assault in the second degree based on a shooting and one count of unlawful possession of a firearm?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Kenneth Campbell, with assault in the first degree, drive-by shooting, and unlawful possession of a firearm in the first degree on December 5th, 2008. CP 1-3. The charges were later amended to two counts of assault in the second degree with enhancements for possession of a firearm and aggravated by gang-related activity, and one count of unlawful possession of a firearm aggravated by gang-related activity. CP 129-130.

A jury trial began before the Honorable Lisa Worswick on October 5, 2009. RP 196.¹ The jury found defendant guilty of all three counts, and answered “yes” to the special verdicts for both firearm enhancements. CP 253-257. The jury answered “no” to the special verdicts for all three gang-related activity aggravators. CP 258-260. Neither party requested that the jury be polled. RP 708.

On November 13, 2009, the court sentenced defendant to 25 months on counts I and II and 36 months on count III. CP 269. The court also sentenced defendant to two 36 month consecutive terms for the firearm enhancements on counts I and II, bringing defendant’s total confinement to 108 months with credit for 343 days time served. *Id.*

Defendant entered a timely notice of appeal on November 17, 2009. CP 292-306.

2. Facts

On December 3, 2008, at about 10:00 p.m., Officer Brian Wurts had finished his shift with the Lakewood Police Department and was sitting in his backyard. RP 220. Officer Wurts heard “rapid gunfire” “very very close” to him. *Id.* The officer immediately “advised dispatch there were shots fired behind [his] residence and gave the address” over

¹ Because the transcripts are not consecutively numbered, the State will refer to the pre-trial, trial, and sentencing proceedings on 09/30/2009 through 11/13/2009 as RP, the proceedings on 05/20/2009 as RP2, and the proceedings on 08/27/2009 though 09/29/2009 as RP3.

his portable radio. *Id.* Officer Wurts' house is located only a short distance from the Lakewood police station, and within a minute he could see the lights of a police car responding. RP 222. After reporting the shots, Officer Wurts' involvement ended. *Id.*

Officer Arron Grant was on duty in a marked patrol car that evening, and was dispatched to respond to the report of shots fired. RP 230. Several other officers in patrol cars were also responding. RP 231. Officer Grant was on his way to the scene when he encountered Dale Dyer who was walking in the street. *Id.* This caught Officer Grant's attention because it was late at night, so he stopped to talk to Mr. Dyer. RP 232-3. Officer Grant followed Mr. Dyer to his house. RP 234. In the street, in front of Mr. Dyer's house, Officer Grant found "nine gunshot shell casings." RP 234-5. After finding the casings, Officer Grant looked around the property for damage. *Id.* It appeared that a bullet had ricocheted off the front screen door and hit the side of the house. RP 237-8. Officer Grant found a bullet in the front walkway. RP 238. Additionally, he found two bullet holes in the side of Mr. Dyer's blue truck, which was parked in front of the house. RP 235. Officer Grant opened the hood of the truck and found a bullet lodged in the engine block of the truck. RP 237. The officer did not note any other property damage. *Id.*

M. D., seven other teenagers, and M.D.'s four year old sister, A.D., were inside Mr. Dyer's house when it was shot at. RP 319. M.D. testified

that the group was playing videogames and A.D. was watching a movie when they heard gunshots. RP 319-20. M.D. heard “a whole clip,” or nine shots go off. RP 320. M.D. was afraid because his little sister was in the house, and he “was just trying to make sure she was okay,” he was also afraid for his own safety. RP 320, 326. No one was hurt inside the house, but they were startled and scared. RP 321, 326, 334.

Three of the teens in the house were members of Blood gangs, including the East Side Piru gang. RP 334-7, 338. One of the teens was an associate with the East Side Pirus. RP 338. Blood gangs, especially the East Side Piru gang are rivals of the Lakewood Hustler Crips. RP 339. Defendant was an associate of the Lakewood Hustler Crips. RP 404-5, 427, 480-1. An associate is a person who is involved with the gang but has not been initiated into the gang yet. RP 555-6.

Officer Brent Prante was also on duty on December 3, 2010. RP 293. He responded to the shots fired call as well. RP 293-4. About 60 feet from the police station, Officer Prante saw two black males approximately sixteen or seventeen year old and dressed in dark clothing walking towards him. RP 234-5. Officer Prante stopped at a stop sign and both males stopped walking and looked up at him. RP 294. One of the males was later identified as defendant. RP 453, 488. Defendant turned around and started running away, the other male “put his head down and started walking” away. RP 294, 488. Officer Prante radioed in a description of defendant and his location, and called the other young man

over to him. RP 297. The second young man was Steven Kelly. RP 488. Officer Prante never saw Kelly remove anything from his pockets, or throw anything away. RP 297-8. Officer Prante handed Kelly over to other officers and proceeded to help search for defendant. RP 300.

Officer James Syler responded with Astor, his K-9. RP 256. Officer Syler set Astor tracking from where Officer Prante had seen defendant run. RP 257-8. Astor tracked defendant and found a jacket, a pair of gloves and a handgun. RP 262-3. Officer Syler testified that when his K-9 indicates items it is because they have been recently discarded by the suspect he is tracking. RP 263. Officer Syler continued with the track, while Officer Sean Conlon collected the handgun, jacket and gloves. RP 264, 267. Astor continued to track defendant and then stopped, indicating a hat on the ground in a residential driveway. RP 265-6. Again, the officer noted the item and continued with the track. RP 266. Astor did not indicate any further trail, and Officer Syler returned to collect the hat. RP 266-7. The jacket and hat were identified as belonging to defendant. RP 477. Defendant had been wearing similar gloves earlier in the evening. RP 478.

Earlier in the evening, Monica Johnson, Kelly, and defendant had been at Johnson's house. RP 390. The three left the house and drove in Johnson's green Taurus to about a block away from the Dyers' house. RP 393, 470. Defendant was in the front seat, Johnson was driving, and Kelly was in the back seat. RP 470. While they were in the car, defendant had

the gun which was later used in the shooting. *Id.* Defendant and Kelly were talking about “putting in some work.” RP 396, 471. Defendant meant shoot somebody’s house when he used the phrase “put in some work.” RP 471. Johnson let defendant and Kelly out of the car, and left. RP 393. Kelly and defendant walked to the Dyers’ house. RP 472-3. Defendant then opened fire on the house and the two ran away. RP 453, 472-4, 487-8.

Johnson pleaded guilty to charges of assault in the second degree with a firearm enhancement. RP 389. Kelly pleaded guilty to two charges of assault in the second degree and a firearm enhancement. RP 447.

C. ARGUMENT.

1. THE JURY INSTRUCTIONS PROPERLY
INSTRUCTED THE JURY AS TO THE LAW
AND WERE NOT MISLEADING.

Jury instructions are proper where, read together, they correctly inform the jury of the applicable law, do not mislead the jury and, allow both parties to argue their theories of the case. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Claimed errors of law in a jury instruction are reviewed *de novo*. *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521 158 P.3d 1193 (2007). Errors in jury instructions are subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Defendant challenges jury instruction number 28, which

instructed the jury on how to enter a special verdict, arguing that when read in conjunction with instructions 26, 27, and 29, the instruction was not clear. Appellant's brief at 1, CP 219-52, jury instruction no. 26-9.

Jury instruction no. 28 states:

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. 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 have a reasonable doubt as to the question, you must answer "no."

CP 219-252, jury instruction no. 28.

- a. The jury instructions were proper and correctly instructed the jury as to the applicable law.

The jurors in this case were properly instructed as to the law under *State v. Goldberg*, requiring the jury to be unanimous in order to answer "yes" on a special verdict, but not in order to answer "no." 149 Wn.2d 888, 895, 72 P.3d 1083 (2003). Jury instruction no. 28 instructed the jury to find "yes" unanimously, or enter "no" on the special verdict form. This instruction does not indicate that a unanimous verdict is required in order to find that the State has failed to meet its burden of proof.

The same instruction issued in this case was issued in *Goldberg*, 149 Wn.2d at note 1 and *State v. Coleman*, 152 Wn. App. 522, 216 P.3d

479, note 10 (2009). The Court did not find error in the instruction in either case. *Id.* The error in both *Goldberg* and *Coleman* was the trial court's order that the jury return to deliberations after reaching a non-unanimous "no" answer on the special verdict form. 149 Wn.2d at 894; 216 P.3d at 485.

This case is distinguishable from *Goldberg* and *Coleman* in that the jury was not ordered to further deliberate after reaching a verdict. Rather than returning a non-unanimous verdict, the jury in this case sent out a question. CP 217-8. In answer to their question, the jury was told to review their instructions, not that they must be unanimous. *Id.* The jury was never instructed to return to deliberations, nor that they must be unanimous. *Id.* The jury was only instructed to review their instructions. *Id.* After receiving the trial court's answer to their questions the jury returned their verdicts. RP 705-6.

Goldberg established that unanimity was only required for finding in the affirmative. This was upheld in the recent case, *State v. Bashaw*, ___ Wn.2d ___, 234 P.3d 195 (2010). *Bashaw* clarified the *Goldberg* decision, ruling that unanimity was not required for a "no" finding. 234 P.3d at 201. In *Bashaw* however, it was the instruction itself that was in error. 234 P.3d at 202. There, the special verdict instruction said, "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." 234 P.3d at 198. Such instruction was not given to the

jury in the instant case. The instruction in the instant case only required unanimity for a “yes” response, and therefore do not run contrary to the rulings in either *Goldberg* or *Bashaw*.

- b. The jury instructions given were not misleading.

Instruction no. 27 informed the jurors that they “must fill in the blank provided in each *verdict form* the words ‘not guilty’ or the word ‘guilty’, according to the decision you reach.” CP 219-52, jury instruction no. 27. The instructions go on to explain that the jury must be unanimous in order to enter either verdict. *Id.* The special verdict forms had their own instruction stating:

You will also be furnished with *special verdict forms*. If you find the defendant not guilty do not use the *special verdict forms*. If you find the defendant guilty, you will then use the *special verdict forms* and fill in the blank with the answer “yes” or “not” according to the decision you reach. 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 have a reasonable doubt as to the question, you must answer “no.”

CP 219-52, jury instruction no. 28 (emphasis added). The differences in the instructions and the order in which the forms must be used clearly delineated between the requirements for verdict forms and special verdict forms.

The jury instructions were not misleading when read in their entirety. The instructions clearly differentiated between *verdict forms* and *special verdict forms* and there was a different instruction associated with each. CP 219-252, jury instruction no. 26-8. The instructions for the *verdict forms* required that the jury enter “guilty” or “not guilty” into the blank on the form, where the *special verdict forms* required that the jury enter “yes” or “no” into the blank. CP 219-252, jury instruction no. 27-8, CP 253-260. Moreover, the jury was instructed that they were not to use the *special verdict forms* unless and until they came to a unanimous guilty verdict on the *verdict forms*. CP 219-252, jury instruction no 27-8. After reading all the instructions as a whole, it is clear that the unanimity instruction for guilty and not guilty verdicts does not apply to the special verdicts. The unanimity instructions for special verdicts did not require unanimous “no” answers.

The fact that the jury sent out a question does not mean that the instructions were flawed or misleading. Washington courts have repeatedly held that a jury’s question does not indicate that the jury was unable to understand the instructions given. *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123 (1985), *State v. Bockman*, 37 Wn. App. 474, 682 P.2d 925 (1984), *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988). “[Q]uestions from the jury are not final determinations, and the decision of

the jury is contained exclusively in the verdict.” *Miller*, 40 Wn. App. at 489, citing *Bockman*, 37 Wn. App. at 493. “Even if the jury was confused at the time of the inquiry, this situation could have changed during deliberations.” *Miller*, 40 Wn. App. at 489. “The jury’s question does not create an inference that the entire jury was confused or that any confusion was not clarified before a final verdict was reached.” *Ng*, 110 Wn.2d at 43.

There is nothing in the record to indicate that the jury remained confused after they reviewed the instructions. Rather, it shows the opposite. After sending out their question, the jury returned to deliberations. CP 325. They deliberated for over an hour before receiving an answer from the court at 2:40 p.m. *Id.* At 2:41 the jury recessed and at 3:00 they returned their verdict. CP 325, RP 706. There is no indication of how long the recess lasted. CP 325. If the jury had been unable to determine what was required of them after reviewing their instructions again, they could have sent another inquiry. They did not. Moreover, if they had still been confused, they would not have been able to render their verdict so quickly.

A jury is presumed to have followed the instructions given unless there is something in the record which overcomes this presumption. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010), *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Defendant cites to the jury’s question as the indication that they did not understand and could not have

followed the instructions given when entering “yes” answers to two special verdict forms. Defendant does not address the jury’s understanding of the instruction as it applies to the three “no” answers the jury entered under the same instruction. Appellant’s Brief at 15. The jury’s question stated:

In regards to the special verdict forms if we are not in unanimous agreement can we render the answer “no” or must we all agree unanimously “yes” or “no”?

CP 217-218. However, this does not indicate anything further than a passing confusion as to what the instruction meant. Furthermore, the jury’s question indicated that they were unsure whether they were required to be unanimous in order to answer “no.” CP 217-8. The instruction on how to answer “yes” is clear, and the jury did not ask for clarification of that instruction. *Id.* The jury followed the courts instruction not to indicate how it had voted. CP 217-218, 219-252, jury instruction no. 27. There is also no indication that the jury was referring to the special verdict forms for the firearm enhancements. *Id.* It would be mere speculation to say the jury’s question was due to a lack of unanimity on the firearm enhancements.

The juries in both *Goldberg* and *Coleman* returned non-unanimous “no” answers to the questions in the special verdicts under the same instruction given in this case, indicating that the instruction is clear that such a non-unanimous answer is acceptable. 149 Wn.2d at 891 and 216

P.3d at 485. Both courts clearly expressed that the special verdict instruction did not require unanimity. *Goldberg*, 149 Wn.2d at 894 and *Coleman*, 216 P.3d at 485. The jury instructions in the instant case were neither incorrect nor misleading, and the jury's special verdicts should be upheld.

2. THE COURT DID NOT ABUSE ITS
DISCRETION BY REFERRING THE JURY
BACK TO THEIR INSTRUCTIONS TO ANSWER
THEIR QUESTION.

“It is within the sound discretion of the trial judge whether to give further instructions to the jury after it has retired for deliberations.” *State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123 (1985), quoting *State v. Studebaker*, 67 Wn.2d 980, 987, 410 P.2d 913 (1966). The trial judge is not required to give any answer to a question from the jury. *Miller*, 40 Wn. App. at 489. The defendant is not prejudiced where the court answers the jury's question by directing them to read their instructions again. *In re Pers. Restraint of Howerton*, 109 Wn. App. 494, 506, 36 P.3d 565 (2001).

CrR 6.15(f)(2) provides that:

After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

Here, after sending out their question, the jury returned to deliberations. CP 325. While the court and counsel for both parties

engaged in a colloquy outside the presence of the jury, the jury continued their deliberations. CP 325. The court and counsel discussed some confusion regarding the state of the law at the time of the case, but ultimately the trial court decided to instruct the jury, “Please refer to your jury instructions.” CP 217, RP 705. The judge expressed her concern that additional information would lead to a violation of *Coleman* by instructing a potentially deadlocked jury to continue to deliberate. RP 705. In compliance with CrR 6.15(f)(2), the court did not suggest a need for agreement, did not state the consequences of no agreement, and did not indicate any length of time the jury was required to deliberate. Without further inquiries, the jury returned its verdicts and special verdicts. RP 706. Because the trial court followed CrR 6.15(f)(2) and the case law established under *Coleman* and *Goldberg*, it did not abuse its discretion in directing the jury to review their written instructions again.

3. IF THE INSTRUCTIONS TO THE JURY WERE
IN ERROR, SUCH ERROR WAS HARMLESS.

If this Court determines that the jury instruction regarding the special verdict forms contained an error, it is subject to a harmless error analysis. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In this case, such error was harmless. Unlike the jury in *Bashaw*, the jury here returned both “no” and “yes” special verdicts. CP 256-260. The

deliberative process was therefore not so flawed as to affect the jury's ability to answer "no," as the court suggested was the case in *Bashaw*. 234 P.3d at 202-03. Further, the jury instruction in *Bashaw* specifically required unanimity for both "yes" and "no" answers. *Id.* at 202. The instructions in this case differ from those in *Bashaw* as there was no specific requirement here.

The court here instructed the jury that they should each decide the case for themselves, and not change their mind solely for the purpose of reaching a unanimous verdict. CP 219-252, jury instruction no. 26. This is in the same instruction as the instruction indicating that the jury should strive for a unanimous verdict. *Id.* This indicated to the jurors that unanimity is important, but not so important as to warrant the jurors giving up their personal beliefs as to the evidence presented.

Defendant argues he was divested of the benefit of the doubt by the instruction given, citing *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007). Appellant's Brief at 19. The special verdict instruction clearly required that the jury be unanimous in order to answer "yes." CP 219-52, jury instruction no. 28. Moreover, the requirement for unanimity in order to enter a "not guilty" verdict was clearly differentiated from the special verdict instruction which did not require unanimity in order to answer "no." CP 219-52, jury instruction no. 27-8. The instruction was sufficiently clear for the jury to understand that for the special verdicts

they must find “yes” unanimously, or enter a “no” answer. The court in *Bennett* noted that while it did not endorse the reasonable doubt instruction given in that case, the instruction “[met] constitutional muster.” 161 Wn.2d at 315. Here, while the special verdict instruction may not have had the best possible wording, it did not relieve the State of its burden of proof, nor strip defendant of the benefit of the doubt. The instruction is not constitutionally invalid.

The three judge dissent in *Bashaw* rightly points out that to suggest that a different outcome might have resulted under different instructions is to suggest either:

“that the jury might not have followed the jury instructions when it returned its unanimous [yes] findings- which would be antithetical to the presumption that juries follow the instructions they are given, or... that the jury was coerced or influenced by the unanimity instruction into reaching a conclusion it would not otherwise have reached...”

234 P.3d at 204. Both presumptions have a fatal flaw. The first, that the jury did not follow its instructions, is not supported by anything in the record in this case, nor is it supported by case law which holds that the jury is presumed to follow the court’s instructions. The second presumption is problematic because unanimity is required for all criminal guilty and not guilty verdicts. Const. art. I, § 22, U.S. Const. amend. VI. We do not assume the jury is coerced into a guilty verdict by the

unanimity instruction, and there is no reason to assume that to be the case for special verdicts.

The evidence presented at trial in this case overwhelming shows that defendant was in possession of a firearm at the time he shot nine rounds into the victims' house. It is unlikely that the outcome of the trial would have been different if the jury had been instructed differently. The jury was instructed that:

“for the purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I and/or Count II.”

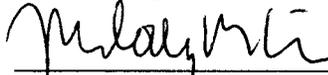
CP 219-252, jury instruction no. 29. Counts I and II were both assault charges based on defendant shooting at a house full of people. CP 129-30. The jury found defendant guilty of both counts of assault as well as one count of unlawful possession of a firearm. CP 253-255. All three of these verdicts were required to be unanimous. CP 219-252, jury instruction no. 27. It is logical that the jury would also unanimously find that defendant committed the assaults while in possession of a firearm. The jury's special verdicts for the firearm enhancements should be upheld as they are consistent with the jury's other verdicts in this case.

D. CONCLUSION.

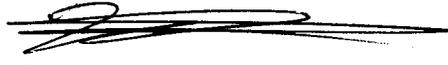
For the aforementioned reasons, the State respectfully requests that the Court affirm defendant's convictions and sentences.

DATED: SEPTEMBER 9, 2010

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Pierce County
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Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/9/10 Johnson
Date Signature

STATE OF WASHINGTON
BY 

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