

NO. 40218-1-II

FILED
BY 
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO CASTRO GARCIA,

Appellant.

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

The Honorable Bryan E. Chushcoff

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE SENTENCE ENHANCEMENTS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST UNANIMOUSLY AGREE ON AN ANSWER TO THE SPECIAL VERDICT AND THE ERROR WAS NOT HARMLESS.

The State agrees that State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) “is the controlling law on the challenged special verdict instruction” but argues that this Court “should decline to address defendant’s challenge to the special verdict instruction as it is not of a constitutional nature and is raised for the first time on appeal.” Brief of Respondent at 7-9. The State overlooks the significant fact that Bashaw did not object to the jury instruction given in her case. State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008). In any event, Garcia had no reason to object because the jury instruction followed WPIC 160¹ and Bashaw, which concluded that the instruction was an incorrect statement of the law, was decided on July 1, 2010, after Garcia’s trial.

¹ WPIC 160 provides in relevant part:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]. In order to answer the special verdict form[s] “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 answer, you must answer “no.”

Although the Washington Supreme Court noted in dictum that the nonunanimous jury rule is not compelled by constitutional protections against double jeopardy but by the common law, the Court's analysis focuses on the fundamental right to due process. The Court rejected the State's argument that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. The Court emphasized that "[t]his argument misses the point," explaining that "[t]he error here was the procedure by which unanimity would be inappropriately achieved" and "[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given the correct instruction." Bashaw, 169 Wn.2d at 147.

Importantly, the Court applied the constitutional harmless error test to determine whether the trial court's error was harmless. The Court determined that in order to hold that the jury instruction was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" Id. at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), which quoted Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). The Court reversed the sentence enhancements, concluding that the error was not harmless:

[W]hen 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 sentence enhancements must be reversed because as the Washington Supreme Court concluded, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law and the error was not harmless. Godefroy v. Reilly, 146 Wn. 257, 259, 262 P. 539 (1928)(when the court has once decided a question of law, that decision, when the question arises again, is binding on all lower courts).²

2. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED GARCIA HIS FUNDAMENTAL AND CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The State argues that the prosecutor did not commit misconduct, defense counsel was not ineffective, and the errors were not cumulative.

Brief of Respondent at 9-29.

² Division Three and Division One reached opposite conclusions on this issue, but in any case, this Court is bound by the decision of the Supreme Court. State v. Nunez, ___ Wn. App. ___, 248 P.3d 103 (2011)(because we are satisfied that the claimed instructional error was not manifest constitutional error, we will not review it for the first time on appeal); (State v. Ryan, No. 64726-1-I (filed April 4, 2011))(we are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless).

To the contrary, the record substantiates that the prosecutor committed numerous instances of misconduct during closing argument by: 1) improperly telling the jury that its job was to determine if Garcia was telling the truth; 2) improperly telling the jury that it could find Garcia not guilty only if it believed his testimony; 3) improperly presenting a slide which read, "If the defendant is lying to you about being there on April 15, he is guilty across the board"; 4) improperly telling the jury that in order to find that Garcia was not involved in the April 15th buy, it had to determine that Santella was lying or grossly mistaken; 5) improperly presenting a slide which read, "Stephen Santella lying or grossly mistaken and "Detective JD Strup lying or grossly mistaken," and 6) improperly presenting a slide of a photograph of Garcia in jail garb which had not been introduced at trial.

The prosecutor misrepresented the burden of proof and the jury's role because the jury is not required to determine who is telling the truth and who is lying in order to perform its duty. The jury's role is to determine whether the State has met its burden of proving the case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), review denied, 127 Wn.2d 1010 (superseded on other grounds by statute). Importantly, because the prosecutor's arguments and actions have been denounced as improper by reviewing courts, his

misconduct is deemed “to be a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial.” State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). See also State v. Venegas, 155 Wn. App. 507, 523-24, 228 P.3d 813 (2010)(when prosecutors make the same improper arguments, they needlessly risk reversal of their convictions). There is a substantial likelihood that the misconduct affected the verdict because the case turned entirely on the credibility of the witnesses. It is evident that the State’s case was not overwhelming because “trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.” Fleming, 83 Wn. App. at 215.

The cumulative error doctrine warrants reversal when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); In re Personal Restraint Petition of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required because the cumulative effect of the prosecutor’s numerous instances of misconduct combined with defense counsel’s failure to propose a

knowledge instruction essential to Garcia's defense denied Garcia his fundamental and constitutional right to a fair trial. See Brief of Appellant.

D. CONCLUSION

Only a fair trial is a constitutional trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). For the reasons stated here in and in appellant's opening brief, this Court should reverse Mr. Garcia's convictions, or in the alternative, reverse the sentence enhancements.

DATED this 7th day of April, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Melody Crick, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 7th day of April 2011, in Kent, Washington.


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