

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

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STATE OF WASHINGTON,

Respondent,

v.

LUIS VARGAS-GUTIERREZ,

Appellant.

APPELLANT'S  
BRIEF  
FILED  
JUL 11 2008  
CLERK OF COURT  
COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Roger Bennett, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's failure to exclude evidence procured by government misconduct denied appellant a fair trial.

2. Trial counsel's failure to object to an improper special verdict instruction constituted ineffective assistance of counsel.

Issues pertaining to assignments of error

1. Appellant was convicted of possession of cocaine with intent to deliver, based on cocaine found in a Tide box in the laundry room of the apartment appellant shared with others. Appellant allegedly said in a police interview after his arrest that he and another person had previously taken the Tide box to several locations. When the officer who interviewed appellant testified about the interview, he did not remember the statement about the Tide box. Following this testimony, the detective designated by the State to assist at trial and thus remain in the courtroom, contacted the officer to discuss his testimony. The next day, the State moved to recall the officer, who would testify that he remembered the statement about the Tide box. Where the detective's contact with the officer violated the court's order excluding witnesses, should the court have excluded the compromised witness's additional testimony?

2. Trial counsel failed to object to instructions improperly requiring the jury to be unanimous to answer the special verdicts "no."

Where counsel's error likely affected the outcome of the case, must the special verdicts be vacated?

B. STATEMENT OF THE CASE

1. Procedural History

The Clark County Prosecuting Attorney charged appellant Luis Vargas-Gutierrez with three counts of possession of a controlled substance (cocaine, methamphetamine, and marijuana) with intent to deliver and three counts of possession of a stolen firearm. CP 4-8, 34-35; RCW 69.50.401(1); RCW 9A.03.020(3); RCW 9A.56.310. The State also alleged that the drug offenses were committed within 1000 feet of a school bus route stop and that Vargas-Gutierrez or an accomplice was armed with a firearm during the commission of the crimes. CP 4-8, 34-35.

The case proceeded to jury trial before the Honorable Roger Bennett, and the court dismissed five of the six counts. CP 156. The jury found Vargas-Gutierrez guilty of possession of cocaine with intent to deliver and answered the special verdicts in the affirmative. CP 104-06.

Vargas-Gutierrez filed a motion for new trial or vacation of judgment, contending that evidence was improperly admitted as a result of

misconduct by the prosecution. CP 107-14, 136-44. Following an evidentiary hearing, the court denied the motion. 5RP<sup>1</sup> 160.

The court imposed a low end standard range sentence of 51 months, plus a 60-month firearm enhancement and a 24-month school zone enhancement, for a total confinement of 135 months. CP 156. Vargas-Gutierrez filed this timely appeal. CP 166.

## 2. Substantive Facts

In March 2009, the Clark-Skamania Drug Task Force was investigating Ivan Cepeda-Cepeda. 2RP 291, 295. As part of the investigation, the task force executed a search warrant on an apartment he was associated with. Cepeda-Cepeda was not in the apartment, but Luis Vargas-Gutierrez and Rodrigo Garcia-Brito were. 2RP 259, 292. Vargas-Gutierrez was not part of the investigation, and the task force had no knowledge of him to that point. 2RP 303.

Police seized numerous items found in the master bedroom of the two-bedroom apartment. Two one-pound packages of methamphetamine, a package of marijuana, and some electronic scales were found in a locked safer in the master bedroom closet. 1RP 185-86, 189; 3RP 486, 488, 511, 513. Packaging material was found in the master bedroom and bathroom.

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<sup>1</sup> The Verbatim Report of Proceedings is contained in 5 volumes, designated as follows: 1RP—9/21/09; 2RP—9/22/09; 3RP—9/23/09; 4RP—9/24/09; 5RP—10/5/09, 10/29/09, 11/6/09, 1/12/10, 1/22/10.

1RP 186-87. A rifle, a semi-automatic handgun, a revolver, and a metal case containing ammunition were found on the master bedroom closet shelf. 2RP 341; 3RP 575, 580-81. Inside a Tide detergent box found in the laundry room off the main hallway, police found a one-kilogram brick of cocaine and a Sig Sauer handgun. 2RP 354-56; 3RP 514. In the kitchen, officers found some identification, utility bills, and a pay stub in the name of Rodrigo Garcia. 2RP 331.

Vargas-Gutierrez was in the west bedroom when the police entered the apartment. 2RP 248-49. Police found a wallet containing Vargas-Gutierrez's debit card and identification on the floor near the window. 2RP 383, 387. Vargas-Gutierrez's passport and Social Security card were also in that bedroom. 2RP 392, 395-96. No guns or drugs were found in the west bedroom. 3RP 600.

Following the search, Clark County Sheriff's Detective Tim Boardman interviewed Vargas-Gutierrez and Garcia-Brito. Because neither of them speaks English and Boardman does not speak Spanish, Vancouver Police Officer Frank Gomez, who speaks both languages fluently, served as an interpreter. 1RP 73-74, 97-98. Boardman took notes of what Gomez told him Vargas-Gutierrez said and prepared a probable cause statement and a police report. 2RP 220, 276.

Prior to trial, the court granted the defense motion to exclude Boardman's testimony as to the statements relayed to him by Gomez. Since Boardman had no personal knowledge as to what Vargas-Gutierrez said, his testimony would be inadmissible hearsay. 1RP 140-41. The prosecutor commented that Gomez would testify to any statements he remembered. 1RP 141. At that hearing, Gomez testified that he remembered only general statements by Vargas-Gutierrez that he lived at the apartment and he was aware there were guns and drugs in the apartment. 1RP 102-03.

The next morning, searching for another way to admit Vargas-Gutierrez's specific statements, the prosecutor showed Gomez the probable cause statement prepared by Boardman the day of the search. 2RP 204, 210. The prosecutor hoped to admit the probable cause statement as a past recollection recorded once Gomez verified its accuracy. 2RP 202; 5RP 33-34. The court ruled that the statements recorded by Boardman were still hearsay. 2RP 202, 234. It suggested, however, that if Gomez's memory was refreshed after reviewing the probable cause statement, he could testify to any statements he now remembered. 2RP 205-06. Gomez testified in an offer of proof that without the probable cause statement he remembered that Vargas-Gutierrez said he lived in the apartment, he knew there were

methamphetamine, cocaine and guns in the apartment, and a man named Ivan came to the apartment. 2RP 211-12.

Defense counsel objected. He pointed out that the probable cause statement was identical to Boardman's police report, which Gomez admitted reviewing the night before the defense interview. 1RP 100; 2RP 220. Counsel argued that reviewing the probable cause statement therefore could not have refreshed Gomez's memory any further, and refreshed recollection was merely a pretext for admitting evidence the court had excluded. 2RP 220-21, 235. The court ruled that Gomez could testify to what he recalled, and the defense could challenge that testimony on cross examination. 2RP 237.

Gomez then testified before the jury that he had asked Vargas-Gutierrez if he lived at the apartment, and Vargas-Gutierrez said yes. He asked Vargas-Gutierrez if he knew there were methamphetamine, cocaine, and guns in the apartment, and Vargas-Gutierrez said yes. He also asked Vargas-Gutierrez if he knew Ivan and if Ivan came to the apartment, and Vargas-Gutierrez said yes. 2RP 253.

The next day the prosecutor moved to recall Gomez. 3RP 437. He explained that Detective Spencer Harris, the State's designated trial assistant, had spoken to Gomez after his testimony, because he did not think Gomez had understood the questions he was asked on the stand.

3RP 437. Harris did not say anything to the prosecutor while Gomez was on the stand or while court was in session. 5RP 67, 128. Instead, after court had recessed for the day, Harris contacted Gomez to discuss his testimony. 5RP 129, 134. Harris determined Gomez could provide further information, and he contacted the prosecutor. 5RP 130. The prosecutor spoke to Gomez that night and made plans to recall him. 5RP 83.

In an offer of proof, Gomez explained that he did not testify to everything he remembered after refreshing his recollection. 3RP 439. When he was asked what he remembered “independently,” he believed he could only testify about statements he remembered without refreshing his memory. 3RP 441-42. He therefore omitted the statements he recalled after reviewing the probable cause statement. 3RP 442. Gomez said that after having refreshed his recollection, he also remembered that Vargas-Gutierrez had said he and Ivan had gone to several locations carrying the Tide box that was found in the apartment. 3RP 441.

Defense counsel objected to recalling Gomez to present this additional testimony. He argued that the procedure was highly prejudicial, predicated on a sham, and the product of prosecutorial misconduct. 3RP 451-52. The court overruled the objection, finding that Gomez’s testimony was credible. 3RP 457. It also found that since the defense was

aware the State planned to present evidence of Vargas-Gutierrez's statements, having the statements come in through Gomez was not unduly prejudicial. 3RP 460. Gomez would be subject to cross examination and impeachment as to his changed recollections. 3RP 461.

The following day, Gomez testified before the jury that he did not tell the jury everything he remembered the last time he testified because of a misunderstanding as to what he was permitted to testify to. 4RP 650. Gomez testified that he remembered Vargas-Gutierrez saying he lived at the apartment and he knew there were guns, methamphetamine, and cocaine in the apartment. Gomez further testified that Vargas-Gutierrez also said a person named Ivan had come to the apartment in the past and that he had gone with Ivan to pick up the Tide box, take it to several residences, and then returned to the apartment with the box. 4RP 651. Gomez testified that he only remembered Vargas-Gutierrez's statements about the Tide box after looking at the probable cause statement written on the day of the search. 4RP 652.

After presenting this additional testimony from Gomez, the State rested. The court dismissed five of the six counts, finding the State had not presented sufficient evidence that Vargas-Gutierrez had access to or control of the drugs locked in the master bedroom or knowledge that the guns were stolen. 4RP 697, 704. It ruled that there was sufficient

evidence to proceed on the remaining count, involving the cocaine found in the Tide box. 4RP 705.

In closing argument, the prosecutor told the jury that its theory was that Vargas-Gutierrez was in constructive possession of the cocaine in the Tide box on the date of the warrant, based in part on Vargas-Gutierrez's admission that he had been in actual possession of the Tide box on a previous occasion. 4RP 765. The prosecutor argued that the laundry room where the Tide box was located was just a few steps away from Vargas-Gutierrez's bedroom, and since Vargas-Gutierrez had taken possession of the cocaine before, he could do so again. 4RP 771.

C. ARGUMENT

1. THE COURT'S FAILURE TO EXCLUDE GOMEZ'S ADDITIONAL TESTIMONY DENIED VARGAS-GUTIERREZ A FAIR TRIAL.

Due process guarantees accused persons a fair trial. U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. Consistent with due process, a new trial is properly granted for egregious government misconduct, even absent a showing of prejudice. State v. Cory, 62 Wn.2d 371, 377, 382 P.2d 1019 (1962) (reversing where sheriff eavesdropped on conversation between defendant and his counsel); State v. Granacki, 90 Wn. App. 598, 604, 90 P.2d 667 (1997). "It is morally incongruous for the state to flout

constitutional rights and at the same time demand that its citizens observe the law....” Cory, 62 Wn.2d at 378.

In Granacki, the prosecutor designated a police officer as lead detective to remain in the courtroom and assist the prosecution during trial. Granacki, 90 Wn. App. at 600. During a court recess, the officer covertly read some of defense counsel’s notes that were sitting on counsel table. The officer was later seen talking to a juror, despite the court’s order that the parties have no contact with the jurors. Id. The trial court dismissed the charges with prejudice, and the Court of Appeals affirmed. Id. at 601. The Court of Appeals found that the detective had abused the trust placed in him by the trial court in permitting him to remain in the courtroom to assist the prosecutor. Id. at 603. It held that the detective’s egregious misconduct warranted dismissal with prejudice. Id. at 604.

In this case, although the court granted the State’s motion to exclude witnesses, Detective Harris was granted permission to remain in the courtroom during trial to assist the prosecuting attorney. 1RP 10; CP 17. Harris was well aware, from being present during the proceedings, that the State had no evidence connecting Vargas-Gutierrez with the cocaine in the Tide box, other than his alleged statements during the police interview. Harris also knew that the State had unsuccessfully sought to admit those statements through Detective Boardman, who had no personal

knowledge of what Vargas-Gutierrez said. Thus, only if Gomez testified that he remembered the statements, could the State connect Vargas-Gutierrez to the cocaine. When Gomez failed to provide that crucial connection, Harris contacted him out of court to discuss his testimony.

As in Granacki, the trial court demonstrated confidence in Harris's integrity and ability to abide by its rulings by permitting him to remain in the courtroom. Harris was aware of the court's order excluding witnesses, and by virtue of his nine and a half years of experience, should have understood its import. At a minimum, he should have been aware that his contact with Gomez could have reasonably been construed as witness tampering. See RCW 9A.72.120. Thus, his out of court contact with Gomez in an attempt to secure further testimony constitutes egregious misconduct.

The trial court has discretion to determine what sanction to impose for violation of an order excluding witnesses. State v. Dixon, 37 Wn. App. 867, 877, 684 P.2d 725 (1984). Generally, there are three possible sanctions: (1) holding the witness in contempt; (2) allowing cross examination regarding the violation and/or comments about the violation in closing argument; and (3) excluding the witness's testimony. State v. Skuza, \_\_\_ Wn. App. \_\_\_ (2010) (citing Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 615.5, at 627-30 (5th ed.2007)).

Here, when the prosecutor sought to recall Gomez, defense counsel argued that the prosecution engaged in misconduct in securing Gomez's additional testimony, and it should be excluded. 3RP 451-52. The court overruled the defense objection, instead ruling that the defense could cross examine Gomez as to the circumstances of his expanded memory. 3RP 461.

This remedy was inadequate. In order to examine why Gomez claimed to remember more than he initially testified to, the jury had to be informed that Vargas-Gutierrez's statements about the Tide box were written in a probable cause statement prepared on the day of his interview. 4RP 652. Cross examination regarding the circumstances of Gomez's additional recollections may have led the jury to question whether Gomez actually remembered Vargas-Gutierrez's statements or was just reciting what he had read, but it reinforced the idea that the statements were actually made. As noted above, the State's case depended on those statements. Rather than serving as a sanction for government misconduct, the court's chosen remedy simply bolstered the State's case against Vargas-Gutierrez. The only appropriate remedy was to exclude Gomez's testimony.

Defense counsel raised the issue again after the jury's verdict, filing a motion for new trial or vacation of judgment. Counsel argued

there was a problem with the procedure employed, not only showing Gomez the probable cause statement, but also Detective Harris contacting Gomez out of court regarding his testimony. 5RP 149. The prosecution responded that the trial court had properly admitted the testimony, allowing the defense to cross examine Gomez regarding the inconsistencies in his testimony. 5RP 153. After hearing evidence regarding the prosecutor's actions and Harris's out of court contact with Gomez, the court sustained its earlier ruling. 5RP 160.

Contrary to the court's determination, cross examination of Gomez regarding the probable cause statement failed to remedy Harris's misconduct, and the only appropriate remedy at the time of trial was exclusion of Gomez's additional testimony. Without that testimony, the State presented insufficient evidence that Vargas-Gutierrez possessed cocaine. The only appropriate remedy at this point is dismissal of the charge with prejudice.

2. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO INSTRUCTIONS IMPROPERLY REQUIRING THE JURY TO BE UNANIMOUS TO ANSWER "NO" ON THE SPECIAL VERDICTS.

Both the federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his

attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

In this case, defense counsel's failure to object to improper special verdict instructions constitutes ineffective assistance of counsel.

Washington requires unanimous verdicts in criminal cases. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). For special verdicts on aggravating factors, jurors must be unanimous to find that the State has proven the existence of the aggravating factors beyond a reasonable doubt. State v. Goldberg, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). Jury unanimity is not required to answer a special verdict “no,” however. State v. Bashaw, \_\_\_ Wn.2d \_\_\_ (July 1, 2010), Slip Op. at 6; Goldberg, 149 Wn.2d at 893. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” Id.

The jury here was given two special verdict forms and instructed that “[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict.” CP 101, 102 (Instructions 15 and 16). This is an incorrect statement of law, because unanimity is not required for the absence of a special finding. Bashaw, Slip Op. at 7; Goldberg, 149 Wn.2d at 893. There was no legitimate reason for counsel’s failure to object to the improper instructions.

Moreover, the defense was prejudiced by counsel’s deficient performance, even though the jury returned unanimous “yes” verdicts on the aggravating factors. In Bashaw, the jury received the same erroneous

instructions. Rejecting the State's contention that the error was harmless because the jury returned unanimous yes verdicts, the Supreme Court held,

The error here was the procedure by which unanimity would be inappropriately achieved.... 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.... 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.

Bashaw, Slip Op. at 7. Here, as in Bashaw, because the special verdict instructions erroneously required unanimity, the special verdicts must be vacated. See Bashaw, Slip Op. at 7.

Vargas-Gutierrez maintains that the charge in this case must be dismissed for insufficient evidence. See § C.1, above. If this Court disagrees, however, the case must be remanded for resentencing without the sentence enhancements. The court below calculated Vargas-Gutierrez's standard range as 51 to 68 months, applying RCW 9.94A.518, which makes any drug offense with a deadly weapon special verdict a level III offense. 5RP 168. Without the special verdict, possession of cocaine with intent to deliver is a level II offense, and with Vargas-Gutierrez's offender score of 0, his standard range is 12+ to 20 months. See RCW 9.94A.517; RCW 9.94A.518. This Court should remand for resentencing within this lower standard range.

C. CONCLUSION

The court's failure to exclude Gomez's additional testimony, following Harris's out of court contact in violation of the court's order excluding witnesses, denied Vargas-Gutierrez a fair trial. Because the State's evidence is insufficient without the additional testimony, the charge against Vargas-Gutierrez must be dismissed. In addition, because the special verdict instructions erroneously required unanimity for a negative answer, the special verdicts must be vacated.

DATED this 23<sup>rd</sup> day of July, 2010.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

*State v. Luis Vargas-Gutierrez*, Cause No. 40299-8-II directed to:

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



Catherine E. Glinski  
Done in Port Orchard, WA  
July 23, 2010

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