

NO. 40376-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LEE MOORE,

Appellant.

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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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

The Honorable James Stonier, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in instructing the jury that it must be unanimous to answer the special verdict forms.

Issue Pertaining to Assignment of Error

It is reversible error to instruct jurors they must be unanimous in order to find that the State has failed to prove the requirements of a sentencing enhancement. Appellant's jury received such an instruction. Must the special verdicts, the firearm enhancements, and appellant's exceptional sentences be vacated?

B. STATEMENT OF THE CASE

The Cowlitz County Prosecutor's Office charged Joseph Moore with six criminal offenses: (count I) Burglary in the First Degree; (count II) Robbery in the First Degree; (count III) Assault in the Second Degree; (count IV) Unlawful Possession of a Firearm in the Second Degree; (count V) Unlawful Possession of a Firearm in the First Degree; and (count VI) Tampering with a Witness. CP 3-5. The State subsequently dismissed the charge in count IV. RP 77.

The charges on counts I, II, and III each contained two firearm enhancement allegations, one for the defendant's possession of a firearm and one for his alleged accomplice's possession of a firearm. CP 4. Moreover, the State provided

notice of its intent to seek an exceptional sentence based on several aggravating factors. CP 1-2.

Jurors received special verdict forms related to the firearm enhancements. Verdict form A asked, "Was the defendant armed with a firearm at the time of the commission of the crime of Burglary in the first Degree?" CP 53. Jurors were asked the identical question in verdict forms B and C for Robbery in the First Degree and Assault in the Second Degree, respectively. CP 54-55. Verdict forms D, E, and F repeated the question for these crimes with one exception. These forms asked jurors whether Moore's accomplice was armed with a firearm. CP 56-58.

Jurors also received a special verdict form for the aggravating factors. Verdict form G asked:

Did the defendant know, or should have known, that the victims of the current offense were particularly vulnerable or incapable of resistance?

Was the victims' vulnerability a substantial factor in the commission of the crime?

Did the offenses involve an invasion of the victim's privacy?

Was one of the current offenses a burglary were [sic] the victim was present in the building when the crime was committed?

CP 59-60.

Instruction 30 informed jurors how to decide the special verdict questions. It provides, in pertinent part:

When completing the special forms, you must 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 unanimously have a reasonable doubt as to the question, you must answer “no.”

....

Because this is a criminal case, each of you must agree for you to return a verdict or special verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP 45-46 (emphasis added).

Jurors answered “yes” on all seven special verdict forms. CP 53-60. This significantly impacted Moore’s sentence. First, it added 312 months in firearm enhancements (120 months each for counts I and II and 72 months for count III). CP 70. Second, based on the aggravating factors, the sentencing court imposed exceptional sentences on three counts. The court imposed an exceptional 200-month term for the burglary in count I (144 months plus a 120-month firearm enhancement) and an exceptional 320-

month term for the robbery in count II (200 months plus a 120-month firearm enhancement).¹ In addition, the court ran a 60-month sentence for witness tampering in count VI consecutive to the other sentences. CP 66, 70; RP 488-490.

C. ARGUMENT

THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICTS REQUIRES THAT MOORE'S EXCEPTIONAL SENTENCES AND FIREARM ENHANCEMENTS BE VACATED.

Instruction 30, which stated all 12 jurors must agree on an answer to the special verdicts, was an incorrect statement of the law. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). An instruction containing the same improper requirement was given in Bashaw. Bashaw, 169 Wn.2d at 139 ("Since this is a criminal case, all twelve of you must agree on the answer to the special verdict."). A unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Id. at 146-147 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

¹ The judgment and sentence mistakenly lists the sentence for count I as the sentence for count II and vice versa. Compare CP 70 with RP 482-483 (prosecutor's request). This should be corrected on remand.

Defense counsel did not object to the erroneous language in instruction 30. But the error can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). The defendant in Bashaw did not object to this instruction, either,² but the Supreme Court still reversed, treating the error as a violation of his constitutional rights. Bashaw, 169 Wn.2d at 147-48.

Recently, Division Three of this Court, in State v. Nunez, ___ Wn. App. ___, ___ P.3d ___ (slip op. filed 2/15/11), held that the instructional error addressed in Bashaw could not be raised for the first time on appeal. Specifically, Division Three found that an erroneous instruction telling jurors they must be unanimous to answer a special verdict does not meet the test for manifest constitutional error under RAP 2.5(a) because it is neither constitutional nor manifest.

The Washington Supreme Court disagrees. Its opinion in Bashaw (reversing Division Three) is based on its earlier opinion in Goldberg (also reversing Division Three). And in Goldberg, the Court identified the constitutional issue at stake:

The right to a jury trial includes the right to have each juror reach his or her own verdict

² State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. State v. Boorgard, 90 Wash.2d 733, 736, 585 P.2d 789 (1978). . . .

Goldberg, 149 Wn.2d at 892. Thus, the constitutional right at issue is the right, under the state and federal constitutions, to jury trial, which includes the right to the court's proper instructions on jury deliberations.³

The Goldberg court reversed where, after jurors were properly instructed they need not be unanimous to answer the special verdict "no," the trial court erroneously ordered continued deliberations in an attempt to reach unanimity. Id. at 893-894. Citing Goldberg, the Bashaw court held it was also error to provide jurors a written instruction telling them they must be unanimous to answer a special verdict "no" because this improperly discouraged dissenting views. Bashaw, 169 Wn.2d at 145-148. And in deciding whether such an error could be harmless, the Court cited to the constitutional standard. Id. at 147 (citing State v. Brown, 147

³ The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" Article 1, § 21 provides, "The right of trial by jury shall remain inviolate." Article 1, § 22 guarantees, "a speedy public trial by an impartial jury"

Wn.2d 330, 341, 58 P.3d 889 (2002); Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

The fact the Bashaw court addressed the instructional error for the first time on appeal and applied the constitutional harmless error standard indicates that the error qualifies as manifest and constitutional under RAP 2.5(a). Indeed, not even the three dissenting judges in Bashaw took issue with the majority's decision to address the claim despite the absence of an objection below or the majority's decision to apply constitutional harmless error analysis. See Bashaw, 169 Wn.2d at 148-152 (Madsen, J., dissenting).

Because Moore's challenge is properly before this Court under RAP 2.5(a), the only question is whether the State can demonstrate the instructional error was harmless beyond a reasonable doubt. As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. The deliberative process is different when the jury is properly given the option of not returning a unanimous verdict. "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." Id.

In Bashaw, the defendant was convicted of three counts of delivering a controlled substance. The jury entered special verdicts finding all three crimes occurred within 1,000 feet of a school bus route stop, increasing Bashaw's maximum sentence. Id. at 137-139. The verdict on one count was vacated based on the erroneous admission of certain evidence. Id. at 140-144. For the remaining counts, however, although *all* of the trial evidence indicated the sentencing enhancement had been proved, in light of the "flawed deliberative process," the court refused to find the error harmless. Id. at 138-139, 143-148.

The Bashaw court explained that given a proper special verdict instruction that did not require unanimity, the jury may have returned a different special verdict. Bashaw, 169 Wn.2d at 147. "For instance, when 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 same holds true here. While the State presented evidence in support of the firearm enhancements and aggravating factors, one or more jurors may have entertained doubts whether the prosecution had proved beyond a reasonable doubt the questions posed, but – given the unanimity requirement for answering “no” – they may have abandoned their positions or failed to raise their concerns. Jurors may not have reached unanimity had they not been required to do so. Because the instructional error impacted the procedure jurors used, it is impossible to determine the “flawed deliberative process” had no impact whatsoever.

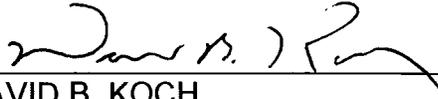
D. CONCLUSION

For the reasons stated, Moore respectfully requests that this Court vacate his exceptional sentences, vacate the firearm enhancements, and remand for resentencing.

DATED this 18th day of February, 2011.

Respectfully Submitted,

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DIVISION II**

STATE OF WASHINGTON,)
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JOSEPH MOORE,)
)
 Appellant.)

COA NO. 40376-5-II

STATE OF WASHINGTON
BY *[Signature]*
IDENTITY
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COURT REPORTER

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JAMES SMITH
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KELSO, WA 98626

- [X] JOSEPH MOORE
DOC NO. 740940
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SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF FEBRUARY, 2011.

x *Patrick Mayovsky*