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DIVISION II
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STATE OF WASHINGTON
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NO. 40968-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ADELE E. EWING,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY

Before the Honorable Nelson Hunt, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury it must be unanimous in order to answer the special verdict form.

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

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Were the jury instructions for the special verdict form erroneous under *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010)?
Assignment of Error 1.

2. Trial counsel failed to object to instructions improperly requiring the jury to be unanimous to answer the special verdict "no." Where counsel's error likely affected the outcome of the case, must the special verdict be vacated? Assignment of Error 1.

C. STATEMENT OF THE CASE

1. Procedural history:

Adele Ewing was charged by information filed in Lewis County Superior Court with one count of delivery of a controlled substance, (methamphetamine), in violation of RCW 69.50.401(1), (2)(b). Clerk's Papers [CP] 1-2. The State subsequently filed amended information adding

the special allegation of RCW 69.50.435, that the offense was committed within 1000 feet of a school bus route stop. CP 4-6.

The court provided the jury with special verdict form regarding the school bus route stop enhancement alleged. CP 31.

The court instructed the jury as to the special verdict form:

If you find the defendant guilty of Delivery of a Controlled Substance, it will then be your duty to determine whether or not the defendant delivered the controlled substance within one thousand feet of a school bus route stop designated by a school district. You will be furnished with a special verdict form for this purpose.

If you find the defendant not guilty of Delivery of a Controlled Substance, do not use the special verdict form. If you find the defendant guilty, you will complete the special verdict form. Since this is a criminal case, all twelve of you must agree on the answer to the special verdict form.

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant delivered the controlled substance within one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict "yes".

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt that the defendant delivered the controlled substance with one thousand feet of a school bus route stop designated by a school district, it will be your duty to answer the special verdict "no".

CP 31 (Instruction No. 15).

The court entered a Judgment and Sentence on July 1, 2010. CP 58-

66. The Opening brief of appellant was filed January 6, 2011. The state filed its Brief of Respondent on March 3, 2011.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THEY MUST BE UNANIMOUS IN ORDER TO ANSWER "NO" ON THE SPECIAL VERDICT FORM

The State charged Ms. Ewing with commission of the offense while within one thousand feet of a school bus route stop. CP 4-6. The trial court provided the jury with a special verdict form regarding the school bus route stop enhancement. CP 34.

The court also instructed the jury in Instruction 15:

Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

CP 31.

Under *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), this instruction was error. In *Bashaw*, Bashaw was charged with three counts of delivery of a controlled substance based on three separate sales to a police informant. *Bashaw*, 169 Wn.2d at 137. The State sought sentence enhancements, pursuant to RCW 69.50.435(1)(c), based on the allegation each sale took place within 1,000 feet of a school bus route stop. *Id.* The

jury was given a special verdict form for each charge, which asked the jury to find whether each charged delivery took place within 1,000 feet of a school bus route stop; in the jury instruction explaining the special verdict forms, jurors were instructed: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Id.* at 139. The jury found Bashaw guilty of all three counts of delivery of a controlled substance and found that each took place within 1,000 feet of a school bus route stop. *Id.*

The Court held the jury need not be unanimous in a special finding for a sentence enhancement: "A non-unanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt." *Bashaw*, 169 Wn.2d at 145. Further, the Court held the error was not harmless, as it was impossible to discern what might have occurred had the jury been properly instructed. *Id.* at 148. The Court therefore vacated the sentence enhancements. *Id.*

The same error that occurred in *Bashaw* also occurred in this case. The jury was instructed that all twelve of them must agree in order to answer the special verdict forms and that they must be unanimous in order to answer "no" on the forms. CP 31. Because it is impossible to discern what the jury might have found if properly instructed, the sentence enhancement must be

vacated. *Bashaw*, 169 Wn.2d at 148.

2. **TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO INSTRUCTIONS IMPROPERLY REQUIRING THE JURY TO BE UNANIMOUS TO ANSWER “NO” ON THE SPECIAL VERDICT FORM.**

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. *Bashaw*, 169 Wn.2d at 145; *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 a special verdict form and instructed that "[s]ince this is a criminal case, all twelve of you must agree in order to answer the special verdict." CP 31 (Instruction 15). This is an incorrect

statement of law because unanimity is not required for the absence of a special finding. *Bashaw*, 169 Wn.2d at 145. 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 a unanimous "yes" verdict on the enhancement. 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, 169 Wn.2d at 148.

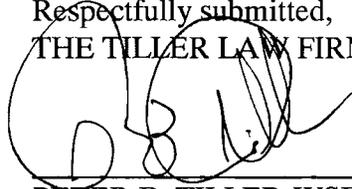
Here, as in *Bashaw*, because the special verdict instructions erroneously required unanimity, the special verdict must be vacated.

E. CONCLUSION

Based on the above, Ms. Ewing respectfully requests that this Court to remand for resentencing consistent with the argument presented herein.

DATED: March 22, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over the text 'THE TILLER LAW FIRM'.

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