

NO. 41307-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KEITH BERLIN,

Appellant.

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

The Honorable George L. Wood, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding evidence the complaining witness offered to change or alter his testimony in exchange for money.

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

Issues Pertaining to Assignments of Error

1. The defense sought to introduce evidence that the complaining witness offered to change his testimony in exchange for money. Were appellant's constitutional rights to confrontation and to present a defense violated when the trial excluded the evidence?

2. 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. Where appellant's jury received such an instruction must the special verdict finding be vacated?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural History

Keith R. Berlin was charged by amended information with attempted second degree murder, first degree assault, and second degree unlawful possession of a firearm. CP 99-101. All charges contained

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<sup>1</sup> RP refers to the verbatim report of proceedings of September 13, 14, 15, 16, and October 14, 2010, which are sequentially numbered.

firearm enhancement and domestic violence allegations. Id. The charge of second degree unlawful possession of a firearm was dismissed before trial. RP 9.

A jury found Berlin not guilty of attempted second degree murder and guilty of first degree assault. CP 27-29; RP 448. The jury also returned special verdicts finding Berlin was armed with a firearm and Berlin and the victim were members of the same family or household. CP 25-26; RP 450-451. Berlin was sentenced to 153 months, which is within the standard range. CP 9-21.

2. Substantive Facts

a. State's Case

In October 2009, Jacob Griffith moved in with Berlin, Berlin's mother (Evelyn Berlin), and Berlin's cousin in their Port Angeles home. RP 79-80. On February 15, 2010, Berlin and Griffith were alone in the house and began arguing. RP 87.

Griffith said the argument started because Berlin believed Griffith had been rude and was bothering him while Berlin was on the telephone. RP 86-87. Griffith testified that Berlin threatened to call Griffith's grandmother and tell her Griffith was a "sorry" person. RP 88. Griffith, in turn, threatened to call Berlin's mother. Id. According to Griffith,

Berlin was intoxicated and after this initial exchange he told Griffith he was going to his room to sleep in off. RP 89.

Griffith then called his girlfriend, Erica Delgado, and asked about moving in with her. RP 89. Shortly thereafter, Berlin came out of his room, accused Griffith of talking to his (Berlin's) mother and told Griffith to leave. RP 90. Griffith said he would leave the following day and if Berlin insisted he leave immediately he was going to call Berlin's mother and ask if she would let him stay another day. RP 91. The two argued some more and Berlin then left the room. RP 91.

Griffith called Delgado again and told her that he was moving out and she should come and get him the next day. RP 92. A short time later Berlin left the house and went to his car. RP 92. Griffith confronted Berlin and told him he should not drive because he was too intoxicated. RP 93. Both men came back inside the house. RP 94.

Griffith said he again asked Berlin why he was angry and told Berlin he loved him. RP 94-95. Griffith put his arms around Berlin and hugged him. RP 95. Suddenly Berlin pushed Griffith and said, "Don't you ever touch me. Don't you lay your hands on me." RP 95.

Griffith called Delgado again and put her on speakerphone. RP 96. While Delgado was on the phone, Griffith told Berlin he was leaving the next day and Delgado was going to pick him up. RP 95. Berlin

questioned whether Delgado would come get Griffith and take him in because Griffith had “laid” his hand on Berlin. RP 97. Delgado, however, confirmed that she would indeed come and get Griffith the following day. RP 98. Berlin then left the room. RP 99.

Griffith continued talking to Delgado when he saw movement indicating Berlin was coming back into the room. Berlin then shot Griffith. RP 100. While on the floor, Griffith looked up and saw Berlin drop a rifle. RP 101. Berlin had a pocketknife in his hand and told Griffith “I’m going to stab you. I’m going to cut you. I’m going to kill you.” RP 102. Griffith told Berlin that if one of them did not leave, “something could happen.” RP 123. Griffith also told Berlin that he needed to deal with his injuries and he left the home for help. RP 102. Griffith testified that “I did contemplate picking up the gun and knocking him over the head...but instead I just walked out of the place altogether.” RP 124.

Delgado testified that the first time she spoke with Griffith on the phone, Berlin asked her if she was going to let Griffith live with her even though Griffith had “laid hands” on him. RP 135. Delgado told Berlin that she was willing to allow Griffith to live with her if he needed a place to live. Id. About 5 minutes later she spoke with Griffith again. RP 136. While she was talking with Griffith she heard a loud bang. She heard

Griffith say “he shot me in the face, call the law.” RP 137. Delgado then heard Berlin say “I’ll kill you” and Griffith telling Berlin to get out of the way so he could leave. Id. Delgado got off the phone and called police. Id.

A few minutes later a neighbor, Scott Clark, went to the Berlin home to talk to Berlin about doing some work on the house. RP 147. Berlin was on the phone to police but he motioned for Clark to come inside. Id. Clark noticed a rifle on the living room floor and blood on the coffee table. Id. Berlin told Clark that he had just shot Griffith in the face, but he did not trying to kill him. RP 148. Berlin told Clark he shot Griffith because Griffith was trying to kill him. RP 152.

The shooting left pieces of birdshot in Griffith’s face and eye. RP 103. Griffith’s injuries required a series of plastic surgeries. Id.

b. Defense Case

Berlin testified he met Griffith in September 2009. RP 307. The two met again in October for drinks and Griffith revealed that he had no place to stay. Berlin offered to let Griffith move in with him, his mother, and his cousin, Robert Haines. RP 309. The two men frequently used methamphetamines together, which Berlin paid for. RP 315-319.

On February 15, 2010, Berlin told Griffith he would no longer buy methamphetamines for him. RP 314. Griffith became angry and agitated

and told Berlin he was going to kill him. RP 319-321. In response, Berlin told Griffith he needed to leave the house that night. RP 322. Griffith initially refused but after Berlin insisted Griffith called Delgado. RP 324.

After speaking with Delgado, Griffith told Berlin he could not leave that night. Berlin, however, insisted Griffith leave immediately. Griffith again became agitated and told Berlin he could kill him. RP 325, 327. Griffith then called Delgado again and put her on a speakerphone. RP 326. Berlin asked Delgado if she wanted to live with a man who had just threatened to kill him and Delgado said she did. RP 326.

Griffith then grabbed Berlin by the upper arm and told Berlin that if he “tried to call my family, his family, or 9-1-1 that he could get to me before they got there.” RP 332. Berlin thought that Griffith was going to attack him and that his life was in danger. RP 332. Griffith eventually let go of Berlin. RP 333. Berlin, who at this point feared for his life, went to his bedroom to get a single shot .22 caliber rifle, which was loaded with birdshot. RP 333-334. Berlin testified he was going to use the rifle to either disable Griffith or at least discourage him from coming after him. Id.

Berlin then returned to where Griffith was standing. Berlin was afraid that if he did not immediately shoot, Griffith would take the rifle from him. RP 335. Berlin attempted to shoot Griffith in the shoulder to

disable him but Griffith moved and the shot hit Griffith in the face. RP 334. Berlin was still afraid of what Griffith might do, so he picked up a small knife and told Griffith not to make him end it. RP 336-337. Griffith then left to get help for his injury. RP 338. Berlin locked the door and called 9-1-1.

Berlin said part of the reason he was afraid of Griffith was because Griffith was 35 years old and much bigger, stronger, younger, and healthier than Berlin, who is 54 years old. RP 327. Griffith also had specialized hand-to-hand training while in the Navy. RP 330. Berlin testified he did not intend to kill Griffith but rather to disable him so Griffith could not harm or kill him. RP 344.

c. Facts Pertaining to Assignment of Error 1

Prior to trial the State moved to exclude evidence that Griffith spoke with Berlin's mother and offered to change his testimony in exchange for money. RP 27. Berlin's mother, however, had passed away a month before the trial so the State moved to exclude the evidence on the grounds that it was hearsay. RP 27. Berlin argued he nonetheless had the right to ask Griffith on cross examine Griffith whether he made the offer to Berlin's mother. RP 28.

The court found it was a legitimate subject for cross examination but because Berlin's mother was dead and could not testify, the court

found the defense had no basis to ask Griffith about his offer to change his testimony. The court reasoned because the defense could not rebut Griffith's testimony with any admissible evidence if Griffith denied he made the offer, Berlin could not cross examine Griffith about the offer. RP 31.

In response, Berlin argued the defense had a good faith basis to ask Griffith whether he told Berlin's mother he would change his testimony if she paid him money because Berlin's mother wrote a statement regarding the offer before she died. Id.; Ex. 55. Before her death Berlin's mother wrote a record of the phone calls she had with Griffith. RP 270. In her statement Berlin's mother wrote Griffith made several offers to make sentencing recommendations in exchange for \$1,500. Ex. 55. On May 14, 2010 she described a phone call in which Griffith offered to either "say Keith didn't know the gun was loaded and shot him by accident, or he could say Keith deliberately shot him and attacked him with a knife" in exchange for \$1,000.00. RP 195; Ex. 55.

Griffith was then examined outside the presence of the jury. He testified that he had never offered to change his testimony in exchange for money. RP 76. The court ruled that because of Griffith's denial the defense could not cross examine Griffith about the alleged offer. RP 77. The court explained, "So just to raise the question, it sounds like a 'are

you still beating your wife' type issue. I mean, there's no way to say—to get over that, and it's pointing something to the jury that I don't think is— unless you've got something to substantiate it with, I don't think it's proper to bring it because it just causes speculation on their part.” RP 54.

On the third day of the trial the defense informed the court that Berlin's family suggested Berlin's cousin, Robert Haines, might have heard the conversations between Griffith and Berlin's mother. RP 191. The defense told the court they contacted Haines and Haines was prepared to testify he was visiting Berlin's mother in May at the same time she received a phone call from Griffith offering to change his testimony in exchange for money. RP 192. Haines heard the conversation because Berlin's mother was hard of hearing and she wanted him to listen to the call. RP 192, 263. Counsel offered that Haines would testify that Griffith said he would testify that Berlin did not mean to shoot or hurt him and that a sentence of three to five years would be appropriate in exchange for \$1,500.00. RP 263.

The court disallowed the evidence. The court reviewed Berlin's mother statement and found that the phone calls, other than the May 14<sup>th</sup> phone call, were not significance. RP 195. The court found the May 14<sup>th</sup> phone call was different than what Haines claimed to have heard, because in her statement Berlin's mother said Griffith offered to change his

testimony for \$1,000.00 and Haines' would testify he heard Griffith say he would change his testimony for \$1,500.00. Based on that the court concluded Haines' testimony was referencing Griffiths earlier offer to ask that Berlin be given leniency in exchange for a \$1,500.00 payment. RP 264-265. The court prohibited the defense from eliciting Haines' testimony about Griffith's offer. The court reasoned:

I don't see that—I see that of minor relevance to the issues here involved, you know, whether or not he's going to give a recommendation or not a recommendation. He seems to think he's got some authority over that.... So I find that to be of relevant—of minimal relevance...Mr. Griffith is now gone. Mr. Griffith is up in Bellingham.... So I think it's actually a late issue with a minimal relevance to that particular issue. Now, the other thing—so I'm not going to allow it.

RP 265-266.

d. Facts Pertaining to Assignment of Error 2

Jurors received special verdict forms related to the firearm enhancement and the domestic violence finding. CP 25-26. The first special verdict form asked, "Was the defendant KEITH RAGNER BERLIN armed with a firearm at the time of the commission of the crime found in either Verdict Form A, B, or C?" CP 25. The second special verdict form asked, "Were Keith Berlin and Jacob Griffith members of the same family or household?" CP 26.

Instruction 29 informed jurors how to decide the special verdict questions. It provides, in pertinent part:

....

You will also be given Special Verdict Forms for the crime of ATTEMPTED MURDER IN THE SECOND DEGREE and ASSAULT IN THE FIRST OR SECOND DEGREE. If you find the Defendant not guilty of these crimes, do not use the Special Verdict Forms. If you find the Defendant guilty of these crimes, you will then use the Special Verdict Forms and fill in the blanks with the answer "Yes" or "No" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the Special Verdict Forms. In order to answer the Special Verdict Forms "Yes," you must unanimously be satisfied beyond a reasonable doubt that "Yes" is the correct answer.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms 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 64. The court orally reiterated this unanimity requirement. RP 415.

Jurors answered yes on both special verdict forms. CP 25-26. This significantly impacted Berlin's sentence by adding a 60 month firearm enhancement. CP 9-21; RP 464.

C. ARGUMENTS

1. THE TRIAL COURT ERRED IN REFUSING TO ADMIT TESTIMONY GRIFFITH OFFERED TO ALTER HIS TESTIMONY IN EXCHANGE FOR MONEY IN VIOLATION OF BERLIN'S CONSTITUTIONAL RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE.

This Court reviews alleged Confrontation Clause violations de novo. State v. Larry, 108 Wn.App. 894, 901, 34 P.3d 241 (2001). The court's rulings prohibiting Berlin from cross examining Griffith and from presenting extrinsic evidence that Griffith offered to change his testimony in exchange for money violated Berlin's rights to confrontation and to present a defense.

Under the Confrontation Clause of the Sixth Amendment and article I, § 21 and 22 of the Washington State Constitution, the defendant has the right to confront and cross-examine witnesses and present a complete defense. State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003). This is a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); Washington v. Texas, 338 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990). This includes the

right to impeach a prosecution witness. State v. Johnson, 90 Wn.App. 54, 69, 950 P.2d 981, 989 (1998).

A defendant's right to confrontation includes the right to engage in otherwise appropriate cross-examination to show that a witness is biased. Delaware v. Van Ardsall, 475 U.S. 673, 680, 106 S.Ct. 1431 (1986); Davis v. Alaska, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Bias refers to “the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.” United States v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Bias may be shown by a witnesses conduct. State v. McDaniel, 37 Wn. App. 768, 772-773, 683 P.2d 231 (1984) (citation omitted). Bias may also be established by introducing extrinsic evidence, including third party testimony. Abel, 469 U.S. at 49.<sup>2</sup>

In State v. Dolan, 118 Wn.App. 323, 327-28, 73 P.3d 1011 (2003), the child's mother testified against Dolan, the father, who was accused of child abuse. In a separate action the mother was party to a custody dispute with the father and allegedly told him she would drop the abuse charges if he relinquished custody of the child. The trial court excluded the evidence.

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<sup>2</sup> In Abel, the Court ruled it was not error for the prosecution to impeach a defense witness by introducing testimony that the witness and defendant both belonged to a prison gang that required its members to lie to protect each other. Abel, 469 U.S. 45

This Court held Dolan's right to confrontation was violated because he had the right to cross-examine the mother about her possible bias against him stemming from the custody battle. Dolan, 118 Wn.App. at 326.

Here, Berlin should have been allowed to cross examine Griffith on his alleged offer to exchange his testimony for money. Like the custody battle evidence in Dolan, the evidence that Griffith offered to sell his testimony directly related to Griffith's bias against Berlin and motive to lie when his offer was rebuffed.

Moreover, the court erroneously excluding Haines' proffered testimony that he heard Griffith offer to sell his testimony for \$1,500. While extrinsic evidence cannot be used to impeach a witness on a collateral issue", State v. Lubers 81 Wn.App. 614, 623, 915 P.2d 1157, 1161 (1996), where the credibility of the complaining witness is crucial, the witness's bias or motive to lie is not a collateral issue. State v. Roberts, 25 Wn.App. 830, 834-35, 611 P.2d 1297 (1980). It is "the very essence of the defense." State v. York, 28 Wn.App 33,36, 621 P.2d 784, 785 (1980). "Even though evidence which establishes the bias of a witness does impeach the witness, such evidence is not considered impeachment on a purely collateral matter. In any event, such evidence is admissible notwithstanding its collateral aspects." State v. Jones, 25 Wn.App. 746, 751, 610 P.2d 934 (1980).

This Court has held that extrinsic evidence of acts or conduct may be introduced to prove a witness's bias without first calling such acts or conduct to the witness's attention. State v. Spencer, 111 Wn.App. 401, 410, 45 P.3d 209 (2002) (citing State v. Huynh, 107 Wn.App. 68, 74, 26 P.3d 290 (2001) and State v. Wilder, 4 Wn.App. 850, 855, 486 P.2d 319, review denied, 79 Wash.2d 1008 (1971)). A defendant has a constitutional right to impeach a prosecution witness with bias evidence, even if the bias evidence is presented via another witness. Spencer, 111 W. App. at 408; United States v. Abel, 469 U.S. at 49. It is reversible error to deny a defendant the right to establish the chief prosecution witness's bias by an independent witness. Spencer, 111 W. App. at 408 (citations omitted).

Griffith was the State's chief prosecution witness and its case depended on his credibility. Griffith downplayed or denied he had any part in causing the argument. For example, Griffith testified when he asked Berlin why he was angry, Berlin said it was because Griffith was rude while Berlin was on the phone. RP 87. Griffith also claimed that when he called Delgado, Berlin thought Griffith had called Berlin's mother and that was when Berlin became even more angry and told Griffith to leave. RP 90. Griffith testified he tried to diffuse Berlin's anger by hugging him and telling Berlin he loved him but Berlin shoved him. RP 95. Griffith denied the argument with Berlin had anything to do

with Berlin refusing to buy Griffith any more methamphetamine. RP 115. Griffith also denied he threatened to kill Berlin and that his threat to kick Berlin's ass was made in a "playful kind of mode." RP 99.

Haines' proffered testimony would have shown Griffith's bias and that he had a motive to lie about what occurred in retaliation against Berlin because Berlin's mother would not buy his favorable testimony. It would have impeached Griffith's testimony that he was not the aggressor, that he tried to diffuse the situation and that he did not threaten to kill Berlin. The evidence was crucial to the defense theory that Berlin shot Griffith because he reasonably feared for his life. Haines' testimony was admissible and its exclusion violated Berlin's rights to confrontation and to present a defense.<sup>3</sup>

The exclusion of bias evidence is presumed prejudicial. Spencer, 111 Wn.App. at 408 (citing State v. Johnson, 90 Wn.App. at 69). Reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. State v. Johnson, 90 Wn.App. at 54.

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<sup>3</sup> "Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn.App. 704, 715, 6 P.3d 43 (2000) (citing State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). There is no State interest is compelling enough to preclude evidence with high probative value. Hudlow, 99 Wn.2d at 16.

If Berlin had been allowed to present evidence that Griffith tried to sell his testimony, it is likely the jury would have found Griffith's testimony was not credible. Berlin was acquitted of the attempted murder charge. Thus, the jury necessarily believed Berlin's testimony that he did not intend to murder Griffith. If it found Griffith's testimony was not credible because he was bias and had a motive to lie, the jury would have reasonably believed Griffith was the aggressor and did threaten to kill Berlin, as Berlin claimed, supporting Berlin's theory that he was afraid Griffith was going to kill him and he shot Griffith in self defense.

Under these facts, the State cannot show the error was harmless. See, State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (State's burden to show error was harmless). Berlin is entitled to a new trial.

2. THE FLAWED UNANIMITY INSTRUCTION FOR THE SPECIAL VERDICTS REQUIRES THAT BERLIN'S FIREARM AND DOMESTIC VIOLENCE ENHANCEMENTS BE VACATED.

Instruction 29, 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)).

Defense counsel did not object to the erroneous language in instruction 29. 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, 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 uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel. State v. Boorgard, 90 Wn.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.<sup>4</sup>

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

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<sup>4</sup> 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 Berlin'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 enhancement and domestic violence finding, 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.

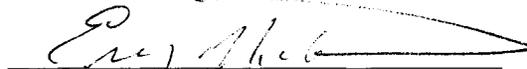
D. CONCLUSION

Berlin was denied his rights to confrontation and to present a defense. Thus, his conviction should be reversed and his case remanded for a new trial. Additionally, the jury's deliberative process was flawed, and Berlin respectfully requests this Court vacate the sentencing enhancement and remand for resentencing.

DATED this 23 day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 41307-8-II
	)	
KEITH BERLIN,	)	
	)	
Appellant.	)	

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**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 23<sup>RD</sup> DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] BRIAN WENDT  
CLALLAM COUNTY PROSECUTOR'S OFFICE  
223 E. 4<sup>TH</sup> STREET, SUITE 11  
PORT ANGELES, WA 98823-0037
  
- [X] KEITH BERLIN  
DOC NO. 344372  
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P.O. BOX 769  
CONNELL, WA 99362

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CORRECTIONS CENTER  
11 MARCH 2011 12:12  
STATE OF WASHINGTON  
BY Patrick Mayovsky  
DEPUTY

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF MARCH, 2011.

x Patrick Mayovsky