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COURT OF APPEALS
STATE OF WASHINGTON

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

THURMAN SHERRILL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Vicki L. Hogan

No. 02-1-04593-8

Response Brief

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Did the court properly resentence defendant under the corrected offender score with a sentencing enhancement which was not challenged at any time prior to the resentencing hearing? 1

 2. Is defendant precluded from raising an issue for the first time on appeal where he cannot show a manifest constitutional error? 1

 3. Were the jury instructions for the special verdicts proper where they clearly differentiated between the requirements for verdicts, and special verdicts? 1

 4. Was any error in the jury instruction harmless where defendant cannot show that a reasonable probability that the jury would have answered the special verdict differently under different instructions? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

C. ARGUMENT. 3

 1. THE SENTENCING COURT DID NOT ERR IN RESENTENCING DEFENDANT WITHOUT CONSIDERING HIS CHALLENGE TO THE SENTENCE ENHANCEMENT 3

 2. DEFENDANT IS PRECLUDED FROM RAISING AN ISSUE NOT PRESERVED AT THE TRIAL COURT FOR THE FIRST TIME HERE. 9

 3. THE JURY INSTRUCTIONS WERE PROPER AND DID NOT MISLEAD THE JURY 13

4.	EVEN IF THE COURT WERE TO HOLD THE INSTRUCTION WAS ERRONEOUS, ANY SUCH ERROR WAS HARMLESS.....	21
D.	<u>CONCLUSION</u>	22

Table of Authorities

State Cases

<i>In re Charles</i> , 135 Wn.2d 239, 253, 955 P.2d 798 (1998).....	4, 7, 8
<i>In re Pers. Restraint of Hegney</i> , 138 Wn. App. 511, 521 158 P.3d 1193 (2007).....	14
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	3, 6, 9, 13, 15, 16, 17, 18, 21
<i>State v. Baxter</i> , 68 Wn.2d 416, 413 P.2d 638 (1966).....	11
<i>State v. Bland</i> , 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).....	12
<i>State v. Brewer</i> , 148 Wn. App. 666, 673, 205 P.3d 900 (2009).....	10
<i>State v. Brown</i> , 147 Wn.2d 330, 341, 58 P.3d 889 (2002).....	14
<i>State v. Coleman</i> , 152 Wn. App. 522, 216 P.3d 479 (2009).....	6, 14, 15, 16, 17, 20
<i>State v. Colwash</i> , 88 Wn.2d 468, 470, 564 P.2d 781 (1977).....	10
<i>State v. Dana</i> , 73 Wn.2d 533, 537, 439 P.2d 403 (1968).....	13
<i>State v. Gamble</i> , 168 Wn.2d 161, 178, 225 P.3d 973 (2010).....	20
<i>State v. Goldberg</i> , 149 Wn.2d 888, 895, 72 P.3d 1083 (2003).....	6, 9, 14, 15, 16, 17, 18, 20
<i>State v. Harris</i> , 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963).....	10
<i>State v. Harrison</i> , 148 Wn.2d 550, 61 P.3d 1104 (2003).....	6, 7, 8
<i>State v. Jackson</i> , 70 Wn.2d 498, 424 P.2d 313 (1967)	10
<i>State v. Kilgore</i> , 167 Wn.2d 28, 41, 216 P.3d 393 (2009).....	4
<i>State v. Kirkman</i> , 159 Wn.2d 918, 928, 155 P.3d 125 (2007)	20
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	12

<i>State v. McNeal</i> , 142 Wn. App. 777, 175 P.3d 1139 (2008).....	8, 9
<i>State v. O’Hara</i> , 167 Wn.2d 91, 98, 217 P.3d 756 (2009).....	21
<i>State v. Rahier</i> , 37 Wn. App. 571, 575, 681 P.2d 1299 (1984).....	10
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993)	12
<i>State v. Robinson</i> , [No. 83525-0, Slip. Op. 13] (2011).....	11
<i>State v. Schwab</i> , 134 Wn. App. 635, 645, 141 P.3d 658 (2006).....	5, 6
<i>State v. Scott</i> , 110 Wn.2d 682, 685, 757 P.2d 492 (1988).....	11, 12
<i>State v. Suave</i> , 100 Wn.2d 84, 86-87 666 P.2d 894 (1983).....	13
<i>State v. Valladares</i> , 31 Wn. App. 63, 75, 639 P.2d 813 (1982), <i>rev’d. in part on other grounds, State v. Valladares</i> , 99 Wn.2d 663, 664 P.2d 508 (1982).....	10, 11
<i>State v. White</i> , 123 Wn. App. 106, 97 P.3d 34 (2004)	6, 7, 8
<i>State v. Worl</i> , 129 Wn.2d 416, 425, 918 P.2d 905 (1996).....	4, 5, 6

Federal and Other Jurisdictions

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)	8, 9
--	------

Statutes

RCW 9.94A.660(2).....	7
-----------------------	---

Rules and Regulations

CrR 6.15.....	9
RAP 2.5.....	5, 6, 13
RAP 2.5(a)	10
RAP 2.5(a)(3).....	10, 12

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court properly resentence defendant under the corrected offender score with a sentencing enhancement which was not challenged at any time prior to the resentencing hearing?
2. Is defendant precluded from raising an issue for the first time on appeal where he cannot show a manifest constitutional error?
3. Were the jury instructions for the special verdicts proper where they clearly differentiated between the requirements for verdicts, and special verdicts?
4. Was any error in the jury instruction harmless where defendant cannot show that a reasonable probability that the jury would have answered the special verdict differently under different instructions?

B. STATEMENT OF THE CASE.

1. Procedure

On October 4, 2002, the State charged defendant, Thurman Sherrill, with assault in the first degree with a firearm enhancement, and unlawful possession of a firearm in the first degree. CP 1-4. After a jury trial, defendant was found guilty of both counts, and the jury found that the firearm enhancement applied. CP 5-6, 9. In 2003, the court sentenced

defendant to 236 months for the assault and firearm possession, and imposed the mandatory 60 months for the firearm enhancement. CP 10-21.

Defendant filed a personal restraint petition for a 1996 drug conviction, which the court granted. CP 152-153. The court ordered that the case be remanded for defendant to withdraw his guilty plea in that case. Upon remand, the State dismissed the case because of the lapse of time and loss of evidence. CP 152-153. Defendant then filed an appeal of the sentence in the case at hand, arguing the judgment and sentence were facially invalid as they included the now dismissed 1996 conviction in his offender score. CP 152-153. The State conceded that the judgment and sentence were facially invalid, and that defendant was entitled to be resentenced with a corrected offender score in light of the now dismissed conviction. *Id.*

The Honorable Judge Vicki Hogan presided over the resentencing on September 24, 2010. RP 1. Through counsel, defendant argued that he was entitled to the corrected offender score, as well as resentencing without the firearm enhancement. RP 4-5. Because the State had not had an opportunity to respond to defendant's briefing, the Court continued the hearing. RP 6. On October 22, 2010, the Court heard arguments regarding whether any issue with the firearm enhancement could be addressed at that hearing. RP 11. The Court determined that the only issue on remand was to fix defendant's offender score and impose a

sentence in line with the standard range for that score. RP 13. The Court imposed a sentence of 111 months with the additional 60 months for the sentence enhancement on count I, and 34 months on count II, to run concurrent to the sentence for count I. RP 19. Both sentences are the low end of the standard range for the defendant's corrected offender score. RP 14. Defendant filed a timely appeal to the new sentence on November 15, 2010.

C. ARGUMENT.

1. THE SENTENCING COURT DID NOT ERR IN RESENTENCING DEFENDANT WITHOUT CONSIDERING HIS CHALLENGE TO THE SENTENCE ENHANCEMENT.

On remand for resentencing based on a changed offender score, the defendant also sought for the first time to challenge a firearm sentence enhancement, claiming a jury instruction for the special verdict was legally erroneous. In support of that claim, defendant relied upon *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). Appellant's brief at 11. In *Bashaw*, the court held that a jury instruction on a special verdict was erroneous where it improperly informed the jury that they must be unanimous in order to return a "no" answer as well as to return a "yes" answer. 169 Wn.2d 146. The trial court, having refused to consider the issue at resentencing on remand, the defendant now raises it in this appeal.

- a. The court is limited to carrying out the Court of Appeals' order on remand.

Defendant argues that the sentencing court erred in resentencing him on remand with the inclusion of a sentencing enhancement found by special verdict by the jury in his trial. Defense brief at 10-11. Defendant relies upon *State v. Kilgore*, 167 Wn.2d 28, 41, 216 P.3d 393 (2009), stating that the trial court has a “duty to correct an erroneous sentence when it is brought to their attention.” Defendant’s brief at 6. However, defendant’s argument has a logical error in that it conflates a challenge to the underlying jury determination of guilty as to the sentence enhancement, with a challenge to the sentence imposed. The jury’s determination of the special verdict was neither previously appealed by the defendant, nor reversed by this Court in its resentencing order. CP 152-53. As such, on remand the court re-imposed the sentence enhancement which was, as defendant notes in briefing, “a statutorily-mandated increase to an offender’s sentence range because of a specified factor in the commission of the offense.” Defendant’s brief at 9-10, *citing In re Charles*, 135 Wn.2d 239, 253, 955 P.2d 798 (1998).

- b. Defendant is precluded from raising new issues under the law of the case doctrine.

Defendant is precluded from raising an issue not raised on appeal at resentencing under the law of the case doctrine. *State v. Worl*, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). The law of the case is a doctrine

derived from the common law and RAP 2.5, and is intended to promote finality and efficiency. *State v. Schwab*, 134 Wn. App. 635, 645, 141 P.3d 658 (2006). The rule is “that questions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence at a second determination of the cause.” *Worl*, 129 Wn.2d at 425. “One exception to applying the law of the case arises when there has been an intervening change in the law.” *Schwab*, 134 Wn. App. at 645.

In the case at hand, defendant challenged the judgment and sentence in his 2002 case, contending that it was facially invalid because the offender score included a conviction which was later dismissed. CP 152-53. The State conceded the facial invalidity and “that Sherrill is entitled to be resentenced without inclusion of the conviction in the now-dismissed 1996 case in this criminal history.” CP 152-53. The court “accept[ed] the State’s concession,” and remanded to the trial court to resentence defendant. CP 152-53.

Defendant did not first challenge the special verdict until the case was on remand to the trial court for resentencing. CP 152-53. Nor, on the prior appeal, did the State make any concession with regard to the special verdict or the imposed sentence enhancement. *Id.*

Because defendant did not raise any challenges to the special verdicts prior to this remand for resentencing, that issue has become a part of the law of the case, and defendant may not challenge it now.

As indicated above, where there is an intervening change in the law as to this issue, RAP 2.5 does not apply. *Worl*, 129 Wn.2d at 425, *Schwab*, 134 Wn. App. at 645. However, there has been no intervening change in the law.

On the contrary, the court in *State v. Bashaw* reaffirmed that special verdicts need only be unanimous if the answer is “yes.” 169 Wn.2d 133, 146, 234 P.3d 195 (2010). That was not a change in the law, as the court was reaffirming the rule expressed in *State v. Goldberg*, 149 Wn.2d 888, 895, 72 P.3d 1083 (2003), *see also State v. Coleman*, 152 Wn. App. 522, 216 P.3d 479 (2009).

Defendant argues that the law of the case doctrine does not apply because a reversal and remand for resentencing throws out the original sentence. Defendant relies upon *State v. Harrison*, 148 Wn.2d 550, 61 P.3d 1104 (2003), and *State v. White*, 123 Wn. App. 106, 97 P.3d 34 (2004). Defendant’s brief at 7-9.

In *Harrison*, the court held that the law of the case doctrine was inapplicable because the State had breached a plea agreement with Harrison, and the specific performance remedy to that breach required that the defendant be resentenced with a clean slate. 148 Wn.2d at 557-8. The trial court in *Harrison* had discretion to impose an exceptional sentence based on the facts of the case.¹ *Id.* at 563. Thus, in *Harrison*, the courts

¹ Because the specific facts of the crime were irrelevant to the legal issue on appeal, the *Harrison* court did not relate to them in its opinion. 148 Wn.2d at 554 n.1.

exercise of discretion in re-imposing the exceptional sentence was at issue on appeal. *Id.* at 555. Whether the facts of the case merited the imposition of an exceptional sentence was considered by the sentencing court. *Id.* At 555.

This case is distinguishable from *Harrison* in that the court here did not decide whether the sentence enhancement was applicable, but rather the jury did. Here, there was no exercise of discretion to be appealed. Unlike the *Harrison* court which decided the applicability of an exceptional sentence, the court in the case at hand merely imposed the statutorily mandated additional time in accordance with the jury's special verdict. RP 14, 19, compare *Harrison*, 148 Wn.2d at 563, see *In re Charles*, 135 Wn.2d at 253.

In *White*, the other case defendant relies upon, the court also held that the law of the case did not apply. 123 Wn. App. at 114. The *White* case again dealt with the court's ability to revisit a discretionary sentence on resentencing. *Id.* The court in *White* declined to reimpose a DOSA sentence because of White's drug abuse in prison after completion of a treatment program. *Id.* at 114-15. The imposition of a DOSA sentence is within the discretion of the sentencing court. *Id.* at 115, RCW 9.94A.660(2).

The sentencing enhancement imposed by the judge in the case at hand was not a discretionary addition of time, but rather one statutorily mandated based on the jury's special verdict for the firearm enhancement.

See *In re Charles*, 135 Wn.2d at 253. A challenge for an abuse of discretion in imposing an exceptional sentence or a challenge for not imposing a DOSA sentence are indeed challenges to a sentencing issues. However, a challenge to the instructions under which the jury found the firearm enhancement applicable is not a challenge to the actions of the court at sentencing. Rather, it is a challenge to the conduct of the trial itself. Because *White* and *Harrison* involved challenges to the exercise of discretion at sentencing, the law of the case doctrine does not apply in them. *White*, 123 Wn. App. at 114, *Harrison*, 148 Wn.2d at 563. But the law of the case does apply here because the defendant's challenge is not to an exercise of discretion of the sentencing court where the enhancement was determined by the jury.

Defendant also relies on *State v. McNeal*, 142 Wn. App. 777, 175 P.3d 1139 (2008), in order to claim that the defendant was entitled to argue issues not previously raised on appeal during his resentencing. Defendant's brief at 7. However, in *McNeal*, the issue was that the defendant had been given sentence enhancements pre-*Blakely* which did not meet with the requirements set forth in *Blakely*. *McNeal*, 142 Wn. App. at 786-87, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The court in *Blakely* held that the sentencing procedures for enhanced sentences in Washington was not

constitutionally valid. 542 U.S. 296. As such, it changed the Washington law, and the sentence enhancement imposed in *McNeal* was a manifest constitutional error.

The court's opinion in *Bashaw* did not change the law. 169 Wn.2d at 146. Rather, it reaffirmed the existing law under *Goldberg*. *Id.* The court held that the instruction given in *Bashaw* was "an incorrect statement of the law" under the rule established in *Goldberg*. 169 Wn.2d at 146-47 citing *Goldberg* 149 Wn.2d at 893. The law of Washington did not change under *Bashaw*. Rather, the court's opinion in *Bashaw* specifically noted that it was reaffirming the rule "adopted in *Goldberg*." 169 Wn.2d at 146. Thus, as there has been no change in the underlying law, the law of the case doctrine is applicable in this case.

Because there has been no change in the law, and defendant is not challenging an exercise of discretion by the trial court at sentencing, defendant is precluded from raising this issue under the law of the case doctrine.

2. DEFENDANT IS PRECLUDED FROM RAISING AN ISSUE NOT PRESERVED AT THE TRIAL COURT FOR THE FIRST TIME HERE.

Defendant is prevented from raising an issue about the jury instruction on appeal, where he failed to preserve the issue below. CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the

trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 872-3, 385 P.2d 18 (1963). The Court of Appeals will not consider an issue raised for the first time on appeal unless it involves a manifest error affecting a constitutional right. RAP 2.5(a); See *State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009).

The court in *State v. Valladares* specifically clarified the scope of the exception under RAP 2.5(a)(3) because it was being misconstrued and had been "misread with increasing regularity." *State v. Valladares*, 31 Wn. App. 63, 75, 639 P.2d 813 (1982), *rev'd. in part on other grounds*, *State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982). RAP 2.5(a)(3) is a limited exception to the general rule that issues may not be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 75.

The court in *Valladares* went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible, the admission of that evidence was not a clear violation of the defendant's

due process rights, and was therefore not a manifest constitutional error that could be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 76 (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)).

Valladares appealed to the Washington Supreme Court, which agreed with and affirmed the Court of Appeal's analysis on the issue of waiver. See *Valladares*, 99 Wn.2d, at 671-72. The Supreme Court held that by, "withdrawing his motion to suppress the evidence, *Valladares* elected not to take advantage of the mechanism provided for him for excluding the evidence," and thus waived or abandoned his objections. *Valladares*, 99 Wn.2d at 672. See also *State v. Robinson*, [No. 83525-0, Slip. Op. 13] (2011).

Only six years after the Court of Appeals in *Valladares* felt the need to clarify "manifest error," in *State v. Scott*, the Supreme Court again felt the need to clarify construction to be given to the "manifest error standard." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott*, the court held that the proper approach to claims of constitutional error asserted for the first time on appeal is that "[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by "manifest"; and second, "[i]f the claim is constitutional then the court should examine the effect the error had on the defendant's

trial according to the harmless error standard. [...]” *Scott*, 110 Wn.2d at 688.

The standard set forth in *Scott* has subsequently been elaborated into a four-part analysis.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.

State v. Bland, 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).

Moreover, under RAP 2.5(a)(3), while an appellant can raise a manifest error affecting a constitutional error for the first time on appeal, appellate review of the issue is not mandated if the facts necessary for a decision cannot be found in the record, because in such circumstances the error is not “manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)). Additionally, it is worth noting that if a case is appealed a second time, an error of constitutional dimensions will not be considered if the error could have been asserted in the first appeal but was not, because at

some point the appellate process must stop. *See State v. Suave*, 100 Wn.2d 84, 86-87 666 P.2d 894 (1983).

In *State v. Bashaw*, the court clarified the rule that a jury is not required to be unanimous in order to answer “no” on a special verdict inquiry. 169 Wn.2d 133, 145, 234 P.3d 195 (2010). The rule reaffirmed in *Bashaw* is “not compelled by constitutional protections.” *Bashaw*, 169 Wn.2d at 146 n. 7. Rather, it is compelled by common law precedent. *Id.* As such, even if the law of the case doctrine does not apply, defendant is precluded from raising the issue for the first time on appeal because his challenge does not fall under RAP 2.5.

In order to challenge this instruction, it must have been objected to below. In the instant case, no objection to this jury instruction was raised. There is no ruling from the trial court to be considered on appeal. As such, 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 in this appeal.

3. THE JURY INSTRUCTIONS WERE PROPER AND DID NOT MISLEAD THE JURY.

Jury instructions are proper where, read together, they correctly inform the jury of the applicable law, do not mislead the jury and, allow both parties to argue their theories of the case. *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Claimed errors of law in a jury instruction

are reviewed *de novo*. *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521 P.3d 1193 (2007). Errors in jury instructions are subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Defendant challenges jury instruction number 28, which instructed the jury on how to enter a special verdict. Appellant's brief at 12, CP 204-236, jury instruction no. 26-8. Defendant argues that when read in conjunction with instructions 26, 27, the instruction was not clear. *Id.* Jury instruction no. 28 states:

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and 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 have a reasonable doubt as to the question, you must answer "no."

CP 204-236.

- a. The special verdict instruction given in this case was a correct statement of the law.

Goldberg established that unanimity was only required for finding in the affirmative on a special verdict for a sentence enhancement. This decision was applied by the court in *State v. Coleman*, 152 Wn. App. 552, 216 P.3d 479.

The trial courts in *Goldberg* and *Coleman* instructed their juries that: "In order to answer the special verdict form "yes", you must

unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no.” **Goldberg**, 149 Wn.2d 888, 893, **Coleman**, 152 Wn. App. at 565. In both cases, the jury returned non-unanimous “no” answers on the special verdict forms. **Goldberg**, 149 Wn.2d at 891, **Coleman**, 152 Wn. App. at 559. Each jury was polled, and upon finding that the jury was not unanimous, both trial judges instructed the jury to continue deliberations in an effort to reach a unanimous verdict. *Id.*

The Washington Supreme Court in **Goldberg**, and this Court in **Coleman**, held that it was error for the jury to be ordered to continue deliberations after returning a non-unanimous “no” answer on the special verdicts, because the non-unanimous “no” constituted a valid verdict when it is returned. **Goldberg**, 149 Wn.2d at 894, **Coleman**, 152 Wn. App. at 565. In addition, both courts specifically noted that the instructions given did not require that the jurors be unanimous in order to answer “no” on the special verdict forms. **Goldberg** 149 Wn.2d at 894, **Coleman**, 152 Wn. App at 565.

Recently, the Washington Supreme Court upheld the **Goldberg** ruling, and clarified its holding that unanimity was only required in order to answer “yes” to the special verdict inquiry. **State v. Bashaw**, 169 Wn.2d 133, 145, 234 P.3d 195 (2010). In that case, the court instructed the jury, in their written instructions, that they must be unanimous in order to answer either yes or no. *Id.* The court noted that **Goldberg** had

established that a “no” answer need not be unanimous, and instructing the jury otherwise was error. 169 Wn.2d at 146, *citing Goldberg*, 149 Wn.2d at 895. Because the instruction at issue in *Bashaw* contained different language from that issued in *Goldberg*, the court in *Bashaw* reaffirmed the rule in *Goldberg* without considering the specific language of the instruction given in that case. Rather the *Bashaw* court held that the written instruction requiring unanimous “no” answers was akin to the oral order of the judge in *Goldberg* requiring the jury to return to deliberations after they had returned a valid special verdict answer. 169 Wn.2d at 203. Because the court in *Bashaw* did not consider the language of the instruction in *Goldberg*, none of the three cases, *Goldberg*, *Coleman*, or *Bashaw*, supports defendant’s claim that the instruction in this case was deficient. Moreover, to the extent that the court in *Bashaw* did not take issue with the *Goldberg* instruction, the implication is that the instruction is in fact valid.

i. The instruction issued in this case was valid under *Goldberg*.

The same instruction issued in this case was issued in *Goldberg*, 149 Wn.2d at 893, and *State v. Coleman*, 152 Wn. App. at 564. The Court did not find error in the instruction in either case. *Goldberg* 149 Wn.2d at 894, *Coleman*, 152 Wn. App. at 565. Rather, the courts found that the juries performed as instructed in returning non-unanimous “no” answers to the special verdict inquiries. *Id.*

The instruction given in the case at hand is the same as that which the courts found instructed the juries that a non-unanimous no answer was allowed in both *Goldberg* and *Coleman*. *Id.*, CP 204-236, jury instruction no. 28. As such, under both cases, the instruction given in this case is a correct statement of the applicable law.

ii. The issue in *Goldberg* was the trial judge's order that the jury return to deliberations

The error in both *Goldberg* and *Coleman* was the trial court's order that the jury return to deliberations after reaching a non-unanimous "no" answer on the special verdict form. 149 Wn.2d at 894; 216 P.3d at 485. Defendant does not raise this as an issue in this case.

This case is distinguishable from *Goldberg* and *Coleman* in that the jury did not return a non-unanimous verdict. *Id.*, CP 6, 8. Thus, although there was error in *Goldberg* and *Coleman*, no such error occurred in this case.

iii. The special verdict instruction given in this case is not defective under *Bashaw*.

The instruction given in *Bashaw* read: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." *Id.* at 139. In *Bashaw*, the court held that the special verdict instruction itself was in error. *Id.* at 146. The *Bashaw* court adopted the ruling of the *Goldberg* case, and held that the instruction stating that the jury must be

unanimous in order to answer no functioned in the same way that the judge's order to return to deliberations did in *Goldberg*. *Id.* The *Bashaw* decision does not invalidate the instruction given in *Goldberg*, but rather reaffirms that a jury need not be unanimous in order to return a "no" answer to the special verdict inquiry. *Id.*

Because the jury here was never instructed to be unanimous in order to answer no, either through the written instructions, or by the judge ordering a return to deliberations, the jury instruction is not unlawful under *Bashaw*.

- b. The jury instructions given were not misleading.

Instruction no. 27 informed the jurors that they "must fill in the blank provided in *verdict form* [A or B] the words 'not guilty' or the word 'guilty', according to the decision you reach." CP 219-52, jury instruction no. 27. The instructions go on to explain that the jury must be unanimous in order to enter either verdict. *Id.* The special verdict forms had their own instruction stating:

You will also be furnished with *special verdict forms* for the charge of Assault. If you find the defendant not guilty of Assault in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, do not use *Special Verdict Form A*. If you find the defendant guilty of Assault in the First Degree, you will then use *Special Verdict Form A* and fill in the blank with the answer "yes" or "no" according to the decision you reach. If you find the defendant guilty of Assault in the First Degree, do not use *Special Verdict Form B*...

In order to answer the *special verdict form* “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no.”

CP 204-236, jury instruction no. 28 (emphasis added). The differences in the instructions and the order in which the forms must be used clearly delineated between the requirements for verdict forms and special verdict forms.

The jury instructions were not misleading when read in their entirety. The instructions clearly differentiated between *verdict forms* and *special verdict forms*, and there was a different instruction associated with each. CP 204-236, jury instruction no. 27-28. The instructions for the *verdict forms* required that the jury enter “guilty” or “not guilty” into the blank on the form, where the *special verdict forms* required that the jury enter “yes” or “no” into the blank. CP 204-236, jury instruction no. 27-8, CP 253-260. Moreover, the jury was instructed that they were not to use the *special verdict forms* unless and until they came to a unanimous guilty verdict on the *verdict forms*. CP 204-236, jury instruction no 27-8. After reading all the instructions as a whole, it is clear that the unanimity instruction for guilty and not guilty verdicts does not apply to the special verdicts. The unanimity instructions for special verdicts did not require unanimous “no” answers.

The court here instructed the jury that they should each decide the case for themselves, and not change their mind solely for the purpose of reaching a unanimous verdict. CP 204-236, jury instruction no. 26. This is in the same instruction as the instruction indicating that the jury should strive for a unanimous verdict. *Id.* This indicated to the jurors that unanimity is important, but not so important as to warrant the jurors giving up their personal beliefs as to the evidence presented.

A jury is presumed to have followed the instructions given unless there is something in the record which overcomes this presumption. *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010), *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Under an identical special verdict instruction as that given in the case at hand, the juries in both *Goldberg* and *Coleman* returned non-unanimous “no” answers to the questions in the special verdicts under the same instruction given in this case, indicating that the instruction is clear that such a non-unanimous answer is acceptable. 149 Wn.2d at 891 and 216 P.3d at 485. The opinions written in both cases clearly expressed that the special verdict instruction did not require unanimity. *Goldberg*, 149 Wn.2d at 894 and *Coleman*, 216 P.3d at 485. The jury instructions in the instant case were neither incorrect nor misleading, and the jury’s special verdicts should be upheld.

4. EVEN IF THE COURT WERE TO HOLD THE INSTRUCTION WAS ERRONEOUS, ANY SUCH ERROR WAS HARMLESS.

Even if this Court were to determine that the jury instruction regarding the special verdict forms contained an error, it is subject to a harmless error analysis. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In this case, such error was harmless. Unlike the jury instruction in *Bashaw* which specifically required unanimity for both “yes” and “no” answers, the instructions in this case made no specific requirement for a unanimous “no” answer. CP 204-236, jury instruction no. 28.

Defendant argues that the prejudice he suffered was that he was divested of the benefit of the doubt by the instruction given. Appellant’s Brief at 12-13. However, it is unlikely that the outcome of the trial would have been different if the jury had been instructed differently. The jury was instructed that:

“for the purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime of Assault.”

CP 204-236, jury instruction no. 29. In addition to finding defendant guilty of one count of assault, the jury also found defendant guilty of one count of unlawful possession of a firearm in a separate count, but arising out of the same incident. CP 1-5, 9. Both of these verdicts were required

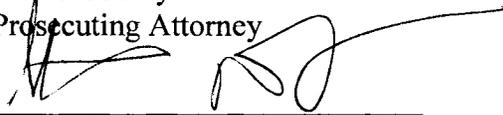
to be unanimous. CP 204-236, jury instruction no. 27. The jury was properly instructed to be unanimous when they reached its verdict for assault, and for the unlawful possession of a firearm, and it returned guilty verdicts on both counts. Defendant is unable to show that the jury's finding on the special verdict would have been different under a different instruction where the jury's special verdict was consistent with their guilty verdict for unlawful possession of a firearm. Because defendant is unable to demonstrate prejudice, any error in the jury instruction was harmless.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that the defendant's sentence be affirmed.

DATED: May 13, 2011.

MARK LINDQUIST
Pierce County
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WSB # 30925

Margo Martin
Legal Intern

CLERK OF SUPERIOR COURT
COUNTY OF TACOMA
WASHINGTON

11 MAY 13 PM 3:37

STATE OF WASHINGTON

BY _____
DEPUTY

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.13.11 Sherril Ken
Date Signature