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No. 41476-7-II STATE OF WASHINGTON  
BY Cm DEPUTY

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

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STATE OF WASHINGTON,  
Respondent,

v.

MARIO MARTINEZ,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE GORDON L. GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## STATEMENT OF FACTS

The appellant's statement of facts is complete and sufficient for the purposes of litigating the issues on appeal.

## ARGUMENT

**(1) Court Rule did not require the mental instruction to finding assault be read to the jury.**

The appellant cites *State v. Sanchez*, 122 Wn.App. 579, 94 P.3d 384 (2004), as precedent that all jury instructions must be read to the jury in open court. This is not the case and the court rule on the matter is clear. CrR 6.15(f) states the rule as to answering jury inquiries. In this case the jury asked the court after it began deliberation for an additional instruction on the definition of assault. CrR 6.15(4) states "any additional instruction upon any point of law shall be given in writing."

The decision in *Sanchez* was made based on CrR 6.15(d), which describes the procedure for the instruction of the jury. This court rule is primarily concerned with the order and procedure regarding closing arguments of the parties. It does state that the court shall read instructions to the jury, and then the parties will have an opportunity to make their

closing arguments. CrR 6.25(f) lays out the procedure for answering questions from the jury during deliberations, which allows additional instructions to be given in writing. Reading these two rules together there is now confusion as the intent of the Supreme Court. The first rule was intended to simply define the procedure of closing arguments and the second section was intended to define the procedure when questions were asked by the jury.

Clearly from this rule the Supreme Court anticipated that additional instructions as to law could be given to the jury by the court and those additional instructions need only be given in writing.

This assignment of error must be denied.

**(2) The instruction regarding the special verdict form was proper.**

If one reads the closing instruction given in this case in its entirety, it is clear that the instruction makes a distinction between the verdict form and the special verdict form. (CP 66, Instruction No. 22).

When discussing the special verdict form, the closing instruction explains that the jury must be unanimous in order to answer “yes.” It does not make such a requirement for the jury to answer no. It simply states “if you have reasonable doubt as to the questions, you must answer no.”

This instruction then goes on to say that in order to render a verdict the jury must unanimously agree. This statement refers to the verdict forms described A and B and is a proper statement of the law. In order

vote not guilty each juror must agree that not guilty is the proper answer. Taken as a whole, this jury instruction is correct.

The instructions were approved by both parties without exception. (RP 33-34). Even if this court were to find that the jury was improperly instructed, any such claimed error is not of constitutional magnitude and may not be raised for the first time on appeal. The issue presented does not involve a “manifest error affecting a constitutional right” RAP 2.5(a)(3). The claimed error herein is not “manifest” and is not of constitutional dimension. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). “Manifest” for purposes of RAP 2.5(a)(3) requires a showing of actual prejudice. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).

In *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), the Supreme Court made it clear that an error as claimed herein is not of constitutional dimension. *Bashaw*, 169 Wn.2d at p. 146 fn. 7.

This rule is not compelled by constitutional protections against double jeopardy, *cf. State v. Eggleston*, 164 Wn.2 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), *cert. denied*, 129 S.Ct. 735 (2008), but rather by the common law precedent of this court, as articulated in *Goldberg*.

Accordingly, this assignment of error must be denied.

**CONCLUSION**

For the reasons stated above, the State asks the court to deny appellant's claimed errors and affirm the conviction.

DATED this 24 day of August, 2011.

Respectfully Submitted,

By:   
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**DECLARATION OF MAILING**

MARIO MARTINEZ,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 24<sup>th</sup> day of August, 2011, I mailed a copy of the Brief of Respondent

to:

Eric J. Nielsen  
Attorney for Appellant  
1908 East Madison Street  
Seattle, WA 98122

by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 24<sup>th</sup> day of August, 2011, at Montesano, Washington.

Barbara Chapman