

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 41912-2-II *ppp*

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

JEREMY JAMES BONO

Petitioner.

REPLY BRIEF OF PETITIONER

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THE PETITIONER answers the issues raised by the Respondent in this Reply Brief.

I.

Petitioner has not shown prejudicial, constitutional error or a fundamental defect resulting in a complete miscarriage of justice.

Petitioner is well aware that the Court, on a Personal Restraint Petition, will not retry the case and that only errors which could have changed the outcome of the trial will be considered. Further, the Petitioner reviewed the Defendant's brief on appeal and did not revisit any of those issues. This Personal Restraint Petition contains only significant issues which Petitioner believes denied him a fair trial.

RAP 16.4 provides:

“Personal Restraint Petition – Grounds for Remedy

(a) Generally. Except as restricted by Section (d), the Appellate Court will grant appropriate relief to a Petitioner if the Petitioner is under a ‘restraint’ as defined in Section (b) and the Petitioner’s restraint is unlawful for one or more of the reasons defined in Section (c).

....

(c) Unlawful nature of restraint. The restraint must be unlawful for one or more of the following reasons:

....

(2) the conviction was obtained or the sentence or other order entered in a criminal proceedings or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of United States or the Constitution or laws of the State of Washington; or

(3) material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) there has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence or other order entered in a criminal proceeding or civil

proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the challenged legal standard; or

....

(7) other grounds exist to challenge the legality of the restraint of Petitioner.”

The State argues to this Court that the Petitioner is presenting the same grounds presented on appeal or that this Petitioner is reformulating the issues on appeal. However, this Petitioner has assiduously avoided the issues before the Court of Appeals.

The following is a compendium of the matters addressed by the Court of Appeals:

1. Prosecutorial misconduct – This was limited to final argument and to the issue of Wilson soiling his clothes to prevent a sexual assault.
2. Deadly weapon enhancement – The appeal was limited to whether two rocks and a plastic/glass bottle could be considered a “deadly weapon”.
3. Introduction of improper evidence – Corpus Delicti – This was rejected by the Court of Appeals and this Petitioner has not addressed it.
4. Mens rea and actus rea – Again, this has not been addressed by this Petitioner.
5. Unrelated beating of Vasquez – This was not addressed by this Petitioner.
6. Vasquez’s statement re: Bono’s threat to Wilson if he slept with his sister – Again, this is not addressed in the Personal Restraint Petition.

This Petitioner has respected to the fullest the integrity of the decision of the Court of Appeals.

State’s Contentions:

- a. Petitioner has failed to show he preserved error on accomplice liability instruction or that instruction was Constitutionally deficient.

The State contends that Petitioner has failed to demonstrate any Constitutional instruction error or show that he suffered actual prejudice. In the State's Response to Petitioner's First Ground of alleged error, the State confines its response to analyzing only the language of Instruction 7 and only in reference to one of the criticisms in *State v. Cronin*, 142 Wn. 2d 568, 14 P. 3d 752, and *State v. Roberts*, 142 Wn. 2d 471, 14 P. 3d 713, that being the interchange within the instruction of "a crime" for "the crime". However, Petitioner's allegations of error go well beyond this. In addition to the transposition of "a" for "the", this instruction was given where the underlying crime was Assault 2nd. Even if the jury would not have been misled by use of "a" and had focused on "the" crime, that crime under the facts of this case, could have been Second Degree Assault to establish accomplice status on the part of Jeremy Bono. Having taken that first step, the jury could then have convicted Jeremy Bono of Assault 1st, even though the elements distinguishing Assault 1st from Assault 2nd had not been proved.

Further, the Response of the State does not address the argument of the Prosecuting Attorney, who essentially told the jury they could do whatever they wanted to do because, in addressing the instructions, the very first instruction he discusses with the jury is the "to convict" instruction, No. 15, which sets forth the elements distinguishing First Degree Assault from Second Degree Assault. And, the Prosecuting Attorney tells the jury that there is now "a little twist" now that the case is over and that the jury does not "have to decide the truth" of everything nor does it have to decide "beyond a reasonable doubt" what really happened.

The State's Response does not address this. And, this final argument in conjunction with the manner in which this instruction was drafted clearly relieved the State of its Constitutional burden to have the State prove every essential element of a crime beyond a reasonable doubt, and, clearly, would have been extremely prejudicial to Jeremy Bono.

The State advises this Court that “the State must prove only that the accomplice had general knowledge of his co-participants substantive crime, not that the accomplice had specific knowledge of the elements of the co-participants crime”. (State’s Resp., P. 10, L. 1) And, “the instruction given in Petitioner’s case tracks the language of the accomplice liability statute”. (State’s Resp., P. 11, L. 1) Both of these statements by the State were the law of the State of Washington. However, neither is now the law as both were overruled by the decisions in State v. Cronin, 142 Wn. 2d 568, 14 P. 3d 752, and State v. Roberts, 142 Wn. 2d 471, 14 P. 3d 713. The Court in Cronin said:

“In our judgment, in order for one to be deemed an accomplice, that individual must have acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged. Because the jury instruction which was given in the Bui and Cronin trials permitted the jury to find accomplice liability on an incorrect legal basis, they were legally deficient. The fact that the instruction was modeled on a Washington pattern instruction for a criminal case does not alter our conclusion.”

The State in Cronin, as does the State in this litigation, also argued that even if the instruction was legally incorrect, the error was harmless. In rejecting this contention and in also providing comment on the final argument given in this litigation, the Court said:

“The State contends that even if the jury instruction that was given in the Bui and Cronin trials is legally incorrect, any error that resulted therefrom was harmless...”

In addressing the harmless error issue, we first observe that the State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld... We also note that a conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden. State v. Jackson, 137 Wn. 2d 712, 976 P. 2d 1229 (noting that ‘the State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. It is reversible error to instruct the jury in a manner that would relieve the State of this burden.’) With these precepts in mind, we turn to the question of whether the instructional error in these cases can be labeled harmless.

....

... Because the instruction relieved the State of the burden of having to prove beyond a reasonable doubt that Cronin knew he was facilitating the crime of murder, the instructional error cannot be deemed harmless.”

The State does not address the fact that Instruction 7 also departs from the statute in permitting the finding of guilt on an alleged accomplice if the accomplice solicits or aids any other person to commit the crime. The instruction does not require that such solicitation or aid be given to the conduct of “such other person” as is required by RCW 9A.08.020. In other words, an accomplice can solicit or aid any other person in steps towards accomplishing the crime charged but not actually aid or solicit the person who actually commits the crime, and yet be found guilty under the wording of Instruction 7. This, obviously, is not what was intended by the statute. RCW 9A.08.020 provides:

“(2) A person is legally accountable for the conduct of another person when:

....

(c) he is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages or requests such other person to commit it.”

Instruction 7, however, told the jury:

“A person is guilty of a crime if it is committed by the conduct of another person for whom he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) Solicits, commands, encourages or requests another person to commit the crime; or
- (2) Aids or agrees to aid another person in planning or committing the crime.”

Here, the jury might well have found that Jeremy Bono requested Tracy Vasquez to have Garret Wilson at his home when he and Metcalf arrived and to thereafter engage in conduct and make statements with the investigating officers such as to mislead them into thinking that Metcalf had nothing to do with what occurred to Wilson.

And such a finding would not provide any proof that Jeremy Bono provided any aid to Metcalf in the actual assault on Wilson. And, given the numerous phone calls Metcalf made to Vasquez, this would have been a reasonable conclusion for the jury to draw.

In *State v. Asaeli*, 150 Wn. App. 543, 208 P. 3d 1136, the Court reversed a conviction of Second Degree Felony Murder against one Vaielua – reversed and ordered the charges dismissed where the facts showed that four gang members, including Vaielua, arrived in a vehicle driven by Vaielua at Thea Foss Park and that just prior there had been discussion at a bar about the improper actions of one Fola, the murder victim; and that two other cars arrived at the same time as the vehicle driven by Vaielua and that two of the occupants of Vaielua’s Explorer covered their faces with brown bandanas (which the evidence showed were indicia of gang membership); and that after arriving Vaielua asked the group assembled for Fola and that Williams, one of the passengers in Vaielua’s Explorer, located Fola and walked to his car and placed one of his hands on the roof of the car and started talking to Fola, with two other persons present, one of whom also came from Vaielua’s Explorer. Someone then asked Fola if he wanted to fight. At that time

Fola leaned over in the car reaching for something and Williams stepped back and tapped Asaeli on the shoulder at which time Asaeli shot and killed Fola.

In spite of the fact that Vaielua had been at a bar with all of the persons involved in the later altercation at Thea Foss Park and that he drove two of the active participants in the murder of Fola to the place of the shooting and that he himself asked for Fola when they all arrived at Thea Foss Park, and even though two of the men from the Explorer had covered their faces with brown bandanas, the Court in dismissing the charges against Vaielua said:

“At best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate Fola but the record contains no evidence, direct or indirect, establishing that Vaielua was aware of any plan by Asaeli, Williams or anyone else to assault or shoot Fola. The law is well settled that mere presence is not sufficient to prove complicity in a crime. *State v. Roberts*, 80 Wn. App. 342, 908 P. 2d 892. Accordingly, there was insufficient evidence to prove Vaielua’s complicity in the shooting. His mere presence at the scene with knowledge that others were looking for Fola is not sufficient to support this conviction.”

What is there so different about this set of facts to distinguish it from facts in instant litigation? The aggressors in both cases, Vaielua and Metcalf, were driven to the scene by the Defendants. Immediately upon leaving Vaielua’s Explorer, two of his passengers put brown bandanas around their faces and all, including Vaielua, began asking for the whereabouts of Fola. Williams and Asaeli spoke together at the bar where Vaielua was also present, they all arrived simultaneously at the park, several members of the group with whom they arrived called out asking for Fola, and Williams, Vaielua’s passenger, invited Fola to fight. Other than some very difficult to understand hearsay testimony about Jeremy Bono’s sister being arrested for shoplifting while Wilson was one block away, there is no material difference between these sets of circumstances.

Vaielua did not shoot Fola. Jeremy Bono did not assault Garret Wilson. Other than the Court engaging in some very speculative conjectures, Metcalf, as did Vaielua, had an animus against Wilson and acted it out in Jeremy Bono's truck.

The State argues in its second Response as follows:

“b. Petitioner did not preserve a claim of error as to the lack of an instruction defining ‘knowledge’ and cannot show any error of Constitutional magnitude cognizable for relief in a collateral attack.

In instant litigation, with the facts as they are, Petitioner believes that an instruction on “knowledge” would have been required, or, at the very least, would have been extremely helpful to the jury.

And, in its third Response, the State alleges as follows:

“c. The ‘to convict’ instruction properly set forth the elements of the crime and Petitioner’s challenge to this instruction shows a misapprehension of Washington’s accomplice liability law.”

The decision in *State v. Thomas*, 150 Wn. 2d 821, 83 P. 3d 970 (2004), disposes of both of the State’s arguments in response to the Defendant’s Second Ground in his Petition. As for the State’s argument that “Petitioner did not object to this instruction in the trial court and it is the law of the case. Petitioner is precluded from challenging this instruction on either direct appeal or collateral attack unless he raises an issue of Constitutional magnitude.” (State’s Resp., P. 14, L. 8), the Court in *State v. Thomas* said:

“While Thomas did not object at trial to the aggravating factors and ‘to convict’ instructions, as noted in *Roberts*, ‘extensive authority supports the proposition that instructional error of the nature alleged here is of sufficient Constitutional magnitude to be raised for the first time on appeal.’”

And, as to the second argument that “the prosecution needs to prove only that the accused knew that the principal intended to commit an assault generally” (State’s Resp., P. 14, L. 2), the Court in Thomas said:

“In Roberts, the ‘to convict’ instruction was erroneous because it ‘informed the jury that the elements of crime could be committed by Roberts ‘or someone to whom he was an accomplice...’. Therefore, the ‘to convict’ instruction did not require the jury to find that Roberts acted with premeditated intent...’

....

... When jury instructions as used in (Roberts) case allow for the possibility that the Defendant was convicted solely as an accomplice to Premeditated First Degree Murder, the Defendant may not be executed unless the jury expressly finds (1) the Defendant was a major participant in the acts that caused the death of the victim; and (2) the aggravating factors under the statute specifically apply to the Defendant.

....

... Thomas is correct in his insistence that the error in his aggravating factors instruction is more egregious than that in Roberts because the first question in Thomas’s instruction reads ‘the Defendant or an accomplice committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime...’ The ‘or’ removes a requirement that the jury find any form of actus reus at all on Thomas’s part and relieves the State of its burden to prove the aggravating circumstances as they pertain to the Defendant.”

The State is simply wrong in the position it takes on Petitioner’s Second Ground. The State also argues that “Washington law does not require the prosecution to prove that Petitioner assaulted the victim or that he used a deadly weapon or that he had the intent to inflict great bodily harm in order to convict him of Assault in the First Degree”. (State’s Resp., P. 14, L. 21)

And, the State further argues:

“Therefore, an accused who knows that his conduct will aid an assault is liable as an accomplice to assault whether or not he

knows of the facts that would determine the degree of the crime. The prosecution is not required to prove that the accused had knowledge that the principal intended to assault the victim with a deadly weapon or that the principal intended to inflict great bodily harm. Rather, the prosecution needs to prove only that the accused knew that the principal intended to commit an assault generally. By facilitating an assault on the victim, the accused runs the risk that an accomplice would elevate the assault to a First Degree offense. (State's Resp., P. 13, L. 23)"

This position, taken by the State, is in absolute contrast to the holding in Thomas. In discussing this issue the Thomas Court said:

"In Roberts, the 'to convict' instruction was erroneous because it 'informed the jury that the elements of the crime could be committed by Roberts or someone to whom he was an accomplice...'

Therefore, the 'to convict' instruction did not require the jury to find that Roberts acted with premeditated intent...

....

The 'to convict' and aggravating factors instructions were erroneous in conjunction with one another because they 'allow a Defendant to be sentenced to death without a showing that he or she personally caused the death or was a major participant in the homicidal acts'.

Thus, 'when jury instructions as used in (Roberts) case allow for the possibility that the Defendant was convicted solely as an accomplice to premeditated first degree murder, the Defendant may not be executed unless the jury expressly finds (1) the Defendant was a major participant in the acts that caused the death of the victim, and (2) the aggravating factors under the statute specifically apply to the Defendant."

And, we know that Jeremy Bono did not assault Garret Wilson because the prosecuting attorney specifically told the jury in final argument: "It's a case of Jeremy, who did not commit any physical assault himself against this person...."

And, clearly the instruction is erroneous. And, applying the “harmless error” analysis, the

Court in Thomas advises that:

“As applied to omissions or misstatements of elements in jury instructions, ‘the error is harmless if that element is supported by uncontroverted evidence’. Brown, 147 Wn. 2d at 341, 58 P. 3d 889 (citing Neder, 527 US at 18, 119 S. Ct. 1827). Thus, in Brown the error in the accomplice liability instruction was harmless beyond a reasonable doubt where there was sufficient evidence in the record indicating the particular Defendant was a principal in certain of the charges.”

Since the prosecuting attorney has advised the jury that Jeremy Bono did not assault Garret Wilson where, in all of the speculative evidence that remains, do we find any “uncontroverted evidence” that Jeremy Bono was a major participant? The answer, of course, is there is none.

Petitioner’s Third Ground:

The State did not offer a Response to Petitioner’s Third Ground. To a certain extent, Petitioner’s Third Ground bears similarity to the argument under Petitioner’s Second Ground. However, the decision in State v. Thomas, supra, has particular significance to Petitioner’s Third Ground, especially in light of the final argument of the Prosecuting Attorney where he told the jury:

“It’s a case of manipulation. It’s a case of Jeremy, who did not commit any physical assault himself against this person, but he took someone who nobody would know, who the victim wouldn’t be able to say I know that person, I can identify that person, I know his name.” (RP 589)

For, as the Court said in Thomas, “the ‘or’ removes a requirement that the jury find any form of actus reus at all on Thomas’s part and relieves the State of its burden to prove the aggravating circumstances as they pertain to the Defendant. That is to say, this instruction permits the jury to impose a death sentence on Thomas even if it finds that the aggravating

factors apply only to Rembert, his accomplice.” Such is also the case with the aggravating factors separating Assault First from Assault Second.

Petitioner’s Fourth Ground:

In Instruction 25, the jury was instructed:

“For purposes of a special verdict, the State must prove beyond a reasonable doubt that the Defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime in Count I. The State must also prove beyond a reasonable doubt that there is a connection between the deadly weapon and the Defendant or an accomplice, and between the deadly weapon and the crime.”

There was no weapon produced in Court as used by the Defendants, and certainly not by Jeremy Bono. From the photograph of Garret Wilson, it is obvious he sustained injuries. However, these could have come, and most likely did, from Metcalf’s kicking of Garret Wilson.

As the Court said in *State v. Eckenrode*, 159 Wn. 2d 488, 150 P. 3d 1116:

“The statutes relating to weapons enhancements do not define what it means to be armed. See RCW 9.94A.523, .602. After consideration, we held that ‘a person is ‘armed’ if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.’ *State v. Valdobinos*, 122 Wn. 2d 270, 282, 858 P. 2d 199... But a person is not armed merely by virtue of owning or even possessing a weapon; there must be some nexus between the Defendant, the weapon, and the crime. *Barnes*, 153 Wn. 2d at 383, *Valdobinos*, 122 Wn. 2d at 282.

Courts are especially careful in this area because of the Constitutional right to bear arms. U.S. Const. Amend. II... *State v. Johnson*, 94 Wn. App. 882, 892-97, 974 P. 2d 855 (1999) (inappropriate to send deadly weapon enhancement to the jury without some showing of both accessibility and nexus).”

In a case decided subsequent to the Appeal in this litigation, *State v. Pineda-Pineda*, 154 Wn. App. 653, 226 P. 3d 164 (March 2010), the Court clearly shows that this would be an erroneous instruction and such an instruction could not be the basis to impose a sentence enhancement on an accomplice. This was a case of first impression and it holds that the

accomplice liability statute does not contain language which would trigger a penalty enhancement and the Court, in quoting from the decision in McKim goes on to hold that for the deadly weapon enhancement provision to apply to an unarmed Defendant, the State must have proven beyond a reasonable doubt that Jeremy Bono knew Metcalf was armed with a deadly weapon. There was no such proof in this case and the jury was not so instructed. The Court said:

“Pineda-Pineda first makes a plain language argument, pointing out that the accomplice liability statute itself, RCW 9A.08.020, contains no language making one person accountable for sentence enhancements based on accomplice liability. Pineda-Pineda is correct that the accomplice liability statute cannot be the basis to impose a sentence enhancement on an accomplice. State v. McKim, 98 Wn. 2d 111, 115-16, 653 P. 2d 1040 (analyzing RCW 9A.08.020 and concluding that it did not provide a triggering device for penalty enhancement, as the old accomplice liability statute, former RCW 9.01.030 did).

....

In McKim, the Court held that ‘for the deadly weapon enhancement provision to apply to an unarmed co-Defendant, the State must prove beyond a reasonable doubt that the accused knew his or her accomplice was armed with a deadly weapon at the time of the commission of the crime.’ However, after the Court decided McKim, the Legislature in former RCW 9.94A.12 superseded McKim’s holding by revising the firearm enhancement scheme to read, ‘the jury shall if it finds the Defendant guilty, also find a special verdict as to whether or not the Defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime’.

While the Legislature superseded the holding in McKim by amending the firearm enhancement statute to allow enhancement on the basis of accomplice liability, McKim’s explanation of the difference between liability for substantive crimes, as established by RCW 9A.08.020, and liability for sentencing enhancements is still valid. The McKim Court explained:

‘We recognize that in most Courts involving the use of deadly weapons, the co-participants are aware that one or more of them is armed. That is no reason, however, for imposing strict liability of penalty enhancements on all co-participants without regard to each

participant's knowledge that another is so armed. Such strict liability was possible under the old accomplice liability statute.... The new complicity statute, by contrast, makes an accomplice equally liable only for the substantive crime – any sentence enhancement must depend on the accused's own misconduct.”

There is absolutely no evidence showing any misconduct on the part of Jeremy Bono regarding the deadly weapon enhancement and therefore that should not have been submitted to the jury, and the deadly weapon enhancement should not have created guilt as part of accomplice liability.

Sentence Enhancement Instruction Erroneous for Additional Reason:

The Trial Court gave the jury as a special verdict enhancement Instruction No. 25 which read:

“For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime in Count I. The State must also prove beyond a reasonable doubt that there was a connection between the deadly weapon and the defendant or accomplice, and between the deadly weapon and the crime.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible for offensive or defensive purposes. If one participant in a crime is armed with a deadly weapon all accomplices are deemed to be so armed, even if only one deadly weapon is involved.

A deadly weapon is an implement or instrument, which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pip or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.”

And, in Instruction 24, the jury was instructed:

“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 proper form of verdict or verdicts to express your decision.”

By so instructing the jury, the Trial Court violated the holding in *State v. Bashaw*, 169

Wn. 2d 133, where the Court held:

“The jury instruction issue in this case is a narrow one: when a jury has unanimously found a defendant guilty of a substantive crime and proceeds to make an additional finding that would increase the defendant’s sentence beyond the maximum penalty allowed by the guidelines, must the jury’s answer be unanimous in order to be final? We answered this question in *State v. Goldberg*, 149 Wn. 2d 888, 72 P. 3d 1083 (2003), and the answer is no. 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.

....

Applying the Goldberg rule to the present case, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law... The jury instruction here stated that unanimity was required for either determination. That was error.

In order to hold that a jury instruction error was harmless ‘we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error... 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. As such, we vacate the remaining sentence enhancements and remand for further proceeding consistent with this opinion. The special enhancement should be set aside.”

Instruction 25 suffers from the same infirmity!

State v. Richard Paul Moore:

Additionally, the decision in *State v. Richard Paul Moore*, 2011WL240676 (Wash. App. Div. I), where Moore was charged with assault, is directly on point on this issue. As the Court of Appeals explained the issue:

“Moore also contends that the jury instructions accompanying the special verdict form incorrectly stated the law. The State sought a deadly weapon sentence enhancement. The Trial Court instructed the jury to use the special verdict form if it found Moore guilty of assault. The Court further instructed the jury that it had to be unanimous to answer the form... Moore argues for the first time on appeal that the Trial Court committed reversible error in instructing the jury that it had to be unanimous to answer ‘no’ to the special verdict form.

Moore relies on State v. Bashaw to support this argument. There, the State charged Bashaw with three counts of delivery of a controlled substance and sought a school bus zone sentence enhancement... In the instruction explaining the special verdict forms, the Court told the jury, ‘Since this is a criminal case, all 12 of you must agree on the answer to the special verdict.’

Our Supreme Court held this instruction was erroneous:

‘Though unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error.’...

The State counters that Moore failed to preserve this issue for our review. An error may be raised for the first time on appeal if it is a manifest error affecting a Constitutional right. An error is ‘manifest’ if it had ‘practical and identifiable consequences in the trial of the case’.

....

But it is ‘well settled that an alleged instructional error in a jury instruction is of sufficient Constitutional magnitude to be raised for the first time on appeal’. Moreover, the Bashaw Court apparently regarded this issue as the Constitutional one.”

Petitioner’s Seventh Ground:

The State, in its Response, offers no argument against Petitioner’s Seventh Ground. And, while Petitioner’s Brief on Appeal did discuss cumulative error, it was restricted to two paragraphs and was based entirely on the prosecutor’s “improper inflammatory arguments based

on facts not contained in the record”. Petitioner’s Seventh Ground goes considerably beyond that argued at Appeal.

From the prosecutor having Vasquez testify that he met Jeremy Bono in a “drug association” and advising the jury that the State had listened to conversations between Vasquez and Metcalf and clearly implying to the jury that these Defendants were in jail and then referring to Mr. Bono as a “thug” and then alleging that the Defendants were going to perform acts of a sexual nature against Mr. Wilson, this, and more, clearly deprived Jeremy Bono of a fair trial.

Respectfully Submitted this 18th day of October, 2011.



Richard F. DeJean
Attorney for Petitioner

WSBA #2548

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STATE OF WASHINGTON
BY _____
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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

JEREMY JAMES BONO)

Case No. 41912-2-II

Petitioner,)

CERTIFICATE OF SERVICE

I, Brenda M. High, certify under penalty of perjury under the laws of the State of Washington that on October 20, 2011 I served the documents; namely, Reply Brief of Petitioner, to which this is attached to the party listed below in the manner shown:

Kathleen Proctor
Deputy Prosecuting Attorney
930 Tacoma Ave. S., Room 946
Tacoma, WA 98402-2171

[] By United States Mail
[X] By Legal Messenger
[] By Facsimile
[] By Overnight Fed Ex Delivery

Brenda High

Brenda High
Legal Secretary to Richard F. DeJean