

NO. 41916-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY RANDALL,

Appellant.

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

REPLY BRIEF OF APPELLANT

JAN TRASEN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

1. THE FAILURE TO ELECT OR GIVE A UNANIMITY INSTRUCTION WAS NOT HARMLESS; THEREFORE, REVERSAL IS REQUIRED..... 1

 a. In multiple acts cases, a jury must be unanimous beyond a reasonable doubt as to which particular act constitutes the crime charged..... 1

 b. The court’s failure to give the unanimity instruction to the jury was not harmless.....2

2. WITHOUT A UNANIMOUS AND SPECIFIC VERDICT, THE STATE FAILED TO PROVE THE CHARGES BY SUFFICIENT EVIDENCE.....7

 a. The unanimity and sufficiency issues are intertwined..... 7

 b. Mr. Randall’s convictions must be reversed and dismissed due to insufficient evidence. 8

3. THE INCONSISTENT VERDICT IS JUST ONE INDICATION OF THE INSUFFICIENCY OF THE SEXUAL MOTIVATION AGGRAVATING FACTOR..... 9

 a. The rape acquittals may be considered as indicia that sexual motivation was not proved beyond a reasonable doubt..... 9

 b. There was insufficient evidence of identifiable sexual conduct during the course of the offense. 10

4. THE SPECIAL VERDICT MUST BE VACATED
BECAUSE OF THE BASHAW ERROR; IN THE
ALTERNATIVE, A STAY PENDING NUNEZ-RYAN
SHOULD BE ENTERED. 13

 a. The sexual motivation instruction contained a
 Bashaw error. 13

 b. The incorrect jury instruction requires vacation of
 the special verdict. 13

B. CONCLUSION. 14

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) ...13, 14, 15

State v. Coleman, 159 Wn.2d 509, 150 P.3d 1126 (2007) .2, 5, 7, 9

State v. Goins, 151 Wn.2d 728, 92 P.23d 181 (2004) 10

State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) 13

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 9

State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993)..... 10, 13

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). 1, 2, 3, 6, 7,
8, 9

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).. 1, 2, 3, 6, 7,
8

State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980)..... 1

State v. Thomas, 138 Wn.2d 630, 980 P.2d 1275 (1999)..... 10

Washington Court of Appeals

State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996)3

State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2010), review
granted, 172 Wn.2d 1004, 258 P.3d 676 (2011) 14, 15

United States Supreme Court

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560
(1960)9

Federal Courts

United States v. Echeverry, 719 F.2d 974 (9th Cir. 1983)..... 8

Washington Constitution

Art. I, §§ 21, 22..... 3

Other Authorities

People v. Davis, 36 Cal.4th 510, 115 P.3d 417 (Cal. 2005)..... 8

People v. Jones, 270 Cal. Rptr. 611, 792 P.2d 643 (Cal. 1990)..... 3

People v. Norman, 157 Cal. App. 4th 460, 69 Cal. Rptr.3d 359 (Cal. App. 2007)..... 8

A. ARGUMENT

1. THE FAILURE TO ELECT OR GIVE A UNANIMITY INSTRUCTION WAS NOT HARMLESS; THEREFORE, REVERSAL IS REQUIRED.

a. In multiple acts cases, a jury must be unanimous beyond a reasonable doubt as to which particular act constitutes the crime charged. Because a defendant may only be convicted by a unanimous jury, the jury must be unanimous as to which particular act or incident constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)); Const. Art. 1, §§ 21, 22. To ensure jury unanimity, the evidence must be sufficient for the jury to agree the State proved the elements of the charged crime on a particular occasion. Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 569.

Where the State chooses not to elect a particular incident, as it chose not to here, unanimity must be assured by an instruction requiring all 12 jurors to agree that the same underlying criminal act has been proved beyond a reasonable doubt. Petrich, 101 Wn.2d 572. Since the trial court here failed to instruct the jury,

despite Mr. Randall's repeated request for a Petrich instruction, jury unanimity was decidedly not assured.

b. The court's failure to give the unanimity instruction to the jury was not harmless. Where multiple-act evidence is controverted, and where there is neither prosecutorial election nor a unanimity instruction, prejudice is presumed. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007); Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572-73. "The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged." Coleman, 159 Wn.2d at 512 (citing Kitchen, 110 Wn.2d at 411-12).

The State devotes a considerable portion of its statement of facts to a recitation of the alleged sexual relationship between Mr. Randall and the two teenaged complaining witnesses – a story that was apparently not accepted by the jury, which acquitted Mr. Randall of all four rape counts. Resp. Brief at 4-7; CP 305-08. Therefore, this Court should not conclude the jury simply accepted Holly and Victoria's allegations, as the State implies in its brief. The acquittals demonstrate that the jury did not find Holly and Victoria's testimony entirely credible.

Because it is impossible to discern the evidence upon which the jury relied for the remaining counts, permitting the convictions to stand violates Mr. Randall's constitutional right to a unanimous verdict based upon sufficient evidence of the incidents underlying those convictions. Art. I, §§ 21, 22; Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572-73.

The State argues that general testimony may be sufficient to support a conviction if it is specific enough to protect the defendant's right to present a defense. Resp. Brief at 9; State v. Hayes, 81 Wn. App. 425, 438, 914 P.2d 788 (1996) (citing People v. Jones, 270 Cal. Rptr. 611, 623, 792 P.2d 643 (Cal. 1990)). The Hayes test requires that a victim: 1) describe the conduct with enough specificity to allow the trier of fact to determine what offense, if any, has been committed; 2) describe the number of acts committed with enough certainty to support each of the counts alleged; and 3) describe the general time period in which the acts occurred. 81 Wn. App. at 438.

As discussed in appellant's opening brief, the Hayes standard is of questionable applicability to a case such as this one, where the complainant was not a young child and was capable of accurate recall. See Opening Brief at 14. However, neither

teenaged complainant was apparently able to recall sufficient distinguishing circumstances of the incidents surrounding the marijuana deliveries to meet even this low standard. Holly and Victoria testified that they would sneak out of their homes after their parents fell asleep and drive around with Mr. Randall in his car during a four-month period in 2008. RP 659-61, 784-86. They said that they smoked marijuana with Mr. Randall and that he gave them marijuana to sell. RP 659-61, 784-86. Both teenagers estimated that this type of behavior occurred on a regular basis, but neither Holly, Victoria, nor any other witness was able to isolate even one single act or transaction with any degree of specificity. RP 944-45, 1009-10, 1031, 1036. In response to the prosecutor's and defense attorney's questions, the complainants were unable to provide a day of the week or any other defining information regarding their accusations, explaining that they were often stoned or drunk, or that the incidents had run together. RP 1058, 1079. Both complainants also admitted they had repeatedly lied about the incidents in prior statements. RP 876-79; 1079.

In State v. Coleman, the Supreme Court held that the omission of a unanimity instruction is presumed prejudicial. 159 Wn.2d at 512. Without a unanimity instruction or prosecutorial

election, there is a risk that jurors will aggregate evidence improperly: “each juror may arrive at a guilty verdict by responding to testimony about discrete incidents – incidents which, if an election were made, the jury may not all agree occurred.” Id. at 512.

The Coleman Court held that although the State had argued that the error was harmless, the facts did not support the State’s argument because the case was built upon controverted evidence. 159 Wn.2d at 514-15.

Here, similarly, during her testimony, Victoria unsuccessfully attempted to describe a single marijuana sale that she allegedly conducted on Mr. Randall’s behalf. RP 869-72, 873-76. She was unable to testify as to any detail of the transaction, including when it allegedly occurred, how much money she charged the buyer for the marijuana, how much money she gave to Mr. Randall and how much she kept for herself, or in which bag she kept the money or the marijuana. RP 869-72.

In addition, both Holly and Victoria admitted that they had previously lied repeatedly in reference to these alleged incidents. RP 876-79; 1079. Not only had both complainants lied to their families about their own alleged drug-dealing, as well as about the

alleged conduct of Mr. Randall, but Holly had lied to law enforcement, as well. RP 694-96. Finally, the allegations of deliveries made by Holly and Victoria were controverted by one of the State's own witnesses. Nathaniel Mitchell testified that during the spring of 2008, he and Mr. Randall played basketball with several male friends "four or five" times a week after school for several months. RP 1372-80. Nathaniel's testimony contradicts that of Holly and Victoria, in that the basketball games at the middle school were apparently taking place at the same time that the girls reported Mr. Randall was picking them up from high school each day to sell marijuana. RP 649-51, 655-58.

Because the multiple-act evidence was controverted, and because there was neither prosecutorial election nor a unanimity instruction, prejudice is presumed. Coleman, 159 Wn.2d at 512; Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572-73. The error here was not harmless and reversal is required. Coleman, 159 Wn.2d at 515.

2. WITHOUT A UNANIMOUS AND SPECIFIC VERDICT, THE STATE FAILED TO PROVE THE CHARGES BY SUFFICIENT EVIDENCE.

It is well settled that a defendant may only be convicted by a unanimous jury, in that there must be unanimity as to which particular act or incident constitutes the crime. Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 569.

a. The unanimity and sufficiency issues are intertwined. Where, as here, the State failed to elect and the trial court additionally failed to instruct the jury as to unanimity, the trial court must be assured that the jury could not possibly have rested their convictions on different episodes nor had a reasonable doubt as to whether one or more incidents actually occurred. Coleman, 159 Wn.2d at 513 (citing Kitchen, 110 Wn.2d at 412).

In this case, as discussed supra, where there was no unanimity instruction, the jury was provided with only a general scheme of marijuana transactions over a period of four months. Yet in the absence of testimony describing even a single specific transaction, Mr. Randall was convicted of two counts of involving a minor in a transaction to deliver marijuana, and two counts of

unlawful delivery of marijuana to a person under the age of eighteen. CP 305-14.

The constitutional requirement of jury unanimity in a multiple acts case must also apply to sufficiency; the Supreme Court in Kitchen reversed specifically because it was impossible to determine whether a rational juror could have entertained a reasonable doubt as to one or more of the acts charged. See Kitchen, 110 Wn.2d at 412. The unanimity and sufficiency issues are intertwined and must be evaluated simultaneously.¹

b. Mr. Randall's convictions must be reversed and dismissed due to insufficient evidence. The State did not elect a particular incident in order to meet its burden, and did not sufficiently prove specific acts upon which the jury could unanimously agree. Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572. The lack of specificity in the generic scheme presented by the State's evidence was insufficient to meet the State's burden; therefore, the unlawful delivery and involving a

¹ United States v. Echeverry, 719 F.2d 974 (9th Cir. 1983) (Washington case); People v. Davis, 36 Cal.4th 510, 562, 115 P.3d 417 (Cal. 2005); People v. Norman, 157 Cal. App.4th 460, 465, 69 Cal. Rptr.3d 359 (Cal. App. 2007) ("The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a

minor in a drug transaction convictions must be reversed and dismissed. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1960); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

3. THE INCONSISTENT VERDICT IS JUST ONE INDICATION OF THE INSUFFICIENCY OF THE SEXUAL MOTIVATION AGGRAVATING FACTOR.

a. The rape acquittals may be considered as indicia that sexual motivation was not proved beyond a reasonable doubt.

Here, despite the colorful stories of sexual misconduct told by Holly and Victoria, the jury properly found the State's allegations of sexual impropriety against Mr. Randall to be insufficient. CP 305-08. Thus, the acquittals on all four counts of RCW 9A.44.079, together with the sexual motivation findings as to the unlawful delivery counts, must be seen as inconsistent verdicts.

Where inconsistent verdicts call into question a guilty verdict, the appellate court must verify that the guilty verdict was supported by sufficient evidence. State v. Goins, 151 Wn.2d 728, 737, 92 P.3d 181 (2004). The State cites Goins to suggest that inconsistent verdicts are often based upon compromise or lenity;

defendant must have done something sufficient to convict on one count.” (internal citation omitted) (emphasis added).

however, the Goins Court clearly held that an inconsistent verdict demands scrutiny by an appellate court into whether a guilty verdict was based upon sufficient evidence. 151 Wn.2d at 737.

The evidence in this case differed from cases such as State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993), and State v. Thomas, 138 Wn.2d 630, 636, 980 P.2d 1275 (1999), where the State presented sufficient and credible evidence of sexual motivation. Here, any evidence of sexual conduct occurring in the course of the alleged unlawful delivery offense was discounted by the jury as incredible or insufficient, as shown by the rape acquittals. CP 305-08. b. There was insufficient evidence of identifiable sexual conduct during the course of the offense. “The statute requires evidence of identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification.” Halstien, 122 Wn.2d at 120 (emphasis added).² In other words, “the State must present evidence of some conduct during the course of the offense as proof of the defendant’s sexual purpose.” Id. at 121.

² RCW 13.40.020(25) (juvenile sexual motivation definition); RCW 9.94A.030(30) (parallel adult statute).

Although the State argues that the evidence supports an inference that Mr. Randall singled out Holly and Victoria for sexual gratification, rather than to merely advance his alleged marijuana business, this argument is belied by the record. Resp. Brief at 31-32. Victoria testified that Mr. Randall spent time with a whole group of her friends, including Chris Gomez, Michael Phillips, Dylan Gormley, Philip (no last name), and Ethan (no last name). RP 879. Holly agreed, stating that she and her boyfriend, Chris Gomez, “hung out” with Mr. Randall together, as did Mike Phillips and Dylan Gormley. RP 1048. In addition, there was evidence that deliveries of marijuana were allegedly made to several male students, including Nathaniel Mitchell, Chris Gomez, Mike Phillips, and others. RP 1377-80. There was no implication that Mr. Randall had a sexual agenda with regard to any of the male students.

On the contrary, as far as befriending the students, the testimony of State witness Nathaniel Mitchell is telling. Other than Holly and Victoria, Nathaniel was the student who became closest to Mr. Randall, even offering to let him spend the night at his home. RP 1381. This type of friendship was not apparent with either Holly or Victoria. Nathaniel spoke of spending countless days playing basketball with Mr. Randall at the local middle school, along with

Mike Phillips, CJ (no formal name), and Chris Gomez. RP 1372-80. Mr. Randall had asked Nathaniel and the other students to help him lose weight, and Nathaniel testified that during spring of 2008 – the same time period that Holly and Victoria said Mr. Randall was forcing them to sell marijuana daily – the guys were playing basketball as “a daily thing.” RP 1378.

The State argues that Mr. Randall treated Holly and Victoria differently from the other students he spent time with at the high school that year, using different “tactics” with them, such as withholding marijuana for a perceived slight. Resp. Brief at 32. The record reveals that this alleged treatment was not unique to Holly and Victoria, as Nathaniel Mitchell testified to the identical experience when Mr. Randall felt that Nathaniel had disrespected him. RP 1383-84. Although its use is not conceded, if this type of tactic is apportioned regardless of gender or sexual attraction to the recipient, sexual motivation has clearly not been proved. Halstien, 122 Wn.2d at 120.³

³ The State argues in its brief that Mr. Randall’s demeanor during interrogation “could have been reasonably interpreted as shame.” Resp. Brief at 32. At no time did the detective opine on Mr. Randall’s demeanor. This type of unsupported comment on the evidence is improper and should be stricken.

For the reasons stated above, as well as those argued in the opening brief, this Court should therefore strike the sexual motivation findings on both counts.

4. THE SPECIAL VERDICT MUST BE VACATED BECAUSE OF THE *BASHAW* ERROR; IN THE ALTERNATIVE, A STAY PENDING *NUNEZ-RYAN* SHOULD BE ENTERED.

a. The sexual motivation instruction contained a *Bashaw* error. The court's special verdict instruction did not make clear that a negative finding need not be unanimous, but only a positive finding of sexual motivation need be. CP 304 (Instruction 31); State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003) (jury need not be unanimous to find the State has not sufficiently proven the aggravating factor).⁴

b. The incorrect jury instruction requires vacation of the special verdict. The court in Bashaw characterized the problem as an error in "the procedure by which unanimity would be inappropriately achieved." 169 Wn.2d at 147. This instructional error creates a "flawed deliberative process" and does not let the reviewing court simply surmise what the result would have been

had the jury been given a correct instruction. Id. The Bashaw Court also noted that when the jury is improperly instructed on a special verdict, the deliberative process is so “flawed,” that it is not possible to “say with any confidence what might have occurred had the jury been properly instructed.” Id. at 147-48.

Due to flawed instruction here, which resulted in a manifest constitutional error, the special verdict must be vacated. Bashaw, 169 Wn.2d at 147-48. In the alternative, Mr. Randall would request that this matter be stayed until the Supreme Court issues a decision in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2010), review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011).

B. CONCLUSION

For the foregoing reasons, as well as those stated in appellant’s opening brief, Mr. Randall respectfully requests this Court reverse his convictions and remand the case for further proceedings. In the alternative, Mr. Randall requests that the special verdict be vacated and the case remanded for further proceedings.

DATED this 18th day of May, 2012.

⁴ A decision is pending in Nunez, following argument on January 12, 2012. State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2010), review granted, 172 Wn.2d 1004, 258 P.3d 676 (2011).

Respectfully submitted,

 #39042 for

JAN TRASEN (WSBA 41177)

Washington Appellate Project (91052)

Attorney for Appellant

WASHINGTON APPELLATE PROJECT

May 18, 2012 - 3:22 PM

Transmittal Letter

Document Uploaded: 419165-Reply Brief.pdf

Case Name: STATE V. JEFFREY RANDALL

Court of Appeals Case Number: 41916-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: Reply
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us