

No. 42108-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Wade Pierce,

Appellant.

Lewis County Superior Court Cause No. 04-1-00323-1

The Honorable Judge Nelson Hunt

Appellant's Reply Brief

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ARGUMENT

I. RESPONDENT’S ARGUMENT REGARDING THE SUFFICIENCY OF THE EVIDENCE IS FORECLOSED BY THE LAW OF THE CASE.

A deadly weapon enhancement may not be imposed if the evidence establishes only the presence of an inoperable firearm, a toy gun, or any other gun-like but non-deadly object. *State v. Fowler*, 114 Wash.2d 59, 62, 785 P.2d 808 (1990), (addressing RCW 9.95.040), *overruled on other grounds by State v. Blair*, 117 Wash.2d 479, 487, 816 P.2d 718 (1991).¹ In this case, the prosecution did not prove beyond a reasonable doubt that Mr. Pierce was armed with a real and operable firearm.^{2,3}

The Court of Appeals has previously held that the prosecution failed to prove beyond a reasonable doubt that Mr. Pierce was armed with an operable firearm. *State v. Pierce*, 155 Wash.App. 701, 714-15; 230

¹ See also *State v. Pam*, 98 Wash.2d 748, 753, 659 P.2d 454 (1983), (same), *overruled on other grounds State v. Brown*, 111 Wash.2d 124, 761 P.2d 588 (1988), *aff’d on rehearing*, 113 Wash.2d 520, 782 P.2d 1013 (1989). Although both *Fowler* and *Pam* addressed RCW 9.95.040, the definition of “deadly weapon” remains the same. See RCW 9.94A.825; former RCW 9.94A.602 (2004).

² As noted in the opening brief, the Cobles were uncertain if the object even looked like a real firearm; Ms. Coble testified that it could have been made of cardboard. RP (9/15/10) 4; RP (4/29/11) 8-10; CP 113-116.

³ The state alludes to a gun found in Mr. Pierce’s car upon his arrest. Brief of Respondent, p. 5. Mr. Pierce was arrested four months after the incident. A car stored at his mother’s home, searched pursuant a search warrant, contained a firearm. See p. 2-4, Part Published Opinion 38377-2-II.

P.3d 237 (2010). Respondent fails to address this holding, turning instead to a selective recitation of the facts in an effort to argue that the record contains sufficient evidence.⁴ Brief of Respondent, pp. 4-5.

But the prior holding is the law of the case. *See, e.g., State v. Schwab*, 163 Wash.2d 664, 672, 185 P.3d 1151 (2008) (“The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation.”) Respondent has made no attempt to argue an exception to the law of the case doctrine. *See* RAP 2.5(c); *Schwab*, at 672-674. Nor could such an exception succeed. *Id.*

The evidence was insufficient to establish that Mr. Pierce had a real and operable firearm. *Pierce*, at 714-715. Accordingly, Mr. Pierce’s deadly weapon enhancements in Counts VIII, IX, and X must be vacated, and the judgment and sentence corrected.⁵ *Pam, supra.*

⁴ Facts which, the Court of Appeals has already determined, do not amount to proof of operability beyond a reasonable doubt. *Pierce*, at 714-15.

⁵ The prior Opinion’s passing statement in *dicta* that “proof of operability is not required” to impose a deadly weapon enhancement does not compel a different result. The reference was undoubtedly to cases holding that a malfunctioning gun qualifies as a deadly weapon, under the theory that a malfunctioning gun—although temporarily inoperable—can be fixed and thus returned to operability. *See, e.g., State v. Raleigh*, 157 Wash.App. 728, 734, 238 P.3d 1211 (2010) (citing *State v. Faust*, 93 Wash.App. 373, 380, 967 P.2d 1284 (1998)). But this line of cases does not aid Respondent; the evidence here was insufficient to prove that Mr. Pierce possessed a gun in fact. There was no allegation that he possessed a real but malfunctioning gun.

II. THE MANDATE NEITHER DIRECTED NOR AUTHORIZED THE TRIAL COURT TO IMPOSE DEADLY WEAPON ENHANCEMENTS.

As Respondent concedes, a trial court is obligated to strictly follow the mandate issued by an appellate court. Brief of Respondent, p. 6 (citing *Harp v. American Sur. Co. of N. Y.*, 50 Wash.2d 365, 311 P.2d 988 (1957)). In this case, the sentencing court was directed to “dismiss Pierce’s firearm enhancements and resentence Pierce without the firearm enhancements on counts I, VIII, IX, X, and XI.” *Pierce*, at 715.

In the trial court, the prosecution conceded that the sentencing judge could not impose deadly weapon enhancements following remand. RP (9/15/10) 2-7; RP (4/29/11) 2-17; *see also* CP 117-121, 113-116. Now, for the first time on appeal, Respondent claims that the Court of Appeals mandate granted the sentencing court discretion to impose deadly weapon enhancements. Brief of Respondent, pp. 6-7.

This Court’s prior Opinion is clear and unequivocal: it directs the superior court to dismiss the firearm enhancements; it does not direct the superior court to impose deadly weapon enhancements. *Pierce*, at 715. Respondent erroneously suggests that the word “resentence” carries with it the authority to impose deadly weapon enhancements. Brief of Respondent, p. 7. This is incorrect.

Had the Court of Appeals intended to grant the superior court such authority, it would have said so explicitly. Its failure to explicitly mention deadly weapon enhancements strongly suggests that it did not intend to authorize their imposition. *See, e.g., In re Delgado*, 149 Wash.App. 223, 240, 204 P.3d 936 (2009) (“[W]e vacate [the] firearm enhancements and remand to the trial court to impose, in their place, the deadly weapon enhancements that were charged by the State and found by a jury beyond a reasonable doubt”); *State v. Williams*, 147 Wash.App. 479, 485, 195 P.3d 578 (2008) “[W]e vacate the sentence enhancements based on the use of a firearm... and remand for resentencing using deadly weapon sentence enhancements.”).

III. THE COURT’S INSTRUCTIONS AND VERDICT FORMS DO NOT SUPPORT THE IMPOSITION OF FIREARM OR DEADLY WEAPON ENHANCEMENTS.

The instructions and verdict forms suffered from defects that created three constitutional problems. First, the special verdict forms erroneously allowed a “yes” verdict if Mr. Pierce were merely in possession of a weapon. CP 66, 76, 78, 80, 82, 84; *see State v. Gurske*, 155 Wash.2d 134, 138, 118 P.3d 333 (2005). This relieved the state of its burden to prove the elements of the enhancement and violated Mr. Pierce’s Fourteenth Amendment right to due process. *State v. Peters*, ___, Wash. App. ___, ___, ___ P.3d ___ (2011)d. Respondent erroneously

contends that the jury was properly instructed. Brief of Respondent, p. 10 (citing CP 63). But the instruction relied on by Respondent conflicts with the special verdict forms, which contain a clear misstatement of the law. Such discrepancies are presumed to have misled jurors in a manner prejudicial to the defendant. *State v. Walden*, 131 Wash.2d 469, 478, 932 P.2d 1237 (1997).

Second, the imposition of enhancements based on these flawed verdict forms violated his right to a jury determination of facts used to enhance his sentence. *See Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *State v. Recuenco*, 163 Wash.2d 428, 180 P.3d 1276 (2008). The verdicts don't reflect a jury finding that Mr. Pierce was "armed" at the time of each crime, and thus can't support the enhancements. As Respondent notes, imposition of a sentence greater than that authorized by the jury's verdict can never be harmless. Brief of Respondent, p. 8 (citing *In re Cruze*, 169 Wash. 2d 422, 237 P.3d 274 (2010)). Respondent's contention that the error was harmless is inexplicable. Brief of Respondent, pp. 11-12.

Respondent concedes that the firearm enhancement in Count XIII was improperly imposed. Brief of Respondent, p. 12. The enhancement must therefore be vacated, and the case remanded for correction of the judgment and sentence.

IV. THE COURT SHOULD CONSIDER THE MERITS OF MR. PIERCE'S BASHAW CLAIM, FOLLOWING DIVISION I'S DECISION IN RYAN RATHER THAN DIVISION III'S OPINION IN NUNEZ.

The instructions in this case suffered from the defect identified by the Supreme Court in *State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010). Specifically, the instructions required the jury to deliberate to unanimity, even to answer “no” on each special verdict form.⁶ CP 66, 74, 76, 78, 80, 82, 84, 86.

Respondent does not dispute that the instruction was instructions were erroneous. Instead, pointing to Division III's decision in *Nunez*, Respondent urges the court not to reach the issue. Brief of Respondent, pp. 14-15 (citing *State v. Nunez*, 160 Wash. App. 150, 248 P.3d 103 (2011)). In *Nunez*, Division III held that a *Bashaw* error is not of constitutional magnitude and, under the facts of that case, was harmless in any event. *Nunez*, at 162-164.

Nunez was wrongly decided, and should not be followed by this court. First, *Bashaw* errors are of constitutional dimension. See, e.g., *State v. Ryan*, 160 Wash.App. 944, 945, 948-949, 252 P.3d 895 (2011). In

⁶ Respondent attempts to distinguish *Bashaw* on the grounds that the jury in that case was instructed that “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Brief of Respondent, at 16-17 (citing *Bashaw*, at 139.) But the instructions in Mr. Pierce's case contained a similar admonition: “Since this is a criminal case, each of you must agree for you to return a verdict.” Jurors were not instructed to ignore this directive when considering the enhancements. CP 66, 74, 76, 78, 80, 82, 84, 86.

Nunez, Division III misinterpreted the *Bashaw* Court’s passing comment that the underlying rule allowing a nonunanimous “no” verdict “is not compelled by constitutional protections against double jeopardy...but rather by the common law precedent of this court...” *Bashaw*, at 146, n. 7. The comment was directed at the rule—that a non-unanimous “no” verdict is a final verdict. The comment was *not* directed at the requirement that the jury be correctly instructed as to its duty.

These two things—the underlying rule that a non-unanimous “no” verdict is a final verdict, and the requirement that juries be properly instructed—are two different things; the former is *not* compelled by the constitution, while the latter *is* so compelled.⁷ *See Ryan*, at 945, 948-949.

Accordingly, the error here may be raised for the first time on review as a manifest error affecting a constitutional right. RAP 2.5(a)(3). Furthermore, even if the error were held to be nonconstitutional, the court

⁷ Furthermore, although *Bashaw* and *Goldberg* found it unnecessary to reach the issue of jury coercion, the issue in this case could be resolved with reference to the rule prohibiting jury coercion. *See Bashaw*, at 146 (citing *State v. Goldberg*, 149 Wash.2d 888, 72 P.3d 1083 (2003)). The due process right to a fair trial and the constitutional right to a jury trial both prohibit a coerced verdict. *See, e.g., State v. Jones*, 97 Wash.2d 159, 641 P.2d 708 (1982). By requiring the jury to deliberate to unanimity, the erroneous instruction serves to coerce a verdict—it amounts to an automatic rejection of any split verdict, and an instruction to continue deliberating. Without the instruction, the jury might be inclined to deliver a “no” verdict before they have reached unanimity. With the instruction, a legitimate but nonunanimous “no” verdict is mechanically refused, and the jury coerced into returning a unanimous verdict. This violates the due process right to a fair trial and the constitutional right to a jury trial. U.S. Const. Amend. VI and XIV; Wash. Const. Article I, Sections 3, 21, and 22; *Jones, supra*.

could exercise discretion to decide the issue, even though it is raised for the first time on appeal. RAP 2.5(a)(3); *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

The flawed instructions here tainted the jury's verdicts.

Accordingly, the enhancements must be vacated. *Ryan, supra*.

V. RESPONDENT'S CONCESSION REQUIRES THAT THE UNDERLYING SENTENCE BE VACATED AND THE CASE REMANDED FOR CORRECTION OF THE OFFENDER SCORE AND RESENTENCING.

Respondent has conceded that Counts VIII, IX, and X comprised the same criminal conduct. Brief of Respondent, pp. 17-18. The proper remedy is vacation of the underlying sentence and remand for correction of the offender score and resentencing.

VI. MR. PIERCE WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Pierce rests on the arguments set forth above and in his Opening Brief.

CONCLUSION

The sentence enhancements must be vacated and the case remanded for correction of the judgment and sentence. In addition, the

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's filing portal.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 10, 2011.



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