

No. 22336-1-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

JASON ALLEN GRAHAM,  
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
HONORABLE MARYANN MORENO

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SUPPLEMENTAL BRIEF OF APPELLANT

---

DAVID N. GASCH  
WSBA No. 18270  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

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**A. ISSUES**

1. Applicability of *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010) to the issue of whether the special verdicts should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts.

2. Applicability of *State v. Williams-Walker*, 167 Wn.2d 889, 225 P.3d 913 (2010) to the issue of whether the trial court was precluded from sentencing Mr. Graham to firearm enhancements, where the jury only found that Mr. Graham possessed a deadly weapon.

**B. STATEMENT OF THE CASE**

The facts are set forth in Appellant’s initial brief and are incorporated herein. Additional pertinent facts will be included in the Argument section when appropriate.

**C. ARGUMENT**

**1. The special verdicts should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdicts.**

Manifest Constitutional Error. As a threshold matter, it should be noted that this issue was not raised at the court below by excepting to the special verdict instruction. However, an error may be raised for the first

time on appeal if it is a manifest error involving a constitutional right.

RAP 2.5(a)(3); *State v. Roberts*, 142 Wn.2d 471, 500, 14 P.3d 713 (2000).

An error is "manifest" if it had " 'practical and identifiable consequences in the trial of the case.' " *Id.* (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992))).

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. *Id.* (citing *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968)); *State v. Scott*, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988); *Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir.1991). This is not a case where a jury instruction merely failed to define a term, or where a trial court did not instruct on a lesser included offense that was never requested. See *Scott*, 110 Wn.2d at 688 n. 5, 757 P.2d 492. Instead, the instruction herein misstates the requirement of unanimity for the jury to answer "no" to the special verdicts.

In *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), the most recent case addressing this issue regarding the special verdict instruction, no exception to the instruction was made at the trial court. *State v. Bashaw*, 144 Wn. App. 196, 199, 182 P.3d 451 (2008). The Supreme

Court did not engage in a manifest constitutional error analysis for the instructional error. *Bashaw*, 169 Wn.2d at 145-48, 234 P.3d 195.

However, since the Supreme Court did engage in a constitutional harmless error analysis, it must have deemed the instructional error to be one of manifest constitutional error. *Bashaw*, 169 Wn.2d at 147-48, 234 P.3d 195. As such, it may be considered for the first time on appeal. RAP 2.5(a)(3).

Invited Error Doctrine. The State may argue under the invited error doctrine that Mr. Graham is precluded from challenging the special verdict instruction in this case because he failed to take exception to that instruction. The invited error doctrine does not go that far. The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." *In re Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001) (citing *In re Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000)). The invited error doctrine "appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, courts do not apply the doctrine. *Id.* (citing *Thompson*, 141 Wn.2d at 724, 10 P.3d 380)).

In *Call*, the Supreme Court found the defendant did not invite the error where his attorney wrote the wrong offender score and standard range on the guilty plea statement that the defendant signed. The defendant, the prosecuting attorney, and the sentencing court were all unaware of the error in calculating the offender score and standard range. *Call*, 144 Wn.2d at 324-28, 28 P.3d 709.

Similarly, in the present case, Mr. Graham did not invite the error where his attorney failed to take exception. His attorney, the prosecutor, and the court were all unaware that the instruction was erroneous. Mr. Graham was convicted in June 2003. CP 111-17. Since *Bashaw* was not decided until July 1, 2010, this was not a situation where there were affirmative actions by the defendant in which he took knowing and voluntary actions to set up the error. Therefore, he did not invite the error.

Improper Special Verdict Instruction Washington requires unanimous jury verdicts in criminal cases. Const. art. I, § 21; *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). As for aggravating factors, jurors must be unanimous to find the State has proved the existence of the special verdict beyond a reasonable doubt. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). However, jury unanimity is not required to answer “no.” *Goldberg*, 149 Wn.2d at 893,

72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” Id.

In *Goldberg*, the jury was given the following special verdict instruction:

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".

Id.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction. *Goldberg*, 149 Wn.2d at 894, 72 P.3d 1083.

Here, the special verdict instruction was similar to the one given in *Goldberg*, except it was preceded by the following language: “Since 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.” CP 86-87, RP 1828-29.

This second instruction incorrectly requires jury unanimity for all the verdict forms, including the special verdict. Requiring the jury to be unanimous to answer “no” to the special verdict is contrary to *Goldberg*. The second instruction needed to have a proviso such as, “Except in the

case of a special verdict where the answer is no.” Without the proviso, the jury could only conclude that unanimity was required to answer “no” to the special verdict.

In *Bashaw*, the Supreme Court vacated sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts similar to this case. *Bashaw*, 169 Wn.2d at 147-48, 234 P.3d 195. In *Bashaw*, the jury was incorrectly instructed, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” *Bashaw*, 169 Wn.2d at 139, 234 P.3d 195. Citing *Goldberg*, the *Bashaw* court held:

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. Though unanimity is required to find the presence of a special finding increasing the maximum penalty, see *Goldberg*, 149 Wn.2d at 893, 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.

*Bashaw*, 169 Wn.2d at 147, 234 P.3d 195.

The instruction in the present case incorrectly requires jury unanimity for the jury to answer “no” to the special verdicts, contrary to *Bashaw* and *Goldberg*. Since this instruction misstates the law, the enhancements based on the special verdicts must be vacated. *Goldberg*,

149 Wn.2d at 894, 72 P.3d 1083; *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195.

Harmless 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.' " *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195 (citing *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))). The *Bashaw* court found the erroneous special verdict instruction was an incorrect statement of the law. *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195. A clear misstatement of the law is presumed to be prejudicial. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (citing *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

In finding the instructional error not harmless the *Bashaw* court stated the following:

The State argues, and the Court of Appeals agreed, that any error in the instruction was harmless because the trial court polled the jury and the jurors affirmed the verdict, demonstrating it was unanimous. This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. In *Goldberg*, the error reversed by this court was the trial court's instruction to a nonunanimous jury to reach unanimity. 149 Wn.2d at 893, 72 P.3d 1083. The error here is identical except for the fact that that direction to reach unanimity was given preemptively.

The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. *Goldberg* is illustrative. There, the jury initially answered "no" to the special verdict, based on a lack of unanimity, until told it must reach a unanimous verdict, at which point it answered "yes." *Id.* at 891-93, 72 P.3d 1083. Given different instructions, the jury returned different verdicts. We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. 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 proceedings consistent with this opinion.

*Bashaw*, 169 Wn.2d at 147-48, 234 P.3d 195.

The situation in the present case is indistinguishable from *Bashaw*.

It is impossible to speculate about what the jury would have decided if it had been given the correct instruction. Therefore, the error was not harmless.

**2. The trial court was precluded from sentencing Mr. Graham to firearm enhancements, where the jury only found that Mr. Graham possessed a deadly weapon.**

The Washington Supreme Court has previously recognized that a sentencing court violates a defendant's right to a jury trial if it imposes a firearm enhancement without a jury authorizing the enhancement by

explicitly finding that, beyond a reasonable doubt, the defendant committed the offense while so armed. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (*Recuenco III*). In *Recuenco III*, the trial court's imposition of a firearm enhancement—where only a deadly weapon enhancement had been charged by the State or authorized by the jury—was unauthorized and therefore in error. *State v. Williams-Walker*, 167 Wn.2d 889, 898, 225 P.3d 913 (2010).

In *Williams-Walker*, as in the present case, the trial court submitted to the jury the special verdict form for a deadly weapon enhancement, not the form for a firearm enhancement, which was originally alleged, and the jury returned answers to those deadly weapon special verdict forms. *Id.* In each case, the jury thus authorized only a deadly weapon enhancement, not the more severe firearm enhancement. *Id.*

The Court found the fact that the State provided notice in the information that it would seek a firearm enhancement does not control in cases where a deadly weapon special verdict form is submitted to the jury. *Williams-Walker*, 167 Wn.2d at 899. When the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding. *Id.* Disregard of the sentence enhancement authorized by the special verdicts violates a defendant's right to a jury trial

under article I, sections 21 and 22. *Williams-Walker*, 167 Wn.2d at 899-900.

Here, Mr. Graham was charged with being armed with a firearm while committing the various offenses. (CP17-21) The court submitted to the jury special verdict forms for deadly weapon enhancements, not the forms for firearm enhancements. The jury returned answers of “yes” to those deadly weapon special verdict forms. CP 111-17. The court disregarded the jury’s finding and instead imposed firearm enhancements. This violated Mr. Graham’s right to a jury trial under article I, sections 21 and 22. *Williams-Walker*, 167 Wn.2d at 899-900. Therefore, the enhancements should be reversed.

**D. CONCLUSION**

For the reasons stated, the special verdict enhancements should be vacated, or in the alternative, the matter should be remanded with instructions to strike the firearm enhancements and impose deadly weapon enhancements.

Respectfully submitted February 2, 2011.

  
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David N. Gasch  
WSBA #18270  
Attorney for Appellant