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MAY 02 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 273067-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JOHN JOSEPH COOK, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 07-1-01020-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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ISSUES

May the defendant for the first time on appeal claim the trial court erred by requiring juror unanimity in order to answer a special verdict "Yes" regarding whether the defendant committed a crime within the sight or sound of the minor child?

ARGUMENT

1. THIS COURT SHOULD RESERVE RULING UNTIL CLARIFICATION IS RECEIVED FROM THE WASHINGTON STATE SUPREME COURT.

The State respectfully points out that this Court's ruling in *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011), is at odds with the Court of Appeals, Division I decision in *State v. Ryan*, --- P.3d ----, 2011 WL 1239796, Wn. App. Div. 1 (April 4, 2011). The Supreme Court may accept review of these cases under RAP 13.4(b)(2).

2. THE BETTER RULE IS THAT THE DEFENDANT SHOULD NOT BE ALLOWED TO RAISE THE ISSUE FOR THE FIRST TIME ON APPEAL.

As attorneys, when did we learn that you must object at trial to perfect an appeal? The second year of law school? The first year in practice? After receiving a telephone call from an appellate attorney wondering if there was some tactical reason you failed to object at trial to some hearsay?

The point of these rhetorical questions is that the principle is very basic. *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1952). An Appellate Court can refuse to review a claimed error if it was not raised with the trial court. The principle is set forth in RAP 2.5(a):

Errors Raised for First Time on Review.
The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

There are clear reasons for the rule:

- Judicial economy,

- Finality of criminal cases,
- Respect for jury verdicts,
- Giving the trial judge and the State an opportunity to correct a claimed error,
- The status of the Appellate Court as not a court which decides whether a defendant is guilty or not guilty.

In this case, the defendant raises an objection to jury instruction for the first time on appeal. The defendant did not object to the instruction before the trial court. As discussed below, either this Court or the Washington State Supreme Court should decline to hear the objection.

- A. The burden is on the defendant to establish that an exception to the general rule should be made, an exception which is rarely allowed.

As stated in *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976)), the general rule

is that review is only on issues which were argued and decided at the trial level. Under RAP 2.5, "The exception actually is a narrow one, affording review only of 'certain constitutional questions.'" *State v. Scott*, 110 Wn.2d at 687. To satisfy the "manifest" constitutional error exception in RAP 2.5(a), there must be actual prejudice shown and the trial court record must be sufficiently developed to determine the merits of the constitutional claim. *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). The defendant must show that the claimed error had practical and identifiable consequences in the trial. *State v. Israel*, 113 Wn. App. 243, 54 P.3d 1218 (2002). An Appellate Court should review claims raised for the first time on appeal if they: 1) are of constitutional magnitude, 2) are "manifest," and 3) affected the outcome. *State v. Lynn*, 67 Wn. App. 339, 342-346, 835 P.2d 251 (1992), and *State v. Naillieux*, 158 Wn. App. 630, 241 P.3d 1280 (2010).

The defendant has the burden to make the required showing that an unpreserved error was a manifest error affecting a constitutional right. *State v. Nguyen*, 165 Wn.2d 428, 197 P.3d 673 (2008). The defendant fails on all three counts.

B. The claimed error is not of a constitutional magnitude.

As stated in *State v. Lynn*, 67 Wn. App. at 342, "RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal." Almost any alleged error "can be phrased in constitutional terms." However, every alleged error in a criminal case is not assumed to be of "constitutional magnitude." *State v. O'Hara*, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). The *O'Hara* Court stated that the asserted claim should be assessed to determine whether, if correct, it implicates a constitutional interest as compared to another form of trial error. *Id.* at 98. As the *Lynn* Court stated, "[P]ermitting every possible

constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts." *State v. Lynn*, 67 Wn. App. at 344.

RAP 2.5(a)(3) refers to a "manifest error affecting a constitutional right." (Emphasis added). It does not say, "manifest error affecting a constitutional right in civil cases and any right in a criminal case." Here, the claimed error is technical. The trial court properly instructed the jury that it had to be unanimous in order to answer the special verdict forms, "yes," and "must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer." (07/09/08, RP 198). The jury was also instructed that the State had the burden of proof. (07/09/08, RP 189). If the alleged error

herein is of constitutional magnitude, then what error in a criminal case is not?

C. The error is not manifest. In fact, this Court, three justices on the Supreme Court, and the Washington Supreme Court Committee on Jury Instructions did not view the instruction as an error.

If this Court determines the alleged error is of constitutional magnitude, it must also be manifest. *State v. Gordon*, 153 Wn. App. 516, 535, 223 P.3d 519 (2009). A "manifest error" is an error that is unmistakable, evident or indisputable. *State v. Nguyen*, 165 Wn. 2d at 433.

Of course, the "error" was not obvious to this Court in its unanimous decision in *State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (2008), which held that an identical jury instruction was appropriate. The State concedes that this holding was reversed by the Washington State Supreme Court in its decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). The defendant should also concede that given this Court's

opinion, it cannot be said that the instruction was manifestly in error.

Further, the error was not "manifest" to the State Supreme Court. If it had been, the Court would have been unanimous. Instead, Chief Justice Madsen, Former Chief Justice Alexander, and Justice J.M. Johnson dissented.

Finally, the Washington State Supreme Court Committee on Jury Instructions did not view this instruction as an error, much less a manifest error. The history of the committees suggested instruction is as follows:

2005: It might be appropriate to instruct the jury that "if any one of you has a reasonable doubt as to the question, you must answer 'no.'" See WPIC 160.00, updated as of 2005.¹

2008: Based on this Court's *Bashaw* ruling in 2008, the committee revised the recommended instruction to eliminate the language quoted above from 2005. The Committee had this comment

¹ 2005 Version of WPIC 160.00 attached as "Appendix A."

in response to *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003):

After *Goldberg*, it was not clear whether the jury always needs to be unanimous in order to answer a special verdict question 'no.' Because the opinion could have been read in two different ways, the previous version of this instruction included bracketed alternative language.

Subsequently, the Court of Appeals held in *State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (2008), that *Goldberg* did not alter the general rule that unanimous jury verdicts are required in criminal cases. The *Bashaw* court approved an instruction stating that "[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict." For the 2008 edition, the committee has modified the instruction in accordance with *Bashaw*.

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 160.00 (3rd Ed).²

While the defendant's argument on appeal ultimately carried the day, it is difficult to see how this outcome was "unmistakable," "evident," or "indisputable" since this Court, three members of the Washington State Supreme Court, and the Washington State Supreme Court

Committee on Jury Instructions thought that the opposite result was appropriate.

D. In any event, the instruction did not "affect" the defendant's constitutional rights.

1. *The test for "a manifest error affecting a constitutional right" under RAP 2.5 is different than the test for harmless error after an instructional error is given.*

The language used in RAP 2.5(a) is "(3) manifest error affecting a constitutional right." (Emphasis added). This results in a requirement that the defendant make a plausible showing that the claimed error had practical and identifiable consequences in the trial. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). The defendant must show actual prejudice as a result of the claimed error. *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001).

This is a different standard than a

² 2008 Version of WPIC 160.00 attached as "Appendix B."

harmless-error analysis regarding an instructional error. As stated in the Supreme Court's opinion in *Bashaw*, in the later situation the issue is whether the Court can conclude that the instructional error was harmless. *State v. Bashaw*, 169 Wn.2d at 148. The Supreme Court in *Bashaw* declined to speculate whether the error would have changed the result. *Id.* Under RAP 2.5(a)(3), the defendant must affirmatively point out in the record how the error had practical and identifiable consequences.

2. *Here, the defendant has not demonstrated any actual prejudice.*

Based on the facts of the case, after finding the defendant guilty of Residential Burglary and Violation of a No-Contact Order, a reasonable jury would have to find that the defendant committed these crimes in the presence of his minor child. The defendant's attorney, in opening statement, admitted the child was

present, but argued the victim invited him into her residence:

"[A]fter the child has been in the emergency room and he comes over to see his child. All of a sudden, on this instance, at this occasion, it's not okay. He lifts his daughter up. He is holding his daughter, when her mother says, no, you've got to get out of here. As he backs out of the place, she comes forward -- And she's coming out the door and she trips. My client tries to catch her fall, but she still falls. And she screams. Any my client, now concerned about this No Contact Order, now concerned that he is gonna be arrested, runs."

(07/09/08, RP 70).

Tosha Phillips told a different story. She stated that the defendant came into her residence, uninvited, through a sliding glass door. (07/09/08, RP 84). The defendant scooped up their child and ran out of the apartment with the child. (07/09/08, RP 84). Ms. Phillips ran after the defendant. Although the defendant's version is very different than Ms. Phillips' version, they both agree that their minor child was present when the No-Contact Order Violation

occurred, and when the defendant entered the victim's residence.

E. There is no precedent that this issue can be raised for the first time on appeal.

The issue was not raised in the recent case of *State v. Bashaw*, 169 Wn.2d 133, which dealt with the issue of juror unanimity on a school bus stop enhancement instruction. As stated in the Court of Appeals decision, the defendant did not object to the instruction at trial. *State v. Bashaw*, 144 Wn. App. at 199. On appeal, the State did not argue that the matter could not be raised since there was no objection at trial. Perhaps the defendant in *Bashaw* properly raised the issue at trial. Perhaps the prosecution overlooked the issue. In any event, the *Bashaw* Court did not address the issue of RAP 2.5 and the propriety of raising an issue for the first time on appeal.

Likewise, the issue did not come up in *State v. Goldberg*, 149 Wn.2d 888. The issue in that

case concerned the situation where the jury informs the trial court judge that it is not unanimous regarding the special verdict on an aggravating factor. In that case, the trial judge accepted the jury's statement as a "No" - it has not found the aggravating factor to be committed. Therefore, the failure to object at trial to the aggravating factor concluding instruction was not an issue.

The defendant also cited *State v. Stephens*, 93 Wn.2d 186, 607 P.2d. 304 (1980). However, Stephens did object at trial to the challenged jury instruction. *Id.* at 188.

If the defendant felt the instruction was not appropriate, he should have made an objection at trial. The trial court would have had the opportunity to correct the instruction. The State may have agreed with the defendant's objection. In any event, this Court should decline to review the defendant's argument under RAP 2.5(a).

3. EVEN IF THE DEFENDANT IS ALLOWED TO
RAISE THIS ISSUE, ANY ERROR IS
HARMLESS.

Although the Supreme Court in *Bashaw* emphasized the "deliberative process," that Court also stated that a jury instruction is harmless if it "conclude[s] beyond a reasonable doubt that the jury verdict would have been the same absent the error." *State v. Bashaw*, 169 Wn.2d at 147.

Here, the defendant unlawfully entered Ms. Phillips' apartment to take the minor child. The defendant committed Residential Burglary by unlawfully entering her residence and taking the child. The confrontation by Ms. Phillips, which led to his conviction of Violation of a No-Contact Order was over the child, and the defendant snatching that child.

This case is far different from *Bashaw*. In *Bashaw*, the special allegation was that the defendant delivered drugs within 1,000 feet of a school-bus stop. In that case, the measuring device was not authenticated, and there were

varying estimates of the distances between school-bus stops and the drug deliveries.

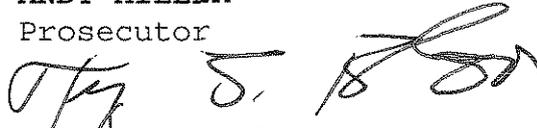
No reasonable jury, no matter what process, could find the crimes were not in the presence of the defendant's minor child.

CONCLUSION

The State requests that the special verdict be affirmed.

RESPECTFULLY SUBMITTED this 29th day of April 2011.

ANDY MILLER
Prosecutor



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Prosecuting Attorney
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APPENDIX A

2005 VERSION OF
WPIC 160.00

WPIC 160.00

CONCLUDING INSTRUCTIONS

WPIC 160.00

CONCLUDING INSTRUCTION—SPECIAL
VERDICT—PENALTY ENHANCEMENTS
[REPLACEMENT]

You will also be given [a special verdict form] [special verdict forms] [for the crime of _____ (insert name of crime) _____] [for the crime[s] charged in count[s] _____]. If you find the defendant not guilty [of this crime] [of these crimes] [of _____ (insert name of crime) _____], do not use the special verdict form[s]. If you find the defendant guilty [of this crime] [of these crimes] [of _____ (insert name of crime) _____], you will then use the special verdict form[s] and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form[s], "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. [If any one of you has a reasonable doubt as to the question, you must answer "no".] [If you unanimously have a reasonable doubt as to this question, you must answer "no".]

NOTE ON USE [Replacement]

For cases involving a sentencing enhancement, insert this paragraph immediately ahead of the last paragraph in the concluding instruction WPIC 151.00 or 155.00, whichever is being used.

Use the appropriate verdict form when this paragraph is included in the concluding instruction. See, e.g., WPIC 190.01 (Special Verdict Form—Deadly Weapon), 190.02 (Special Verdict Form—Firearm), 190.08 (Special Verdict Form—Sexual Motivation).

For a discussion of the unanimity issues raised in the instruction's final two (bracketed) sentences, see the Comment's discussion of the *Goldberg* case.

Choose from among the bracketed options within the instruction's first three sentences depending on which will provide the clearest directions to the jury, depending on such considerations as the number of charges and the existence of lesser included offenses.

COMMENT [Replacement]

Revised instruction. In the main volume and in previous editions, this instruction was limited to the sentencing enhancement for deadly

weapons, and separate instructions were provided for sentencing enhancements for firearms and sexual motivation. See also former WPIC 161.00 and 162.00. Because the language of all three instructions was the same, the committee has consolidated them into a single instruction, which can be used in any case involving a penalty enhancement.

Unanimity issue—*Goldberg*. The jury must be unanimous in order to answer “yes” to a special verdict question about the grounds for a sentence enhancement. *State v. Goldberg*, 149 Wn.2d 888, 892–93, 72 P.3d 1083 (2003). In light of *Goldberg*, however, it is not clear whether the jury always needs to be unanimous in order to answer a special verdict question “no.”

In *Goldberg*, the jury returned a general verdict of guilty as to premeditated first degree and a special verdict (under RCW Chapter 10.95) answering “no” to the question whether the charged aggravating circumstance had been proved beyond a reasonable doubt (these two verdicts are not inherently inconsistent). A polling of the jurors led to the discovery that three jurors disagreed with the “no” answer. The trial court treated this lack of unanimity as a deadlock and instructed the jurors to deliberate further on the special verdict. The Supreme Court reversed this decision, holding that the “no” answer on the special verdict was a final verdict, inasmuch as a “no” answer did not require unanimity, and therefore the trial judge should not have ordered further deliberations. *Goldberg*, 149 Wn.2d at 893–95, 72 P.3d 1083.

A puzzling aspect about *Goldberg* is its inconsistency with the general principle that verdicts in criminal cases must be unanimous. See *Goldberg*, 149 Wn.2d at 892, 72 P.3d 1083; Const. Art. I, § 21 (cited in *Goldberg*); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994); CrR 6.16 (a)(2). A corollary of this rule is that a hung jury requires a mistrial on the issue in question, rather than a finding in favor of the defendant. The opinion in *Goldberg* does not address this general principle. Nor does its rationale shed any light on why special verdicts should be treated any differently in this regard than general verdicts. In holding that jurors do not need to be unanimous in answering “no” to a special verdict, the Supreme Court relied solely on the trial court’s jury instruction, which read in relevant part as follows:

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”.

Goldberg, 149 Wn.2d at 893, 72 P.3d 1083. The *Goldberg* court construed the second sentence from this quotation as meaning that jurors need not be unanimous in order to answer “no.”

Possible interpretations of *Goldberg*. Because the *Goldberg* court relied exclusively on the jury instruction for its authority on this point, it is not clear how the opinion should be interpreted. On the one

hand, the opinion's conclusion is written expansively: "In sum, special verdicts do not need to be unanimous in order to be final." *Goldberg*, 149 Wn.2d at 895, 72 P.3d 1083. On the other hand, because the Supreme Court did not cite to any authority other than the trial court's jury instruction, the opinion can be interpreted as merely applying the law of the case or as being limited to the particular statutes at issue from RCW Chapter 10.95. Under this approach, the opinion's expansive conclusion would be dicta.

If a trial judge interprets *Goldberg* as applying the law of the case doctrine or a similar theory, then the judge would have discretion to instruct jurors differently in other cases. A judge following this interpretation would use the second of the two bracketed sentences at the end of the instruction, thereby requiring unanimity among the jurors before they could answer "no" on the special verdict.

If a judge interprets *Goldberg* as applying to all special verdicts, and further that jurors should be instructed that they need not be unanimous in order to answer "no," then the judge should use the first of the two bracketed sentences at the end of the instruction. The committee has revised this bracketed sentence by adding the words "any one of" in order to more clearly inform the jury that a single juror's reasonable doubt is sufficient for a "no" answer.

Trial judges should carefully consider these issues before instructing jurors as to whether unanimity is required before jurors can answer "no" to a special verdict question.

[Current as of 2005 Update.]

APPENDIX B

2008 VERSION OF
WPIC 160.00

WPIC 160.00

CONCLUDING INSTRUCTION—SPECIAL
VERDICT—PENALTY ENHANCEMENTS

You will also be given [a special verdict form] [special verdict forms] [for the crime of (insert name of crime)] [for the crime[s] charged in count[s] ____]. If you find the defendant not guilty [of this crime] [of these crimes] [of (insert name of crime)], do not use the special verdict form[s]. If you find the defendant guilty [of this crime] [of these crimes] [of (insert name of crime)], you will then use the special verdict form[s] and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]. In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no".

NOTE ON USE

For cases involving a sentencing enhancement, insert this paragraph immediately ahead of the last paragraph in the concluding instruction WPIC 151.00 or 155.00, whichever is being used.

Use the appropriate verdict form when this paragraph is included in the concluding instruction. See the special verdict forms found in WPIC Chapter 190.

Choose from among the bracketed options within the instruction's first three sentences depending on which will provide the clearest directions to the jury, depending on such considerations as the number of charges and the existence of lesser included offenses.

COMMENT

Unanimity issue—*Goldberg*. The jury must be unanimous in order to answer "yes" to a special verdict question about the grounds for a sentence enhancement. *State v. Goldberg*, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). After *Goldberg*, it was not clear whether the jury always needs to be unanimous in order to answer a special verdict question "no." Because the opinion could have been read in two different ways, the previous version of this instruction included bracketed alternative language:

CONCLUDING INSTRUCTIONS

WPIC 160.00

Subsequently, the Court of Appeals held in *State v. Bashaw*, 144 Wn.App. 196, 182 P.3d 451 (2008), that *Goldberg* did not alter the general rule that unanimous jury verdicts are required in criminal cases. The *Bashaw* court approved an instruction stating that "[s]ince this is a criminal case, all twelve of you must agree on the answer to the special verdict." For the 2008 edition, the committee has modified the instruction in accordance with *Bashaw*.

[Current as of July 2008.]

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 273067

vs.

DECLARATION OF SERVICE

JOHN JOSEPH COOK,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Supplemental Brief of Respondent* and this *Declaration of Service*, on April 29, 2011.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on April 29, 2010.


PAMELA BRADSHAW