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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28540-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL BEA, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE FLAWED SPECIAL VERDICT WAS MANIFEST CONSTITUTIONAL ERROR SUBJECT TO REVIEW BY THIS COURT.

The State contends that Mr. Bea failed to preserve for review the erroneous special verdict instruction. An error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). “An error is ‘manifest’ if it had ‘practical and identifiable consequences in the trial of the case.’” *State v. Davis*, 141 Wn.2d 798, 866, 10 P.3d 977 (2000) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

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.” *Davis*, 141 Wn.2d at 866 (citing *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996)). Moreover, the *Bashaw* court apparently regarded this issue as a constitutional one. In *Bashaw*, as here, no one objected to the erroneous instruction at trial. *State v. Bashaw*, 144 Wn. App. 196, 198-99, 182 P.3d 451 (2008). And while the court expressly noted that double jeopardy considerations did not compel *Bashaw*’s holding, it did not exclude the possibility that an erroneous jury

instruction affects other constitutional rights, such as a defendant's right to the due process of law. *Bashaw*, 169 Wn.2d at 146 n. 7.

As the *Bashaw* court noted, the harm resulting from giving the erroneous special verdict instruction arises from the possibility that it may serve to coerce a juror to abandon his or her opinion in order to reach the unanimous verdict apparently required by the instruction.

The right to a jury trial under the state and federal constitutions embodies the right to a jury verdict uninfluenced by factors outside the evidence, the court's instructions, and the arguments of counsel. *State v. Boorgaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). This right prohibits a judge from bringing coercive pressure to bear upon jury deliberations. *State v. Jones*, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). A jury instruction invades this right by suggesting that a juror who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict. *Boorgaard*, 90 Wn.2d at 736.

The coercive instruction given in this case violated Mr. Bea's constitutionally guaranteed right to a jury trial.

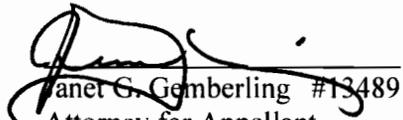
In fact, the *Bashaw* court applied a constitutional harmless error analysis to determine whether the instructions were prejudicial error. *Bashaw*, 169 Wn.2d at 147-48. *Bashaw* strongly suggests that constitutional considerations compelled the court's decision.

B. CONCLUSION

Because the trial court's error had constitutional dimensions and practical and identifiable consequences – the jury's special verdict added an additional 24 months to Mr. Bea's sentence – this court should reject the State's claim that Mr. Bea waived his ability to challenge the instruction on appeal.

Dated this 17th day of February, 2011.

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