

**FILED**

OCT 13 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

No. 28613-4-III

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

SHAWN M. TAYLOR,  
Defendant/Appellant.

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BRIEF OF RESPONDENT

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## I. STATEMENT OF THE CASE

On July 9, 2008, the defendant was arrested as he was walking down the street in Wenatchee, having just left his residence. (RP 130-132). During a search incident to his arrest, he was found to have methamphetamine and a firearm on his person. (RP 130-132, 137-140). A search warrant was served at the defendant's residence later that same day and the defendant was found to have a shotgun. (RP 38, 65). On July 9, 2008, the defendant had prior felony convictions making it unlawful for the defendant to possess firearms. (RP 135). The defendant was subsequently convicted by jury trial of possession of methamphetamine while armed with a firearm as well as two counts of unlawful possession of a firearm in the first degree. (CP 151-54).

At trial, the jury was instructed as to the firearm special verdict that:

If you find from the evidence that the State has proved beyond a reasonable doubt that the defendant was armed with a firearm at the time he possessed the controlled substance-methamphetamine, it will be your duty to answer Special Verdict Form C "Yes".

On the other hand, if, after weighing all the evidence, you have a reasonable doubt that the defendant was armed with a firearm at the time he possessed the controlled substance-methamphetamine, it will be your duty to answer Special Verdict Form C "No".

Because 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 verdict form to express your decision. The foreperson must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

(RP 201-03).

The defendant was convicted of all three counts and the jury answered yes to the special verdict. (CP 152). The court sentenced the defendant to the statutory maximum of 60 months for possession of methamphetamine, inclusive of the 18-month firearm enhancement. (CP 158). The court also ordered 9 to 12 months of community custody on that charge. (CP 158).

## II. ARGUMENT

### A. ANY INSTRUCTIONAL ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

The defendant contends, citing State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), that the trial court erred in instructing the jury that it had to be unanimous in its answer to the special verdict, and that “since this instruction misstates the law, the special verdict must be stricken.” (Appellant’s Brief at 7). Importantly, the court’s ruling in Bashaw was not required by constitutional protections against double jeopardy but, rather, by the common law precedent of State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

In the instant case, the jury was instructed that “. . . each of you must agree for you to return a verdict.” This instruction was not objected to in the trial court, nor was an alternative to this instruction proposed. (RP 183). When no exception is taken to a jury instruction, that instruction becomes the law of the case. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). An exception to the rule that a defendant may not complain about a jury instruction for the first time on appeal exists in the case of

manifest error affecting a constitutional right. Id. In Bashaw, the court did not identify a constitutional basis for a non-unanimous verdict. Nevertheless, the court in Bashaw did utilize the constitutional harmless error test.

Under the constitutional harmless error test, error is harmless only if the reviewing court is convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). The question on review is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2001), citing Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).

In the present case, any instructional error was obviously harmless beyond a reasonable doubt as the evidence supporting the firearm special verdict was overwhelming and uncontroverted. The defendant had both the methamphetamine and firearm on his person.

To impose a firearm enhancement, the State must prove that the defendant was armed with a firearm at the time he committed the crime. RCW 9.94A.602; State v. Barnes, 153

Wn.2d 378, 383, 103 P.3d 1219 (2005). A defendant is armed when a weapon is easily accessible and readily available for use and there is a connection between the defendant, the weapon, and the crime. State v. Easterlin, 159 Wn.2d 203, 208-09, 149 P.3d 366 (2006), citing State v. Willis, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005).

Where the defendant actually, instead of constructively, possesses a firearm, the State need not show more than that the weapon was easily accessible and readily available unless some unique circumstance so requires. Easterlin, 159 Wn.2d at 209, n. 3 (giving examples of such circumstances, including possession of a ceremonial weapon for religious purposes or a kitchen knife and a picnic basket). In Easterlin, the defendant was found asleep in the driver's seat of a car with a 9 mm pistol in his lap and cocaine in his sock. As the Easterlin court held, actual possession of a firearm is almost always sufficient to show a nexus between the defendant, his crime, and his firearm. Easterlin, 159 Wn.2d at 210. The potential use of the firearm "may be offensive or defensive and may be to facilitate the crime's commission, to escape the scene, or to protect contraband." State v. Neff, 163 Wn.2d 453, 462, 181 P.3d 819 (2008). In the present case, the evidence in support of a

firearm special verdict is overwhelming and any instructional error was harmless beyond a reasonable doubt. Therefore, the firearm special verdict should be affirmed.

Moreover, even assuming the instructional error was not harmless, the special verdict should not just be “stricken” as the defendant suggests. The appropriate remedy for instructional error is remand for trial with the correct instructions.

B. THE MATTER SHOULD BE REMANDED FOR ENTRY OF AN ORDER CLARIFYING THE JUDGMENT AND SENTENCE.

The defendant was sentenced to a term of 60 months for possession of methamphetamine while armed with a firearm and was placed on community custody for 9 to 12 months. The State concedes that the judgment and sentence does not contain any clarifying language that the combination of confinement and community custody not exceed the statutory maximum. Consequently, this matter should be remanded to the trial court for entry of an order clarifying the judgment and sentence. In Re

Personal Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023  
(2009).

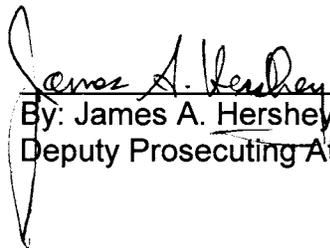
III. CONCLUSION

For the reasons set forth above, the firearm special verdict should be affirmed. In addition, this matter should be remanded to the trial court for amendment of the judgment and sentence to clarify that the combination of confinement and community custody shall not exceed the statutory maximum of 5 years.

DATED this 12th day of October, 2010.

Respectfully submitted,

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