No. 28618-5-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ERIBERTO GONZALEZ,

Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
HONORABLE MICHAEL E. SCHWAB

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied defense counsel's motion to withdraw as Mr. Gonzalez' attorney.

2. The trial court erred in instructing the jury it had to be unanimous to answer "no" to the special verdict.

3. The trial court erred in imposing a firearm enhancement based on the answer to the special verdict.

Issues pertaining to assignments of error.

1. Where Mr. Gonzalez' assault of defense counsel during trial created a conflict of interest for counsel and resulted in a complete breakdown of communication between attorney and client, did the trial court err when it refused to allow counsel to withdraw?

2. Should the firearm enhancement based on special verdict be vacated because the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict?

B. STATEMENT OF THE CASE

Eriberto Gonzalez was convicted of first degree murder in the shooting death of Eziquel Reyes. 8 RP 1021;[1] CP 11, 24, 32, 61. The

[1] The report of proceedings are contained in nine volumes labeled 1 through 8 (pages numbered consecutively) and Supplemental. For ease of reference, they will be referred to by their volume label, e.g. "8 RP ___" and "Supplemental RP ___."

Information[2] alleged the crime was committed while armed with a firearm and was therefore subject to an increased penalty. CP 61.

Friction between Gonzalez and his attorney Adolfo Banda was evident throughout the trial. At the outset Banda asked that courthouse security be present. 2 RP 160–162. Gonzalez was dissatisfied with Banda's representation and asked several times for a different attorney, saying he and Banda "bumped heads many times" and that he otherwise would not get a fair trial. 2 RP 252, 259; 3 RP 331, 354–358, 439–443; 4 RP 447–453. Gonzalez' reactions to the unexpected testimony of his friend David Lopez, secured only after being held for possible contempt and then subject to a material witness warrant, prompted the trial court to warn Gonzalez it had the power to physically restrain him if necessary. 2

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[2] In pertinent part, the Information provides:

"By this Information, the Prosecuting Attorney accuses you of committing the following crime(s):

Count 1 – FIRST DEGREE MURDER – RCW 9A.32.030(1)(a) and 9.94A.533(3)

CLASS A FELONY – The maximum penalty is Life imprisonment and/or a $50,000.00 fine

On or about March 17, 2007, in the State of Washington, with premeditated intent to cause the death of another person, you shot Eziquel Reyes, thereby causing the death of Eziquel Reyes.

Furthermore, when you committed the crime, you (or an accomplice) were armed with a firearm, and your penalty will be increased. (RCW 9.94A.533(3))

Furthermore, if you have previously been convicted on two separate occasions of a "most serious offense", either in this state or elsewhere, the mandatory penalty for this offense if life imprisonment without the possibility of parole.

Those crimes are Arson 1 (etc.) ... "

CP 61.

RP 150–156; 4 RP 490–511, 558–576; Supplemental RP 1–8; 6 RP 750–752, 767–772, 773–803.

Following Lopez' testimony, Jennifer Sharp testified.[3] Gonzalez believed her testimony was damaging to him. 6 RP 823. Before the witness could be excused by defense counsel, Gonzalez threw water in Banda's face, a scuffle ensued in which the counsel table was overturned, and Banda pushed his client into the wall of the jury box. Gonzalez was eventually subdued by five security officers, and suffered minor facial injuries. 6 RP 822–824; 7 RP 831–832; CP 4. The court excused the jury, and ended the day's session to allow time to consider the next step. 6 RP 822–825.

The court inquired the next morning. Gonzalez restated that he and his attorney hadn't had a good relationship from the beginning and he'd tried to fire Banda but nobody listened. 7 RP 826–827. Banda moved to withdraw as Gonzalez' attorney, indicating that in light of the assault and the way he felt, he could no longer effectively represent Gonzalez. 7 RP 827–828. Banda emphasized he could not zealously defend Gonzalez because there was a total lack of communication. 7 RP

[3] Ms. Sharp was listed as a witness for the State, but the State did not intend to have her testify. However, because defense counsel did want to have her testify, the State as an accommodation called her as a witness. 5 RP 611, 657–659; Supplemental RP 9; 6 RP 675, 691, 804–806, 810–811, 812–822.

831. Banda also moved for a mistrial on the basis Gonzalez could not receive a fair trial where the jury saw Banda strike him. 7 RP 827, 829–830. Although Banda knew what his ethical obligations were, he wanted time to contact the state bar association to reinforce his beliefs. 7 RP 830, 835–836.

The prosecutor opposed the motion for a mistrial. He argued that any harm caused by the event could be remedied and suggested polling the jurors, or giving a curative instruction. 7 RP 833. When asked by the court what their positions were regarding physical restraint, counsel deferred to the court's discretion. 7 RP 834. The jurors were brought in individually, and each responded they were comfortable going forward in the trial and would be fair and impartial despite having seen Gonzalez attack his lawyer. 7 RP 836–849.

The court denied Banda's motion to withdraw. It acknowledged that the relationship between Banda and Gonzalez had been problematic, but characterized Banda's role in the physical confrontation as merely reflexive and defensive, not an effort to engage in an act of aggression against Gonzalez" 7 RP 828–829, 850–851. Noting that friction is not uncommon in a high stakes trial, the court believed it was possible for the attorney-client relationship to continue and urged both sides to "try their

best to get through this." 7 RP 828–829. The court also denied the motion for mistrial, finding that there was no "irreparable damage that would prevent us from going forward." 7 RP 850–851.

The court then ordered that Gonzalez be physically restrained during the remainder of the trial, and moved the defense team to the opposite side of the counsel tables to prevent the restraints from being seen by the jury. 7 RP 834–835, 850, 852; CP 4–9.

Banda again addressed the court, restating that his relationship and ability to communicate with Gonzalez was irreparably broken. 7 RP 854–856. The court stood by its ruling, suggesting that Banda's cross-examination of the remaining state's witnesses needed minimal communication and that the defense investigator could perhaps help in any communication necessary to prepare the defendant's case-in chief. 7 RP 854–856. The court brought the jurors into the courtroom for the morning session and the jurors were instructed that "[w]hat happened [yesterday] and those events are not evidence that you are to consider in determining whether the defendant is guilty of the crime. ...". 7 RP 859–861.

The state thereafter called or recalled a few more witnesses, and rested its case-in-chief. 7 RP 861–924. The defense rested its case-in-chief without calling any witnesses. 7 RP 948–949.

The jury was instructed in pertinent part as to the special verdict:

> Instruction No. 13: For purposes of a special verdict, the state must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime.
> . . .

CP 40.

> Instruction No. 14: ... You'll also be furnished with a special verdict form. If you find the defendant not guilty, do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form 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. 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 unanimously have a reasonable doubt as to this question, you must answer "no".

CP 41–42.

The jury found Gonzalez guilty of first degree murder. 8 RP 1021; CP 24. In response to the special verdict's question, the jury answered "yes". 8 RP 1021; CP 23. The trial court imposed a standard range sentence of 347 months. The court determined that because Mr. Gonzalez had previously been sentenced with a firearm enhancement, the enhancement in this case doubled the mandatory period of confinement from 60 months to 120 months pursuant to RCW 9.94A.533(3)(d). The total period of confinement imposed by the court was 467 months. 8 RP 1046, 1052; CP 11–12. This appeal followed. CP 3.

C. ARGUMENT

1. The trial court erred when it denied defense counsel's motion to withdraw.

RPC 1.7 provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." RPC 1.7(a)(2). CrR 3.1(e) permits withdrawal of an attorney during trial where good and sufficient reason is shown. Good cause justifying withdrawal includes conflict of interest, irreconcilable conflict, and a complete breakdown of communication between attorney and client. State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). The trial court's decision is reviewed for an abuse of discretion. State v. Hegge, 53 Wn .App. 345, 350, 766 P.2d 1127 (1989).

a. Complete breakdown of communication.

Although simple lack of rapport between attorney and client is not sufficient, a complete breakdown of communication which may lead to an unjust verdict is considered a good and sufficient reason for withdrawal. Hegge, 53 Wn .App. at 350–351 (internal quotations omitted). This Court

examines the extent and nature of the breakdown and the breakdown's effect on the representation. If representation is inadequate due to the breakdown, prejudice is presumed. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001).

A physical assault on defense counsel would seem to indicate the ultimate breakdown in communication. Courts routinely allow attorneys to withdraw when their clients assault them. *See* Gilchrist v. O'Keefe, 260 F.3d 87, 90 (2nd Cir. 2001) (appointed counsel withdraws after client punched him in the ear), *cert. denied*, 535 U.S. 1064 (2002); United States v. Leggett, 162 F.3d 237, 240 (3rd Cir. 1998) (initial trial counsel withdraws due mainly to client's threats of physical harm; subsequent counsel withdraws after client assaulted him), *cert. denied*, 528 U.S. 868 (1999); United States v. McLeod, 53 F.3d 322, 325-26 (11th Cir. 1995) (counsel withdraws where client verbally abusive and threatened physical harm); United States v. Jennings, 855 F. Supp. 1427, 1432-1433 (M.D. Pa. 1994) (counsel withdraws after client hits counsel in head), *aff'd*, 61 F.3d 897 (3rd Cir. 1995); Legal Aid Society v. Rothwax, 415 N.Y.S.2d 432, 433-434, 69 A.D.2d 801 (1st Dept. 1979) (citing the "duty to protect its officers," court allows appointed counsel to withdraw following threatened assault by client).

In State v. Williams, 99 Ohio St. 3d 493, 794 N.E.2d 27 (2003), the defendant punched one of his two attorneys after hearing the guilty verdict in the jurors' presence. Citing "a breakdown in the attorney-client relationship," both attorneys moved to withdraw. 794 N.E.2d at 49. The attorney who had been assaulted indicated he could no longer consult with his client without "some fear of getting popped," he worried his feelings might be conveyed to jurors, and he was not able to speak to the client about mitigating factors for the sentencing phase of trial. Neither attorney could assure the trial court of his ability to represent the defendant zealously thereafter. 794 N.E.2d at 49. The Supreme Court of Ohio found that the trial court had abused its discretion in denying counsels' motion to withdraw. Id. at 50.

The facts in this case are similar. Early on, Banda had expressed concern for his personal safety. 2 RP 160–162. Banda indicated that in light of the assault and the way he felt, he could no longer effectively represent Gonzalez, he worried about the adverse effect of the jury seeing him deck his own client, his ability to communicate with Gonzalez about the remainder of the trial was irreparably broken, and Banda believed he could not zealously defend Gonzalez as he was professionally and ethically required to do. 7 RP 827–828, 830–831, 854–856. This

undermines the court's finding that it *was* possible for the attorney-client relationship to continue if only Banda and Gonzalez "tr|ied| their best to get through this." 7 RP 828–829.

Banda's representation of Gonzalez suffered after the assault. He did not call defense witnesses as planned[4], was unable to communicate with his client, and the deteriorating attorney-client relationship resulted in another physical assault outside the presence of the jury. 7 RP 933–939. This resulted in inadequate representation and presumed prejudice. Reversal is required.

b. Conflict of interest.

The right to conflict-free counsel is not simply rule based. The Sixth Amendment to the United States Constitution guarantees every criminal defendant the right to competent representation, including representation free from conflicts of interest. Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003).

An attorney has an actual conflict of interest as soon as "the attorney's and the defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" Winkler v. Keane, 7 F.3d

[4] 1 RP 138–140 and *passim.*

304, 307 (2nd Cir. 1993) (quoting Cuyler v. Sullivan, 446 U.S. 335, 356 n.3, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). An actual conflict is "'a conflict that affected counsel's performance -- as opposed to a mere theoretical division of loyalties.'" State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)), *rev. denied*, 165 Wn.2d 1012 (2008). Similarly, to establish a Sixth Amendment violation, "a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. . . . If this standard is met, prejudice is presumed." Regan, 143 Wn. App. at 427.

To show "adverse effect," the defendant:

> need not demonstrate prejudice--that the outcome of his trial would have been different but for the conflict--but only " 'that some plausible alternative defense strategy or tactic might have been pursued' but was not and that 'the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.' " United States v. Stantini, 85 F.3d 9, 16 (2d Cir.1996) (quoting Winkler v. Keane, 7 F.3d [at 309]). Thus, the conflict (1) " 'must cause some lapse in representation contrary to the defendant's interests,' " State v. Robinson, 79 Wn. .App. 386, 395, 902 P.2d 652 (1995) (quoting Sullivan v. Cuyler, 723 F.2d 1077, 1086)); or (2) have "likely" affected particular aspects of counsel's advocacy on behalf of the defendant. United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir.1992).

Regan, 143 Wn. App. at 428. Whether counsel had a conflict is a legal question this Court reviews *de novo*. Id.

Once Gonzalez attacked Banda, Banda had a conflict of interest. He was Gonzalez' lawyer *and* his crime victim. Banda told the court he could not fulfill his professional and ethical duties to Gonzalez in light of the assault and how Banda felt about it. His interests and his client's interests had permanently diverged. Yet the trial court required that Banda continue representing the client despite the conflict of interest. The Rules of Professional Conduct, however, do not permit this option. If the client's interests conflict with the attorney's, the attorney must withdraw. RPC 1.7(a)(2) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.").

Because Gonzalez was forced to proceed with an attorney who had a conflict of interest and the conflict resulted in inadequate representation as discussed above, prejudice is presumed and reversal is required.

2. The firearm enhancement should be vacated because it was based on an invalid special verdict in which the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict.

A criminal defendant may not be convicted unless a twelve-person jury unanimously finds every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; State v.

Williams-Walker, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 213 (1994); 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." State v. Bashaw, 169 Wn.2d 133, 146-47, 234 P.3d 195 (2010); 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.

In Bashaw, the Supreme Court vacated sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts similar to the one given in this case. Bashaw, 169 Wn.2d

at 147-48, 234 P.3d 195. In this case as well as 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." CP 41–42; 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.

In the present case, the jurors were instructed even more specifically than in Bashaw, and were told they *must* be unanimous to return a "no" verdict:

> Because this is a criminal case all twelve of you must agree in order to answer the special verdict form. 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 unanimously have a reasonable doubt as to this question, you must answer "no".*

CP 41–42 (emphasis added).

The instruction in the present case incorrectly requires jury unanimity for the jury to answer "no" to the special verdict, contrary to Bashaw and Goldberg. Since this instruction misstates the law, the special

verdict enhancement must be vacated. Goldberg, 149 Wn.2d at 894; Bashaw, 169 Wn.2d at 147.

3. A sentence enhancement is illegal or erroneous when based upon an invalid special verdict. Illegal or erroneous sentences may be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court.

Recently, in State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (2011), the Court of Appeals found the trial court erred when it required the jury to be unanimous to find the State had not proven the special allegation. However, the Court ruled the error was not a manifest constitutional error and thus could not be raised for the first time on appeal. Nunez, 160 Wn. App. at 159–65. The decision in Nunez directly conflicts with other decisions from the Washington Supreme Court and Division I of the court of Appeals. Those courts found such an error is manifest constitutional error and can be raised for the first time on appeal. Bashaw, 169 Wn.2d at 146-47; Goldberg, 149 Wn.2d at 892-94; *accord* State v. Ryan, No. 64726-1-I, 2011 WL 1239796 (Apr. 4, 2011).

"[I]llegal or erroneous sentences may be challenged for the first time on appeal," regardless of whether defense counsel registered a proper objection before the trial court. State v. Ross, 152 Wn.2d 220, 229, 95

P.3d 1225 (2004), quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). A sentence enhancement must be authorized by a valid jury verdict. Williams-Walker, 167 Wn.2d at 900. Error occurs when a trial court imposes a sentence enhancement not authorized by a valid jury verdict. *See* State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon, occurred during sentencing, not in the jury's determination of guilt).

Similarly, the error here occurred not just in the use of the invalid instruction, but more importantly when the trial court imposed the sentence enhancement based upon the invalid special verdict. Thus, contrary to the Court of Appeals ruling in Nunez, Mr. Gonzalez could raise this issue for the first time on appeal because it involved the imposition of an illegal or erroneous sentence which was based upon an invalid special verdict -- itself the product of an improper jury instruction.

The instructions in the present case incorrectly required jury unanimity for the jury to answer "no" to the special verdict, contrary to Bashaw and Goldberg. The remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. Williams-Walker, 167 Wn.2d at 899-900; Recuenco, 163 Wn.2d at 441-42.

4. The illegal or erroneous sentence based upon an invalid special verdict was not 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 Wash.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 non-unanimous 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.

D. CONCLUSION

For the reasons stated, the conviction must be reversed and the matter remanded for new trial with conflict-free counsel or, alternatively, the firearm enhancement should be vacated and the case remanded for resentencing within the standard range.

Respectfully submitted June 6, 2011.

Susan Marie Gasch, Attorney for Appellant