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APR 11 2011  
COURT OF APPEALS  
DIVISION III  
SPokane, WA

No. 28721-1-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

COREY JAVON WILLIAMS,

Defendant/Appellant.

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Appellant's Brief

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in instructing the jury it had to be unanimous to answer “no” to the special verdict.

2. The trial court erred in imposing the school zone enhancement on Count II.

*Issue Pertaining to Assignments of Error*

Should the exceptional sentence and 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**

Corey Williams was convicted by a jury of two counts of delivery of a controlled substance and one count of forgery. CP 45-49. On Count II the jury was asked to find by special verdict that the defendant delivered a controlled substance within 1000 feet of a school bus route stop designated by the school district. CP 47. The jury was instructed in pertinent part regarding the special verdict:

If you find the defendant guilty of this crime, 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 37.

The jury answered “yes” to the special verdict. CP 47. Based on this answer, the court imposed an additional 24-month enhancement on Count II. 12/17/09 RP 16.

This appeal followed. CP 62-68.

### **C. ARGUMENT**

#### **1. The exceptional sentence and special verdict should be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict.<sup>1</sup>**

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.

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<sup>1</sup> Assignments of error 1 & 2.

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.

More recently, in State v. Bashaw, Slip Op. No. 81633-6 (July 1, 2010), the Supreme Court reversed sentencing enhancements where the jury was given an instruction requiring jury unanimity for special verdicts identical to the one in this case. Bashaw, Slip Op. pp 4, 13-18.

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." Bashaw, Slip Op. p 4, RP 201. The jury herein was also specifically instructed, "If you *unanimously* have a reasonable doubt as to this question, you must answer no." (emphasis added). 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, Slip Op. p 16.

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 stricken.

**D. CONCLUSION**

For the reasons stated, the special verdict enhancement should be stricken.

Respectfully submitted November 8, 2010.

  
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