

FILED

AUG 17, 2012
Court of Appeals
Division III
State of Washington

NO. 287211-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

COREY JAVON WILLIAMS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-00804-7

SUPPLEMENTAL BRIEF OF RESPONDENT REGARDING
THE APPLICABILITY OF *STATE V. NUNEZ*

ANDY MILLER
Prosecuting Attorney
for Benton County

TERRY J. BLOOR,
Chief Criminal Deputy
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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ISSUE

1. Did the trial court error in instructing the jury that it must come to a unanimous decision in answering the special verdict form?

STATEMENT OF THE CASE

On October 23, 2009, the defendant was charged, by Amended Information, with two counts of Delivery of a Controlled Substance in violation of RCW 69.50.401(2)(a); one count of Forgery in violation of RCW 9A.60.020(1)(a)(b); and one count of Unlawful Possession of a Controlled Substance in violation of RCW 69.50.4013(1). (CP 5-7). The defendant was also on notice of being in violation of RCW 69.50.435(1)(c), delivery of a controlled substance within 1,000 feet of a school bus stop. The notice was attached to Count II. (CP 6).

The cases were tried before a jury on October 22, 2009. At the close of all the evidence, the court moved to address any issues either party may have had concerning the jury instructions. (II RP 207). An objection was

raised as to only one instruction, and the court promptly removed it before presenting the instructions to the jury. (II RP 207). Instruction number 25, which was not objected to, asked that the jury consider a special verdict form for the crime charged in Count II. (CP 37). Such instruction asked that the jury, upon finding the defendant guilty of Count II, decide whether the special verdict applied, and to either answer "yes" or "no." (CP 37). The instruction was clear that either answer required a unanimous decision. (CP 37).

On October 23, 2009, the jury returned a verdict of guilty as to Counts I, II, and III and found the defendant not guilty as to Count IV. (CP 45-46, 48-49). The jury also answered, "yes" on the special verdict form, thus finding that the defendant delivered a controlled substance within 1000 feet of a school bus stop. (CP 47). The defendant was subsequently sentenced on

December 17, 2009 and this appeal followed. (CP 53-61, 62-68).

ARGUMENT

A. THE TRIAL COURT DID NOT ERROR WHEN IT ASKED THAT THE JURY REACH A UNANIMOUS DECISION REGARDING THE SPECIAL VERDICT.

A trial court, in criminal cases, almost invariably gives the jury a basic concluding instruction requiring that every element be decided unanimously. *State v. Nunez*, 174 Wn.2d 707, ___ P.3d ___ (2012). The Sixth Amendment to the United States Constitution requires unanimity to find, beyond a reasonable doubt, any aggravated circumstance that increases a defendant's sentence. *Id.* The Washington Supreme Court has also held that a jury must be unanimous when rejecting the same aggravated circumstance. *Id.* (citing *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995)).

Allowing a jury to reject an aggravated circumstance with anything less than unanimity would create unnecessary confusion for trial

courts and juries and undermine the purpose of jury unanimity. *Nunez*, 174 Wn.2d 707. "A rule that allows a jury to give a definite answer on a special verdict form when the jurors are not in agreement frustrates one of the core purposes of jury unanimity, which is to promote the jurors' full discussion and well-reasoned determinations before returning a verdict." *Id.*

The Supreme Court, in deciding *Nunez*, overturned its prior decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), holding that, if a jury is told that it must decide all aspects of the case unanimously and is then subsequently told that the special verdict form does not have to be unanimous, the jurors will only be confused and such confusion is harmful to the judicial process. *Nunez*, 174 Wn.2d 707. The *Nunez* Court also held that if the unanimity rule is required when rejecting certain aggravated circumstances then it must be required in most, if not, all

aggravated circumstance rejections; including school bus enhancements. *Id.*

The *Nunez* case is directly on point and should control this appeal. *Nunez* was convicted of delivery of a controlled substance and the State had included a special allegation on the aggravated circumstance that each crime took place within 1,000 feet of a school bus stop. *Id.* A similar, if not the same, special verdict instruction was given during *Nunez's* trial that was given during this trial. *Id.* *Nunez* did not object to the use of the instruction, and the jury subsequently answered "yes" on the special verdict form. *Id.* Because the *Nunez* case is an exact copy of this appeal it should apply and control.

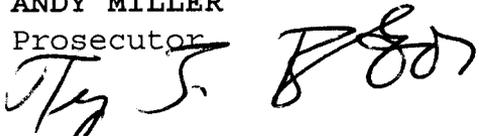
CONCLUSION

Based on the *Nunez* case, a trial court does not error by giving an instruction that requires a jury to be unanimous in rejecting an aggravated circumstance. The trial court in this case did

not error when it gave a similar instruction concerning the special verdict. Therefore, the trial courts findings should be upheld.

RESPECTFULLY SUBMITTED this 17th day of August 2012.

ANDY MILLER
Prosecutor



TERRY J. BLOOR,
Chief Criminal Deputy,
Prosecuting Attorney
Bar No. 9044
OFC ID No. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

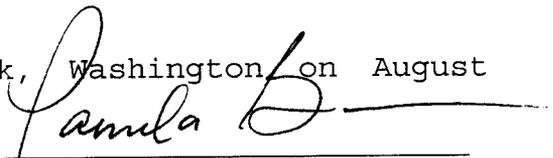
David N. Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005

E-mail service by agreement was made to the following parties:
gaschlaw@msn.com

Corey Javon Williams
#864621
Coyote Ridge Correction Ctr
P.O. Box 769
Connell, WA 99326

U.S. Regular Mail,
Postage Prepaid

Signed at Kennewick, Washington on August 17, 2012.



Pamela Bradshaw
Legal Assistant