

28835-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY D. SINGH, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

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I.

ASSIGNMENTS OF ERROR

1. The trial court erred instructing the jury it had to be unanimous to answer the special verdict interrogatory “no.”
2. The trial court erred imposing firearm enhancements based upon the answers to the special interrogatories.
3. The trial court erred imposing an exceptional sentence.

II.

ISSUES PRESENTED

1. Should a special verdict firearm enhancement be vacated based upon the wording of the instruction advising the jury how to proceed in answering the special interrogatory?
2. Should an exceptional sentence be vacated when one of the reasons that the trial court imposed the sentence no longer exists?

II.

STATEMENT OF THE CASE

On July 26, 2008, around 2:58 a.m., Spokane City Police Officers responded to the report of a shooting near the intersection of Sprague

Avenue and Stevens Street. RP 368. Officers contacted a witness who had located a spent .45 shell casing and bullet fragments in the parking lot directly north of the Ridpath Hotel on Sprague. RP 369-371. The witness also advised that after he heard the gun shot, he observed a white car and a dark Chevy Impala exit the lot. RP 357. Officers stopped the dark Chevy near the intersection of Sprague and Stevens and contacted the occupants, Mr. Tauala and Ms. Thomas. RP 375.

Tauala and Thomas advised officers that they were confronted by two black males in the parking lot. RP 376-378, 493. During the incident one of the black males pulled out a handgun, pointed it at Mr. Tauala and said, "What's up nigger?" RP 336-337, 494. Mr. Tauala told the armed male that he was not afraid. RP 344. The black male then lowered the gun and fired one round at Tauala's feet. RP 337. The bullet struck Mr. Tauala's right shoe without inflicting any bodily injury. RP 338-339, 494-495. After the shooting, the black males jumped into a white sedan that drove away. RP 495.

Officers responded to the scene of the shooting, contacted Mr. Tauala, and observed a bullet hole in his right shoe. RP 375-376.

Taxi Cab Driver, Todd Hughes, in front of the Ridpath Hotel, was across the street from the parking lot where the shooting occurred when he heard the gunshot. RP 508. Mr. Hughes observed several individuals

enter a white Chevy which he followed and obtained the license plate thereof. RP 511-512. Mr. Hughes located the vehicle parked behind the Medical building near Sacred Heart. RP 512-513. Mr. Hughes observed a black male wearing a white hooded sweatshirt walking away from the Chevy holding a gun. RP 514-516.

Officers responded to the Medical building and found Jennifer Jacobs near the intersection of 8<sup>th</sup> and McClellan. RP 518. Detective Barrington was assigned the investigation of the shooting and discovered that the registered owner of the white Chevy was Ashley Breesnee. RP 533-534. Detective Barrington contacted and interviewed Ms. Jacobs and Ms. Breesnee who both identified the defendant as the shooter from the incident downtown. RP 399, 535-539.

Ms. Breesnee and Ms. Jacobs testified that on July 26, 2008, they went with the defendant and his brother, Jamal Singh, downtown. RP 383-385, 459. In the parking lot near Sprague and Stevens, defendant was confronted by Mr. Tauala when he asked, "Anyone else got any problems?" RP 388. Jamal Singh then directed Ms. Breesnee to drive them to his house on Ostrander where he retrieved something from inside and placed in the trunk. RP 388-389. Thereafter, Jamal Singh directed Ms. Breesnee to return downtown to see if Mr. Tauala was still in the area. RP 391. Mr. Tauala was still in the parking lot when they arrived

downtown. RP 391. Defendant and Jamal Singh exited the vehicle, argued with Mr. Tauala, then Jamal Singh had Ms. Breesnee open the trunk. RP 392. Jamal Singh retrieved the shirt and handed it to Defendant. RP 392. Ms. Breesnee saw that defendant had a gun when it dropped out of the shirt. RP 392, 464. Ms. Breesnee saw defendant pick up the gun, walk over to Mr. Tauala, then she heard the sound of the gun cocking followed by a gunshot. RP 393, 395. Ms. Jacobs saw defendant with the gun and heard the gunshot. RP 465-466. Then everyone started running, defendant and Jamal Singh entered the car and told her to drive. RP 396, 466. Defendant complained that the gun was hot. RP 396.

Ms. Breesnee drove to the South hill and stopped at Stevens and Grand or Bernard because Ms. Jacobs was “freaking out” and wanted out of the car. RP 396-397, 467-468. Defendant took Ms. Jacobs cellular telephone when she exited the car because he was fearful that she would contact the police. RP 467-469.

Thereafter, defendant contacted Ms. Breesnee and demanded to meet her to talk about the incident. RP 401. Defendant sounded paranoid, yet insisted they meet. RP 401. She met defendant in the parking lot of Big Daddy’s Casino on the South hill. RP 402. Defendant advised Ms. Breesnee not to talk to anyone about the shooting. RP 402. Defendant’s

attitude and words made Ms. Breesnee fearful for her safety if she talked to anyone about the incident. RP 402-403.

Detective Barrington confirmed that defendant had three prior felony convictions, two for Attempted Second Degree Assault with a corresponding firearm enhancement, and one for Third Degree Assault, which rendered defendant ineligible to possess a firearm. Defendant was charged and convicted of Second Degree Assault with a firearm enhancement, Drive-By-Shooting, First Degree Unlawful Possession of a Firearm, Conspiracy to commit Second Degree Assault with a firearm enhancement, and Tampering with a Witness. The trial court imposed an exceptional sentence on defendant and defendant filed this appeal.

### III.

#### ARGUMENT

A. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT COMMITTED A MANIFEST ERROR WHICH QUALIFIES FOR REVIEW PURSUANT TO RAP 2.5(a)(3).

Generally, the failure to object to a trial court's jury instruction precludes appellate review. *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instruction that he now contends was erroneous. Generally, an issue

cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by a test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn. 2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added). Here, defendant has identified no practical and identifiable consequences in the *trial of this case* that are directly attributable to the alleged error. The defendant has not satisfied the threshold burden that the trial court committed a manifest error which affected a constitutional right, and hence, is not entitled to appellate review thereof at this point.

**B. THE DEFENDANT’S FAILURE TO OBJECT TO THE TRIAL COURT’S ALLEGEDLY ERRONEOUS INSTRUCTION PRECLUDES REVIEW OF THE ERROR ON APPEAL PURSUANT TO RAP 2.5(a).**

Defendant claims that the special verdicts should be vacated based upon the trial court incorrectly instructing the jury that it had to unanimously answer “no” before the special verdicts could be rejected. The defendant cites the Supreme Court’s decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), in support of his claim. Defendant relies upon the reasoning in *Bashaw* while not heeding the ruling by the

Supreme Court in *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009), that appellate courts do not assume that an error is of constitutional magnitude. *Id.*

In *State v. Nunez*, No. 28259-7-III, 2011 WL 505335 (Wash.Ct.App. Feb. 15, 2011), this Court analyzed the requisites for review of the issue defendant has raised herein. Citing the Supreme Court's *O'Hara* decision, this Court analyzed whether the defendant in *Nunez* had qualified for review of the trial court instructional error. Specifically, this Court inquired whether Mr. Nunez had established that the trial court's instructional error was constitutionally "manifest." This Court sought proof that the instructional error was constitutionally "manifest" in the only source available, the record before the trial court. In *Nunez*, this Court found the record devoid of the facts required to demonstrate that the defendant had suffered actual prejudice. Accordingly, this Court found that Mr. Nunez had failed to carry his burden to prove that he had suffered actual prejudice as a result of the instructional error. Hence, Mr. Nunez had not proved that the trial court's instructional error had manifestly affected an identified constitutional provision, and thus had not qualified for the exception to the provisions of RAP 2.5(a). Here, the record lacks proof of any practical and identifiable

consequences *to the trial* of Mr. Singh's case to support the claim that the asserted instructional error was "manifest."

C. ASSUMING, ARGUENDO, THAT THE INSTRUCTIONAL ERROR IS "MANIFEST" AND THAT SUFFICIENT EVIDENCE SUPPORTED THE CLAIM TO MAKE IT OF CONSTITUTIONAL MAGNITUDE, THE ERROR WAS HARMLESS.

Defendant claims the trial court committed manifest constitutional error by instructing the jury that it had to unanimously answer the special verdict form "no" to avoid finding the sentencing enhancement factor. Defendant cites *State v. Bashaw* in support of his position; however, this position does not cure the fact that instructional error does not automatically constitute constitutional error.

The Supreme Court based its *Bashaw* decision on *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). In *Goldberg*, the trial court instructed the jury: "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.*, at 893. The Supreme Court held that this instruction did not mandate unanimity before a "no" answer could be rendered. *Id.*, at 893. The Supreme Court further ruled that the jury therein had completed their assigned task as instructed when it rendered a

“no” verdict despite a lack of unanimity. *Id.*, at 893. It is important to note that the Supreme Court found that the error in *Goldberg* was precipitated by the trial court’s order that the jury continue to deliberate despite its having indicated that it was deadlocked and unable to reach a verdict regarding the special interrogatory.

Here, the trial court’s instruction regarding the special verdict form precluded the jury from facing the necessity for unanimity with regard to whether it had a reasonable doubt concerning the proof of the special interrogatory. The trial court instructed the jury that it *could not answer the special interrogatory affirmatively unless it was unanimous beyond a reasonable doubt that the answer was “yes.”* The trial court’s instruction focused the jury’s attention on the need to be unanimous beyond a reasonable doubt to answer the special interrogatory “yes.” Accordingly, it is logical to infer from the instructions given in *Goldberg* and herein that unanimity was not required to render a “no” answer to the special interrogatory.

The defendant’s reliance upon *Bashaw* is understandable, yet misplaced. The trial court’s requirement of unanimity for the jury to answer the special interrogatory and complete the special verdict form comports with the instructions regarding how to resolve the issue presented by a general verdict form. This position is consistent with the

general infrastructure of criminal jury trials. This position does not foreclose a jury from becoming deadlocked when trying to answer a special interrogatory. A jury that is deadlocked with regard to a special interrogatory provides the same practical and logistical resolution of the subject special interrogatory as would a unanimous “no” answer. The criminal justice system in Washington provides no procedural means by which a defendant could face jeopardy for a sentencing enhancement where a jury was unable to return a unanimous “no” answer thereto. A special verdict differs from a general verdict regarding the underlying charged offense in that a deadlocked jury on a general verdict results in a mistrial which places the defendant back in the position of facing trial on the charged offense. Such is not the result of a deadlocked jury with regard to a special interrogatory and special verdict. Accordingly, a jury need not unanimously agree that the answer to the special interrogatory is “no” to render a negative resolution thereof and thereby foreclose its consideration by the trial court.

By incorporating, the presumption that the jury follows the law as instructed by the trial court into the process, *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994), a defendant *cannot face a sentencing enhancement until a jury returns a general verdict finding that defendant committed the underlying charged offense beyond a reasonable doubt.*

Only then is the jury charged with resolving the special interrogatory and rendering a special verdict. Nevertheless, a defendant *cannot face a sentencing enhancement unless the jury returns a special verdict finding that the defendant committed the enhancing factor beyond a reasonable doubt while committing the charged offense.* If the trial court committed an instructional error with regard to the special interrogatory and verdict, it was harmless in light of the presumption that the jury follows the law as instructed.

D. THE TRIAL COURT'S INSTRUCTIONAL ERROR WAS HARMLESS.

Defendant argues that the error created by the trial court's special verdict form instruction was not harmless based upon the Supreme Court's reasoning in *Bashaw* that there was no way to discern how the jury would have answered the interrogatory had it been properly instructed. Here, the essential elements instructions for the first degree assault, conspiracy to commit first degree assault with the lesser degree crimes thereof, and drive-by-shooting charges required the jury find that those crimes were committed with a firearm in order to convict. The defendant was also charged with unlawful possession of a firearm. Assuming that the jury followed the trial court's instruction, the jury had to unanimously find beyond a reasonable doubt that the defendant committed the underlying

crimes with a firearm before it could render a guilty verdict thereon and before the jury could even consider the special verdict interrogatories.

The standard of review requires that the appellate court inquire whether it can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error with regard to each charged crime. *See Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Here, there should be no reasonable doubt that the jury, having already agreed that defendant had used a firearm to commit the second degree assault, conspiracy to commit second degree assault and the drive-by-shooting for purposes of the general verdict forms, would render the same answers to the interrogatory posed by the special verdicts. Accordingly, assuming that the instructional error was manifestly unconstitutional pursuant to *State v. Bashaw*, it was harmless beyond a reasonable doubt based upon the evidence before the jury.

E. THE TRIAL COURT WAS NOT PRECLUDED FROM IMPOSING FIREARM ENHANCEMENTS PURSUANT TO THE JURY'S ANSWERS TO THE SPECIAL VERDICT INTERROGATORIES.

Defendant contends that the trial court committed error when it imposed an exceptional sentence herein based upon the impact of the sentencing enhancements upon the overall sentence. Specifically, defendant contends that since the special verdicts rendered by the jury

were unconstitutional, the trial court's use thereof in conjunction with the provisions of RCW 9.94A.589 to avoid a clearly too lenient sentence was legally unsupportable. As previously noted, the trial court's instructions to the jury regarding the special interrogatories were proper and, if not, then constituted harmless error when measured against the evidence before the jury.

Assuming, *arguendo*, that the special verdicts were properly rendered by the jury herein, the issue of whether the trial court was justified in imposing an exceptional sentence herein is dependent upon the interactions of the provisions of RCW 9.94A.533(3), 9.94A.535, and 9.94A.589. In *State v. Newlum*, 142 Wn. App. 730, 176 P.3d 529 (2008), this Court noted that:

The legislature amended RCW 9.94A.535(2)(c) to allow a sentencing judge to impose an exceptional sentence solely on the basis of criminal history.

*Id.*, at 744.

Here, the trial court carefully calculated the defendant's criminal history based upon his prior convictions. Report of Proceedings-Sentencing of February 10, 2010 ("RP-S") 8-16. The trial court then granted defendant's motion to consider the second degree assault, drive-by-shooting, and unlawful possession of a firearm as same criminal conduct so that those current convictions counted as only one point toward

the offender score. RP-S 14-16, 28. Next, the trial court considered the parties' respective requests for the imposition of exceptional sentences below and above the standard sentencing range. RP-S 28-29. The trial court declined to impose an exceptional sentence below the standard range because defendant had left the scene, armed himself with a firearm, returned and used the weapon to facilitate his assault of the victim. RP-S 29. Thereafter, the trial court considered whether the case justified an exceptional sentence above the standard range sentence. RP-S 29-34.

The trial court noted that the impact of the doubling provision of the firearm enhancements, combined with defendant's lengthy violent criminal history would result in some of defendant's current convictions going unpunished. RP-S 29-34. The trial court considered the defendant's violent criminal history as driving its consideration of, and the need for the imposition of an exceptional sentence above the standard range. RP-S 32-33. The trial court imposed an exceptional sentence above the standard range based more upon the lengthy violent criminal history of the defendant coupled with the violent crimes he perpetrated herein than merely the impact of the firearm enhancements found by the jury. The trial court specifically noted that an exceptional sentence above the standard sentencing range was merited to at least provide some reasonable accountability for the current offenses. RP-S 34. Accordingly,

the trial court properly supported the imposition of the exceptional sentence based upon the Sentencing Reform Act, the case law, and the record established by the trial.

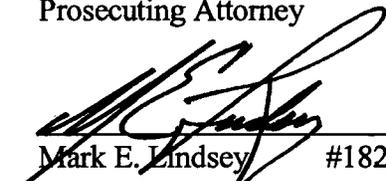
V.

CONCLUSION

For the reason stated, the special verdicts rendered, the corresponding sentencing enhancements imposed therefrom, and the sentence imposed should be affirmed.

Respectfully submitted this 14<sup>TH</sup> day of April, 2011.

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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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  )  
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                                  v.                    )  
  )  
ANTHONY D. SINGH,            )  
  )  
                                  Appellant,    )

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I certify under penalty of perjury under the laws of the State of Washington, that on April 14, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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4/14/2011  
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Spokane, WA  
(Place)

*Lorraine K Owen*  
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