

**FILED**

DEC 02 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 28870-6-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ROGELIO M. HERNANDEZ,

Defendant/Appellant.

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Appellant's Reply Brief

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**A. ARGUMENT**

**Issue No. 1. Mr. Hernandez's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to identify him as the perpetrator of the charged crimes.**

The State's Response to this issue is adequately rebutted in appellant's opening brief.

**Issue No. 2. Mr. Hernandez's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove that his threat to kill Corporal Ball placed Corporal Ball in reasonable fear that the threat would be carried out.**

The State's Response to this issue is also adequately rebutted in appellant's opening brief.

**Issue No. 3. 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.**

The State contends that Mr. Hernandez failed to preserve this issue for appeal because he did not object to the jury instruction at trial.

Response Brief pp 17. However, an error may be raised for the first time

on appeal if it is a manifest error involving a constitutional right. RAP 2.5(a)(3); State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000). An error is "manifest" if it had " 'practical and identifiable consequences in the trial of the case.' " Id. (citing State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992))).

Extensive authority supports the proposition that instructional error of the nature alleged here is of sufficient constitutional magnitude to be raised for the first time on appeal. Id. (citing State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968)); State v. Scott, 110 Wn.2d 682, 688 n. 5, 757 P.2d 492 (1988); Martinez v. Borg, 937 F.2d 422, 423 (9th Cir.1991). This is not a case where a jury instruction merely failed to define a term, or where a trial court did not instruct on a lesser included offense that was never requested. See Scott, 110 Wn.2d at 688 n. 5, 757 P.2d 492. Instead, the instruction here violates due process because the erroneous instruction was an incorrect statement of the law that effectively alters the burden of proof.

The court in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), did not engage in a manifest constitutional error analysis for the instructional error. However, since the Bashaw court did engage in a

constitutional harmless error analysis, it must have deemed the instructional error to be one of manifest constitutional error. Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195. As such, it may be considered for the first time on appeal. RAP 2.5(a)(3)

The State also argues the error was harmless. Response Brief pp 13-17. This assertion is incorrect. The Bashaw court found the erroneous 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)). Moreover, 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<sup>1</sup>, the error reversed by this court was the trial court's instruction to a nonunanimous 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

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<sup>1</sup> State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)

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.

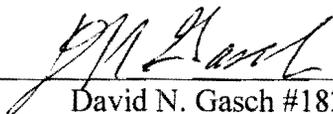
Bashaw, 169 Wn.2d at 147-48, 234 P.3d 195.

The situation in the present case is indistinguishable from Bashaw. It is impossible to speculate about what the jury would have decided if it were given the correct instruction. Therefore, the error is not harmless.

**B. CONCLUSION**

For the reasons stated herein, and in appellant's opening brief, the special verdict should be vacated.

Respectfully submitted December 1, 2010.

  
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Attorney for Appellant

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ROGELIO M. HERNANDEZ, ) PROOF OF SERVICE  
)  
Defendant/Appellant. )  
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I, David N. Gasch, do hereby certify under penalty of perjury that on December 1, 2010, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of Appellant's Reply Brief:

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