

No. 29232-1-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

PHILIP J. STRONG,  
Defendant/Appellant.

APPEAL FROM THE FERRY COUNTY SUPERIOR COURT  
HONORABLE ALLEN C. NIELSON

---

BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in instructing the jury in a manner that required the jury to be unanimous to answer “no” to the special verdict. Instruction No. 1 (CP 100); Instruction No. 2 (CP 102); Instruction No. 22 (CP 122–123); Instruction No. 23 (CP 124).

2. The trial court erred in imposing a sentencing enhancement based on the deadly weapon special verdict.

*Issues Pertaining to Assignments of Error*

A non-unanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt. Did the court err in instructing the jury in a manner that required the jury to be unanimous to answer "no" to the deadly weapon special verdict?

**B. STATEMENT OF THE CASE**

Philip “Jeb” Strong entered the back door of the house holding his rifle, its lever opened. RP 101, 108–109, 697, 714, 770, 809. Down the hallway, Trent Irby was sitting at kitchen/dining room table. RP 100, 108, 786. Within a short time, Irby was dead. RP 117, 229, 241, 268, 471, 482, 489. It was not disputed that Mr. Strong fired two shots -- one into Irby’s chest and a second shot into his upper back. RP 112–113, 774. The jury was asked to decide *why* the shots were fired. Court’s Instructions to the Jury at CP 99–131.

By Second Amended Information, the State charged Mr. Strong with murder in the second degree with a firearm sentencing enhancement.<sup>1</sup> CP 49–50, 75–76. The jury was given self-defense and aggressor instructions. CP 118, 121.

In pertinent part, the jury was also instructed as follows:

Instruction No. 1: ... It [] is your duty to accept the law from the court ... You should consider the instructions as a whole ...

CP 100 (omission added).

Instruction No. 2. As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. ...

CP 102.

The jury was instructed they must be unanimous to answer the verdict and special verdict forms:

Instruction No. 22: ... If you unanimously agree on a verdict, you must fill in the blank provided in verdict form [] the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form [].

...

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

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<sup>1</sup> This trial was a retrial upon remand. In the first trial, Mr. Strong was charged with first degree murder and was convicted of second degree murder. *See* unpublished opinion, State v. Philip J. Strong, 2009 WL 1114608 (Wn. App. Div. 3, April 21, 2009) (268551).

CP 122–123 (omissions added).

Instruction No. 23. ... If you find the defendant guilty of [a particular crime], you will then use the special verdict form for [that particular crime] and fill in the blank with the answer "yes" or "no" according to the decision you reach. ...

...

Because this is a criminal case, in order to answer any special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

CP 124 (substitution added).

The jury found Mr. Strong guilty of the lesser included crime of first degree manslaughter. CP 134. The jury returned a special verdict of “yes” to the question whether he was armed with a firearm at the time of commission of the crime. CP 135. The court imposed a high end standard range sentence of 102 months and a deadly weapon enhancement of 60 months, for a total period of confinement of 162 months. CP 137–138. This appeal followed. CP 145.

### C. ARGUMENT

**The firearm special verdict should be vacated because the jury was incorrectly instructed in a manner requiring unanimity to answer “no” to the special verdict.**

*Manifest Constitutional Error.* As a threshold matter, it should be noted that this issue was not raised at the court below by excepting to the

special verdict instruction. 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. Instead, the manner in which the jury was instructed herein effectively alters the burden of proof because it misstates the requirement of unanimity for the jury to answer "no" to the special verdict.

The State may rely on footnote 7 of State v. Bashaw, the most recent case addressing this issue regarding the special verdict instruction,

to argue that the error is not of constitutional magnitude. 169 Wn.2d 133, 234 P.3d 195 (2010). Footnote 7 reads, “This rule is not compelled by constitutional protections against double jeopardy, but rather by the common law precedent of this court, as articulated in Goldberg<sup>2</sup>,” Bashaw, 169 Wn.2d at 146 n. 7 (citations omitted).

But it is “well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal.” State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000) (citing State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996)). Moreover, the Bashaw court apparently regarded this issue as a constitutional one. In Bashaw, as here, no one objected to the erroneous instruction at trial. State v. Bashaw, 144 Wn. App. 196, 198-99, 182 P.3d 451 (2008). And while the court in footnote 7 expressly noted that double jeopardy considerations did not compel Bashaw's holding, it did not exclude the possibility that an erroneous jury instruction affects other constitutional rights, such as a defendant's right to the due process of law. In fact, the court applied a constitutional harmless error analysis to determine whether the instructions were prejudicial error. Bashaw, 169

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

Wn.2d at 147–48. It is apparent that constitutional considerations compelled the court's decision in Bashaw, notwithstanding footnote 7.

Here, the trial court's error had constitutional dimensions and practical and identifiable consequences—the jury's special verdicts added an additional mandatory 60 months to Mr. Strong's sentence. Because the instructional error was a manifest error involving a constitutional right, it may be considered for the first time on appeal.<sup>3</sup> RAP 2.5(a)(3).

*Invited Error Doctrine.* The State may also argue that Mr. Strong is precluded from challenging the special verdict instruction in this case under the invited error doctrine because he failed to take exception to the instruction. The invited error doctrine does not go that far. The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." In re Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001) (citing In re Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000)).

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<sup>3</sup> In a recent decision, this Court concluded otherwise. State v. Nunez, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 505335 (Wn. App. Div. 3, February 15, 2011). However, the undersigned author believes Nunez conflicts with State v. Bashaw. A decision by the Supreme Court is binding on all lower courts in the state. Fondren v. Klickitat County, 79 Wn. App. 850, 856, 905 P.2d 928 (1995). It is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court. 1000 Virginia P'ship v. Vertecs, 158 Wn.2d 566, 579, 146 P.3d 423 (2006); State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Unless and until the Washington State Supreme Court decides otherwise, the decision in Bashaw remains the law and contributes to the outcome of this case.

The invited error doctrine "appears to require affirmative actions by the defendant ... [in which] the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, courts do not apply the doctrine. *Id.* (citing Thompson, 141 Wn.2d at 724).

In Call, the Supreme Court found the defendant did not invite the error where his attorney wrote the wrong offender score and standard range on the guilty plea statement that the defendant signed. Neither the defendant, the prosecuting attorney nor the sentencing court was aware of the error in calculating the offender score and standard range. Call, 144 Wn.2d at 324-28, 28 P.3d 709.

Similarly, in the present case, Mr. Strong did not invite the error where his attorney failed to take exception to an instruction that the parties did not know was erroneous. Exceptions to the jury instructions were taken July 12, 2010. RP 852–872. Bashaw did not become final until the mandate was issued on December 16, 2010. As in Call, neither Mr. Strong, the prosecutor nor the court was aware of the legal error inherent in the combination of instructions given to the jury. Furthermore, Mr. Strong did not invite the error where he did not propose the special verdict instruction. *See* CP 88–98; Thompson, 141 Wn.2d at 724 (citing State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)). This was not a

situation where there were affirmative actions by the defendant in which he took knowing and voluntary actions to set up the error. Therefore, Mr. Strong did not invite the error and may challenge it on appeal.

*Improper Special Verdict Instructions.* Washington requires unanimous jury verdicts in criminal cases. Wash. 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.” State v. Bashaw, 169 Wn.2d at 146 (“The rule from Goldberg, then, is that a unanimous jury determination is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.”). A unanimity instruction that does not adequately inform the jury of the applicable law violates a defendant’s right to a unanimous jury verdict. State v. Watkins, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006).

Jury instructions are constitutionally sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform

the jury of the applicable law. See State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). This Court applies *de novo* review to determine whether instructions met those standards. See State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). In this case, the instructions did not meet those standards.

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".

Goldberg, 149 Wn.2d at 893.

Although the Supreme Court vacated the special verdict for other reasons, it did not find fault with this instruction.<sup>4</sup> Goldberg, 149 Wn.2d at 894, 72 P.3d 1083.

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<sup>4</sup> In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either "yes" or "no". 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

In Bashaw, the Supreme Court vacated sentencing enhancements where the jury was incorrectly instructed that all twelve jurors must agree on the answer to the special verdict.

Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.

CP 73; Bashaw, 169 Wn.2d at 139. The Court held the instruction was in error:

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, [] 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 (internal citation omitted) (emphasis original).

In the present case, the instructions as a whole failed to inform the jury of the law applicable to special findings. The special verdict instruction correctly told the jurors that unanimity was required to find the presence of the special finding:

Because this is a criminal case, in order to answer any special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

Instruction No. 23 (CP 124). However, the instruction was silent as to whether unanimity was required in order to answer “no”.<sup>5</sup> Thus, the jury was not informed through this instruction that the law does not require unanimity in order to find the *absence* of the special finding.

The jury was properly instructed that it must only apply the law as instructed by the court, must read the instructions together as a whole, and must deliberate in an effort to reach a unanimous decision. Instruction No. 1 (CP 100); Instruction No. 2 (CP 102). The jury was also instructed, “Because this is a criminal case, each of you must agree for you to return a verdict.” Instruction No. 22 (CP 123). This second instruction needed to have a proviso such as “Except in the case of a special verdict where the answer is no.” Without the proviso, or a more specific special verdict instruction as was given in Goldberg, the jury could only conclude that unanimity was required for either answer to the special verdict.

The jury was further instructed that if they “cannot agree on a verdict, do not fill in the blank provided” in the verdict forms. Instruction No. 22 (CP 122). Thus, the only way to answer “yes” or “no” to the

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<sup>5</sup> The special verdict instruction used in this case omitted the final sentence of the pattern jury instruction, which reads: “If you unanimously have a reasonable doubt as to this question, you must answer “no”. 11A Wash. Prac. Series WPIC 160.00, Concluding Instruction-Special Verdict-Penalty Enhancements (2010). Note, also, that the Committee’s Notes on Use state that the instruction will have to be modified in light of Bashaw decision and that the committee is considering a revised pattern instruction. Id.

special verdict question required unanimous agreement that “yes” or “no” was the correct answer. It is undisputed the jury *did* fill in the blank provided on the special verdict form. CP 135. Under the facts of this case, this third instruction in combination with the instructions and/or omissions set forth above incorrectly required unanimity for either answer to the special verdict.

As a whole, the instructions in the present case incorrectly required jury unanimity for the jury to answer “no” to the special verdicts, contrary to Bashaw and Goldberg. Since the instructions misstate the law through omission, the deadly weapon enhancement based on the special verdict must be vacated. Bashaw, 169 Wn.2d at 147, Goldberg, 149 Wn.2d at 894.

*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 (citing State v. Brown, 147 Wn.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. A clear misstatement of the law is presumed to be prejudicial. Keller

v. City of Spokane, 146 Wn.2d 237, 249–50, 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 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.

The situation in the present case is indistinguishable from Bashaw. The trial court's directive to reach unanimity was given preemptively, resulting in a flawed deliberative process. It is impossible—and improper—to speculate about what the jury would have decided if it had been given the correct instruction.<sup>6</sup> This Court may not guess the outcome of the case had the jury been correctly instructed. Bashaw, 169 Wn.2d at 147. The instructions in this case incorrectly required unanimity for the jury to answer “no” to the special verdict. Under Bashaw, the error was not harmless. The matter must be remanded for resentencing without the deadly weapon enhancement. See Bashaw, 169 Wn.2d at 148.

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<sup>6</sup> Cf., e.g., Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L. Rev. 277, 280 (1995-96) (“Whether and to what extent an error influenced a given jury verdict is therefore necessarily an exercise in judicial speculation—perhaps principled or reasoned speculation, but nonetheless speculation, about what a jury would or would not have done with or without the offending evidence, instruction, or comment. While much has been written about what does or does not influence juries, what influences a particular case can simply never be discovered.”); Cox v. Charles Wright Acad., Inc., 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967) (“The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself.”); State v. Linton, 156 Wn.2d 777, 787, 132 P.3d 127 (2006) (“Neither parties nor judges may inquire into the internal processes through which the jury reaches its verdict”).

**D. CONCLUSION**

For the reasons stated, the deadly weapon special verdict should be vacated and the case remanded for resentencing.

Respectfully submitted on March 7, 2011.

  
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COURT OF APPEALS  
DIVISION III  
SPokane, WA  
RECEIVED  
APR 11 2011  
SUSAN MARIE GASCH

RE: State v. Philip Jerome Strong, II, COA #29232-1-III  
First Statement of Additional Authority

Dear Ms. Townsley:

As permitted by RAP 10.8. Appellant submits the following as additional authority pertaining to Brief of Appellant:

State v. Ryan, No. 64726-1 (April 4, 2011)

I am enclosing five (5) copies of this letter for the Court's use. If you have any questions, please let me know.

Sincerely,



Susan Marie Gasch

Enclosures as stated

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