

**FILED**

JAN 20 2011

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

NO. 29238-0-III

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON**

Plaintiff/Respondent,

vs.

**ARMONDO HERNANDEZ GONZALEZ,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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**CONSTITUTIONAL PROVISIONS**

Const. art. 1, § 22	1, 7, 10
U. S. Constitution, Sixth Amendment	1, 7, 10

### **ASSIGNMENTS OF ERROR**

1. The trial court should have removed juror 4 when that juror expressed fear of retaliation.
2. Instruction 39, the special verdict instruction, does not comport with the requirements of *State v. Goldberg*, 149 Wn. 2d 888, 72 P. 3d 1083 (2003) or *State v. Bashaw*, 169 Wn. 2d 133 (2010). (CP 162; Appendix “A”)

### **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Is Armondo Hernandez Gonzalez entitled to a new trial due to a violation of his constitutional right to a fair and impartial jury? *See*: Sixth Amendment to the United States Constitution; Const. art. I, § 22?
2. Should the firearm enhancements be removed from Mr. Gonzalez’s sentence due to instructional error?

### **STATEMENT OF THE CASE**

Antonio Carrasco instigated an episode of gang violence on

November 10, 2008 which resulted in the death of Eric Vargas. (RP 510, ll. 15-16; RP 511, ll. 6-8; RP 673, ll. 12-14; RP 676, ll. 2-5; RP 686, l. 23 to RP 687, l. 6).

Mr. Carrasco, Arisai Barron and Joshua Sarabia were passengers in Mr. Vargas's red Ford Expedition. As they drove through downtown Sunnyside Mr. Carrasco saw member of a rival gang in a white van. He directed Mr. Vargas to make a u-turn and follow it. (RP 511, ll. 6-8; ll. 17-23; RP 512, ll. 2-5; RP 518, ll. 18-23; RP 519, ll. 6-11; ll. 18-19; RP 527, ll. 17-22; RP 528, ll. 3-8; RP 648, ll. 3-6).

The van stopped at a stop sign. Mr. Carrasco jumped out of Mr. Vargas's SUV. He went into a nearby yard and grabbed several bricks which he threw at the van. (RP 520, ll. 14-22; RP 580, ll. 13-22; RP 651, ll. 1-2; RP 790, ll. 14-20).

Two individuals exited the van. (One was African-American; the other was Hispanic.) As they walked to the rear of the van the Hispanic male pulled out a gun and began shooting. (RP 398, ll. 1-6; RP 473, l. 16 to RP 474, l. 4; RP 521, ll. 13-17; RP 522, ll. 21-24; RP 651, ll. 15-18; RP 652, ll. 2-3; l. 25; RP 791, ll. 2-10; RP 820, ll. 2-9).

A total of seventeen shots were fired. Shell casings were recovered at the scene. They were linked to a Glock 17 which was recovered several months later at the home of Alejandro Aguilar. The gun was underneath his bed. Mr. Aguilar admitted that the gun was his. He was later

convicted of unlawful possession of a firearm second degree. (RP 696, ll. 1-6; RP 701, ll. 11-13; RP 703, l. 9; ll. 15-23; RP 706, ll. 2-12; RP 711, l. 10 to RP 712, l. 3; RP 725, ll. 15-20; RP 730, ll. 3-25; RP 731, ll. 2-8; RP 743, ll. 13-20, RP 745, ll. 12-25; RP 750, ll. 12-20).

As Mr. Vargas tried to drive from the scene he collapsed. Mr. Carrasco had jumped back into the SUV. He managed to drive it to Sunnyside Hospital where it crashed into a sign and rock garden. Mr. Carrasco was wounded in the head, back and buttocks. (RP 425, ll. 3-13; RP 426, ll. 4-8; RP 504, ll. 6-21; RP 523, ll. 4-13; RP 524, ll. 5-16; ll. 19-23; RP 664, ll. 1-3; ll. 20-25; RP 666, ll. 1-3; RP 667, l. 22 to RP 668, l. 5; RP 1025, ll. 1-80.

The Hispanic shooter ran from the scene. A number of witnesses in the area described him as light complected; approximately 5'7" to 5'9" tall; 150 to 160 lbs.; very, very short hair with a rat-tail; and wearing black clothing. (RP 369, ll. 12-17; RP 370, ll. 14-17; RP 372, ll. 21-24; RP 373, ll. 3-15; RP 376, l. 14 to RP 377, l. 2; RP 377, ll. 17-19, RP 378, ll. 1-2; RP 385, ll. 7-13; l. 15; RP 394, ll. 9-11; RP 413, ll. 17-24; RP 474, ll. 6-16; RP 475, ll. 11-19; RP 476, ll. 15-18; ll. 20-25; RP 480, ll. 2-11; RP 493, ll. 10-14; ll. 17-25; RP 495, ll. 8-15; RP 497, ll. 14-15; RP 1024, ll. 1-7).

Mr. Gonzalez is 5'8" to 5'9" tall, weighs 160 to 170 lbs., and had very short hair on November 10, 2008. He also has buck teeth. (RP 926,

l. 5; ll. 14-23; RP 927, ll. 1-18).

Mr. Carrasco and Mr. Barron identified Mr. Gonzalez as the shooter. Both of them had been in juvenile detention with Mr. Gonzalez. Mr. Carrasco identified Mr. Gonzalez based upon his teeth. Mr. Barron identified him because he used to ride the school bus with him for 3-4 years. (RP 525, ll. 14-24; RP 791, ll. 12-17; ll. 20-22).

Detective Ortiz prepared a photomontage. Mr. Carrasco and Connie Borja were able to identify Mr. Gonzalez from that montage. Mr. Barron also identified Mr. Gonzalez's photo. He did that at the Sunnyside Police Department. He leaned across Detective Ortiz's desk and looked at the photo on a computer monitor. No other witnesses to the shooting were able to identify Mr. Gonzalez from the montage. (RP 386, ll. 15-17; RP 387, ll. 20-23; RP 388, ll. 1-10; ll. 10-12; RP 481, ll. 7-12; RP 496, ll. 7-11; RP 507, ll. 15-18; RP 655, ll. 12-15; RP 863, l. 23 to RP 864, l. 5; RP 864, l. 16 to RP 865, l. 7; RP 874, ll. 18-25; RP 876, ll. 17-22; RP 1031, ll. 3-17).

Mr. Carrasco had looked up rival gang members on My Space prior to the shooting incident. He saw Mr. Gonzalez on My Space. Mr. Carrasco discussed this with Mr. Barron several days after the shooting. (RP 835, ll. 1-10; RP 1039, ll. 4-12; RP 1039, l. 19 to RP 1040, l. 1).

An Information was filed on November 14, 2008 charging Mr. Gonzalez with second degree murder, first degree assault and unlawful

possession of a firearm second degree. Firearm enhancements were included on Counts 1 and 2. (CP 1)

Mr. Gonzalez was arraigned on April 3, 2009. Various continuances were granted to allow defense counsel to prepare for trial, interview witnesses and address discovery issues. (CP 6; CP 8; CP 11; CP 16; CP 21; CP 26; CP 28; CP 30; CP 32; CP 33; CP 44; RP 56, l. 11 to RP 59, l. 25).

Mr. Gonzalez's trial was consolidated with a co-defendant, Julian Williams. A motion to sever was argued on March 16, 2010. The motion was denied. (RP 24, l. 13 to RP 25, l. 3).

On the fourth day of trial defense counsel moved to excluded testimony concerning the photomontage. Argument centered on Mr. Barron's identification of Mr. Gonzalez from the single computer photo. (RP 453, l. 19 to RP 461, l. 12).

Prior to testimony from Detective Ortiz or Mr. Barron an offer of proof was presented to the Court concerning the computer photo ID. The Court ruled that there was no undue misidentification. (RP 763, ll. 6-16; RP 764, ll. 13-25; RP 765; l. 4 to RP 767, l. 25; RP 775, l. 18 to RP 776, l. 3; RP 784, l. 9 to RP 785, l. 25).

On the start of trial on the fifth day juror 4 asked to be excused. He was in fear of retaliation from spectators and/or others. Mr. Gonzalez's attorney requested that he be excused. The deputy prosecutor and defense

counsel for Mr. Williams did not ask for juror 4 to be excused. The trial court denied the request. (RP 596, l. 23 to RP 599, l. 6; RP 599, l. 8 to RP 600, l. 8).

Lee Edmonds, Mr. Williams's attorney, was accosted in the Men's Room at the Yakima County Courthouse on June 24, 2010 by Mr. Vargas' father. The confrontation was so unsettling that Mr. Edmonds asked the Court for a police escort to his car so he could return to his office and get his gun. (RP 937, l. 24 to RP 939, l. 25).

During a telephone conversation with his mother, Mr. Gonzalez, who was incarcerated in the Yakima County Jail, discussed the shooting. He stated that the other guy was the shooter. He also wanted to know who was snitching. (RP 947, ll. 1-4; ll. 8-9; RP 964, l. 25 to RP 965, l. 3; RP 972, ll. 14-15; RP 977, l. 1; ll. 12-24).

During the instruction conference Mr. Gonzalez excepted to Instruction 21. (RP 1111, ll. 14-16; CP 144; Appendix "B"). Mr. Gonzalez's attorney later withdrew his objection to this instruction. (RP 1151, l. 3).

Counsel and the trial court discussed the unanimity language for the special verdict-Instruction 39. (RP 1116, l. 6 to RP 1117, l. 16)

Instruction 39 was read to the jury. It required unanimity to find that Mr. Gonzalez was armed with a firearm. It also required unanimity to find that he was not armed. The remaining alternative was to leave the

question blank if the jury could not agree. (RP 1175, ll. 7-14).

The jury found Mr. Gonzalez guilty of all 3 offenses. The special verdict was answered in the affirmative as to Counts 1 and 2. (CP 168, CP 169; CP 170; CP 171; CP 172).

Judgment and Sentence was entered on July 9, 2010. Consecutive sentences were imposed on Counts 1 and 2. Count 3 was to run concurrently. Consecutive firearm enhancements were to run consecutive to the underlying sentence. Mr. Gonzalez was sentenced to a total of 518 months in prison. (CP 191).

At the sentencing hearing defense counsel called the trial court's attention to *State v. Bashaw, supra*. Following a discussion the trial court denied defense counsel's request to strike the firearm enhancements. (RP 1265, l. 1 to RP 1271, l. 10).

Mr. Gonzalez filed his Notice of Appeal on July 22, 2010. (CP 206).

### **SUMMARY OF ARGUMENT**

Mr. Gonzalez's right to a fair and impartial jury under the Sixth Amendment and Const. art. I, § 22 was violated when the trial court refused to excuse juror 4.

Instruction 39 erroneously states the law concerning jury unanimity.

## ARGUMENT

### I. JUROR NUMBER 4

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right of an accused in all criminal prosecutions to trial by an impartial jury. The Washington Constitution provides a similar guaranty. Under the laws of Washington, the right to a jury trial includes the right to an unbiased and unprejudiced jury. “The failure to accord an accused a fair hearing violates even the minimal standards of due process.” “[M]ore important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. **Not only should there be a fair trial, but there should be no lingering doubt about it.**”

*State v. Davis*, 141 Wn. 2d 798, 824-25, 10 P. 3d 977 (2000) quoting *State v. Parnell*, 77 Wn. 2d 503, 507, 463 P. 2d 134 (1969) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.ed. 2d 751 (1961)). (Emphasis supplied.)

Juror 4 expressed fear of retaliation. The trial court did not make a sufficient inquiry into the reasons for juror 4’s fear. Mr. Gonzalez concurred with juror 4’s request to be excused.

“We review a trial court’s decision to excuse a juror for abuse of discretion.” *State v. Jordan*, 103 Wn. App. 221, 226, 11 P. 3d 866 (2000).

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

*State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P.2d 775 (1971).

A juror who expresses fear of retaliation from members of the audience, individuals within the community, or otherwise is a juror whose mind has been tainted by what he/she has experienced.

A trial court need not disqualify a juror with preconceived ideas if the juror can “”put these notions aside and decide the case on the basis of the evidence given at the trial and the laws given him by the court.””*State v. Mak*, 105 Wn. 2d 692, 707, 718 P. 2d 407, *cert. denied*, \_\_\_\_\_ U.S. \_\_\_\_\_, 93 L.Ed. 2d 599, 107 S.Ct. 599 (1986).

*State v. Rupe*, 108 Wn. 2d 734, 748, 743 P. 2d 210 (1987).

Mr. Gonzalez contends that the trial court’s failure to conduct a sufficient inquiry to determine if juror 4 could set aside the fear that had been aroused by whatever he had observed or experienced while sitting as a juror, or outside the courtroom, deprived him of a juror who was free of bias and/or prejudice.

“RCW 2.36.110 and CrR6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.” *State v. Jorden, supra* 227.

Juror 4, based upon his fears, was no longer a fair and impartial juror. A juror's concern for his safety and welfare impacts and potentially overrides his ability to remain open-minded throughout the trial and deliberative process.

Mr. Gonzalez is not contending that juror 4 engaged in any misconduct. Nevertheless, the limited inquiry made by the trial court does not meet due process standards and constitutes an abuse of the trial court's discretion.

When this incident is considered in conjunction with juror 4's request to be excused for fear of retaliation it becomes readily apparent that the tensions existing in the courtroom were palpable. The fear expressed by both the juror and Mr. Edmonds was real. It cannot be gainsaid but that fear permeated the trial on more than one (1) occasion.

Fear is a powerful emotion which can act as a motivating force compelling an individual to react in a way that may or may not be expected. The fear expressed by juror 4 should not have been minimized. By denying the juror's request, and Mr. Gonzalez's affirmation of that request, the trial court invaded and violated Mr. Gonzalez's right to a fair trial under the Sixth Amendment and Const. art. I, § 22.

## **II. INSTRUCTION 39**

Defense counsel properly called the trial court's attention to *State*

v. *Bashaw*, *supra*. The holding of *Bashaw* is clear. The Court ruled at 147:

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.

The fact that Instruction 39 included additional language directing the jury to leave the special verdict form blank if they could not reach agreement, does not cure the error.

Clear and concise language on a special verdict form should be as follows:

All twelve (12) 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 cannot agree on this question, do not fill in the blank provided in the special verdict form.

The inclusion of any other language detracts from the exacting requirements of *Bashaw and Goldberg*.

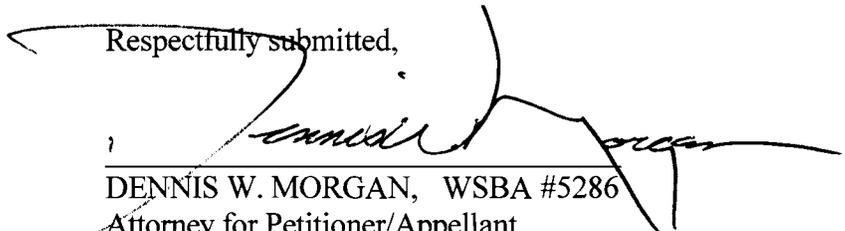
### CONCLUSION

The trial court abused its discretion when it declined to excuse juror number 4. Mr. Gonzalez is entitled to a new trial.

The trial court's ruling that Instruction 39 is not violative of the rule in *Bashaw and Goldberg* is in error. Mr. Gonzalez is entitled to be resentenced without the firearm enhancements.

DATED this 19<sup>TH</sup> day of January, 2011.

Respectfully submitted,



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# APPENDIX "A"

INSTRUCTION NO. 39

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms, 1, 2, 3, 4, and 5 for each defendant, and verdict form 6 for the defendant Armondo Gonzalez only. Some exhibits and visual aids may have

been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of second degree murder as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 1 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 1.

If you find the defendant guilty on verdict form 1, do not use verdict form 2 or 3. If you find the defendant not guilty of the crime of second degree murder, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of first degree manslaughter. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 2 with 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 2.

If you find the defendant guilty on verdict form 2, do not use verdict form 3. If you find the defendant not guilty of the crime of first degree manslaughter, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of second degree manslaughter. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 3 with the words "not guilty" or the word "guilty," according to the decision you reach.

When completing the verdict forms, you will next consider the crime of first

degree assault as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 4 with 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 4.

If you find the defendant guilty on verdict form 4, do not use verdict form 5. If you find the defendant not guilty of the crime of first degree assault, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of second degree assault. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 5 with the words "not guilty" or the word "guilty", according to the decision you reach.

Next you will consider the crime of second degree unlawful possession of a firearm as charged against Armondo Gonzalez only. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form 6 with 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 6.

You will also be given special verdict forms for the crimes charged in counts 1 and 2. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes or any lesser crime or degree, you will then use the special verdict forms 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 forms. In order to answer the special verdict forms "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". If you cannot agree on a verdict, do not fill in the blank provided in the special 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.

## APPENDIX "B"

INSTRUCTION NO. 21

Justifiable homicide committed in the defense of the slayer, or 'self-defense,' is an act of necessity. The right of self-defense does not permit action done in retaliation or revenge.