

FILED
June 5, 2012
Court of Appeals
Division III
State of Washington

No. 30393-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DAVID G. RICE,

Defendant/Appellant.

Appellant's Brief

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....5

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....5

C. STATEMENT OF THE CASE.....5

D. ARGUMENT.....7

 1. The 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.....7

 2. A sentence enhancement is illegal or erroneous when based upon an invalid special verdict. Illegal or erroneous sentences may be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court.....8

 3. The illegal or erroneous sentence based upon an invalid special verdict was not harmless error.....10

E. CONCLUSION.....12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Neder v. United States</i> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	10
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002).....	10
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	7-11
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	10
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	9
<i>State v. Goldberg</i> , 149 Wn.2d 888, 72 P.3d 1083 (2003).....	7-11
<i>State v. Nunez</i> , 160 Wn. App. 150, 248 P.3d 103 (2011).....	8, 9
<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 881 P.2d 213 (1994).....	7
<i>State v. Recuenco</i> , 163 Wn.2d 428, 180 P.3d 1276 (2008).....	8, 9
<i>State v. Ross</i> , 152 Wn.2d 220, 95 P.3d 1225 (2004).....	9
<i>State v. Ryan</i> , 160 Wn. App. 944, 252 P.3d 895 (2011).....	9
<i>State v. Stephens</i> , 93 Wn.2d 186, 607 P.2d 304 (1980).....	7
<i>State v. Wanrow</i> , 88 Wn.2d 221, 559 P.2d 548 (1977).....	10
<i>State v. Williams-Walker</i> , 167 Wn.2d 889, 225 P.3d 913 (2010).....	7, 8, 9

Constitutional Provisions

U.S. Const. amend. VI.....7

U.S. Const. amend. XIV.....7

Washington Constitution Article I, § 21.....7

Washington Constitution Article I, § 22.....7

A. ASSIGNMENT OF ERROR

The trial court erred in instructing the jury it had to be unanimous in its answer to the special verdict.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Should the sentence and special verdict be vacated because the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict?

2. A sentence enhancement is illegal or erroneous when based upon an invalid special verdict. May illegal or erroneous sentences be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court?

3. Was the illegal or erroneous sentence based upon an invalid special verdict not harmless error?

C. STATEMENT OF THE CASE

David Rice was charged in the alternative with first degree attempted murder, first degree assault, attempted second degree murder and second degree assault for one incident wherein he allegedly stabbed the victim in the arm. CP 28-32. He was convicted by a jury of both first degree assault and second degree assault. CP 95-98. The jury was asked to find by special verdict that Mr. Rice was armed with a deadly weapon

when the crimes were committed. CP 101-02. The jury was instructed in pertinent part regarding the special verdict:

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 *unanimously* have a reasonable doubt as to the question on the special verdict form, you must answer "no."

Unanimity. In this criminal case, all twelve deliberating jurors must agree in order to return *any* verdict. When all of you have so agreed, fill in the proper form or forms of verdict to express your decision.

CP 91-92 (emphasis added).

After the jury retired to deliberate it submitted a question to the Court asking for clarification on whether the term "unanimity" meant that all twelve jurors had to agree. The query included the statement, "We are concerned about the wording "any verdict." The Court responded, "Yes. All twelve jurors must agree to fill in a blank on *any* verdict form." CP 93-94 (emphasis added).

The jury answered "yes" to the special verdict. CP 23. Based on the special verdict, the court added 24 months to the standard range sentence on the first degree assault. The Court held the second degree assault merged with the first degree assault and was not a separate conviction. CP 103-19. This appeal followed. CP 120-21.

D. ARGUMENT

1. The 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.

A criminal defendant may not be convicted unless a twelve-person jury unanimously finds every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Williams-Walker*, 167 Wn.2d 889, 895-97, 225 P.3d 913 (2010); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 213 (1994); *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 133, 146-47, 234 P.3d 195 (2010); *Goldberg*, 149 Wn.2d at 893, 72 P.3d 1083. Where the jury is deadlocked or cannot decide, the answer to the special verdict is “no.” *Id.*

In this case as in *Bashaw*, the jury was incorrectly instructed it had to be unanimous to answer “no” to the special verdict. *Bashaw*, 169 Wn.2d at 139; CP 21. Citing *Goldberg*, the *Bashaw* court held:

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.

Bashaw, 169 Wn.2d at 147.

The instructions in the present case incorrectly required jury unanimity for the jury to answer “no” to the special verdict, contrary to *Bashaw* and *Goldberg*. The trial court reemphasized the erroneous instruction to the jury by responding to the jury inquiry, “Yes. All twelve jurors must agree to fill in a blank on *any* verdict form.” CP 93-94 (emphasis added). The remedy for an improper special verdict is to strike the enhancement, not remand for a new trial. *Williams-Walker*, 167 Wn.2d at 899-900; *State v. Recuenco*, 163 Wn.2d 428, 441-42, 180 P.3d 1276 (2008).

2. A sentence enhancement is illegal or erroneous when based upon an invalid special verdict. Illegal or erroneous sentences may be challenged for the first time on appeal, regardless of whether defense counsel registered a proper objection before the trial court.

In *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011), the Court of Appeals found the trial court erred when it required the jury to be

unanimous to find the State had not proven the special allegation. However, the Court ruled the error was not a manifest constitutional error and thus could not be raised for the first time on appeal. *Nunez*, 160 Wn. App. 150, 248 P.3d at 110. The decision in *Nunez* directly conflicts with *Bashaw* and *Goldberg*, which found such an error is manifest constitutional error and can be raised for the first time on appeal. *Bashaw*, 169 Wn.2d at 146-47; *Goldberg*, 149 Wn.2d at 892-94; accord *State v. Ryan*, 160 Wn. App. 944, 252 P.3d 895 (2011).¹

“[I]llegal or erroneous sentences may be challenged for the first time on appeal,” regardless of whether defense counsel registered a proper objection before the trial court. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004), quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). A sentence enhancement must be authorized by a valid jury verdict. *Williams-Walker*, 167 Wn.2d at 900. Error occurs when a trial court imposes a sentence enhancement not authorized by a valid jury verdict. See *Recuenco*, 163 Wn.2d at 440, 180 P.3d 1276 (the error in imposing a firearm enhancement where the jury found only a deadly weapon, occurred during sentencing, not in the jury’s determination of guilt).

¹ *Nunez* and *Ryan* have been consolidated and are pending review before the Washington Supreme Court. No. 85789-0. The cases were argued January 12, 2012.

Similarly, the error here occurred not just in the use of the invalid instruction, but more importantly when the trial court imposed the deadly weapon enhancement sentence based upon the invalid special verdict. Thus, contrary to *Nunez*, an appellant can raise this issue for the first time on appeal because it involves the imposition of an illegal or erroneous sentence which was based upon an invalid special verdict -- itself the product of an improper jury instruction.

3. The illegal or erroneous sentence based upon an invalid special verdict was not 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, 234 P.3d 195 (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, 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)).

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 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 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 had been given the correct instruction. The fact that the jury submitted a

question to the Court asking for clarification on whether the term “unanimity” meant that all twelve jurors had to agree and expressed concern about the wording “any verdict” further illustrates this point. Therefore, the error was not harmless.

E. CONCLUSION

For the reasons stated, the special verdict should be stricken, the sentence reversed, and the case remanded for resentencing.

Respectfully submitted June 5, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on June 5, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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