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65243-5

NO. 65243-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,  
Respondent,  
v.  
PENNY GREEN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY  
THE HONORABLE MICHAEL HAYDEN

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. An issue may not be raised for the first time on appeal unless the error involves manifest constitutional error. Green challenges a jury instruction for the first time on appeal and cannot show that the assigned error implicates a constitutional right. Has Green waived her challenge to the jury instruction?

2. An erroneous jury instruction, even if based on constitutional error, is harmless if the court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Here, the jury unanimously found that Green was guilty of attempted robbery, using a firearm. Can this Court conclude that the jury verdict on the firearm enhancement would have been the same absent any error in the instructions?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Penny Green was charged by amended information with attempted robbery in the first degree; specifically, the State alleged that Green displayed a handgun during the attempted robbery. CP 28-29. The State further alleged that

Green was armed with a firearm at the time of the attempted robbery. Id.

Trial occurred in February of 2010. The jury found Green guilty as charged. CP 86, 86. The trial court sentenced Green to 120 months of confinement, the statutory maximum. CP 91-100.

## 2. SUBSTANTIVE FACTS.

At around 2:00 p.m. on May 20, 2009, Paul Bauer was mopping the floor of his Seattle home in preparation for a dinner party. 5RP 28-29.<sup>1</sup> Because he was expecting guests, Bauer was not surprised when he heard his screen door open. 5RP 30-31. When Bauer looked up to see who had arrived, he was startled to see two women whom he did not recognize standing in his entry. 5RP 33. One woman was a blond and the other was a brunette; both were heavy-set. 5RP 37-38.

The women immediately charged into the kitchen. 5RP 33. The brunette told Bauer that they were there to collect the money that he owed. 5RP 36, 39. Bauer told them that he did not owe

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<sup>1</sup> The verbatim report of proceedings will be referred to as follows: 1RP (12/8/2009, 12/9/2009, 2/17/2010); 2RP (2/9/2010); 3RP (2/11/2010); 4RP (2/16/2010); 5RP (2/18/2010); and 6RP (2/22/2010, 3/19/2010, 4/9/2010).

anybody money and demanded that they leave his house. 5RP 36.

The brunette responded, "He said you do." 5RP 36, 39.

As Bauer tried to push them out of his house, the brunette pulled a gun out of her bag and began gesturing with it. 5RP 39-40. Bauer was scared, but continued to try to push the women out, grabbing a steak knife from the desk. 5RP 43, 69. One of the women knocked the knife out of his hand. 5RP 43. Bauer then pulled out his cell phone, but the women knocked the phone out of his hand. 5RP 44.

At some point, Bauer saw the blond holding a gun, although he could not be sure whether it was the same gun that the brunette had been holding earlier. 5RP 44-46. The struggle continued as Bauer tried to get the women out of his house. 5RP 46. One of the women "conked" Bauer on the head with the gun. Id. The gun discharged and a .45 caliber bullet ricocheted off the front door and onto the floor. 1RP 148-49; 5RP 55. Bauer fell into a plant and the women fled. 5RP 47-48. Because of his resistance, the women were not able to take anything from Bauer. 5RP 69-70. Bleeding from the head, Bauer called for help from a neighbor, who called 911. 5RP 48-49.

At around the time of the attempted robbery, officers noticed two men in a vehicle near Bauer's house. 6RP 11-12. After hearing the radio broadcast about the incident at Bauer's house, the officers suspected that the men might have been involved. 6RP 14-15. The officers returned to the area and found the vehicle; Samuel Harvey was the driver and Shane Rochester was the front passenger. 6RP 18-19. Officers found several .45 caliber bullets in Rochester's pocket. 1RP 193.

Detective Frank Clark interviewed Bauer and asked him whether anyone might think that Bauer owed him money. 5RP 57. The only person that Bauer could suggest was Rochester. 5RP 57-59. The two had first met when Bauer hired Rochester to do work on his house. 5RP 10. They eventually became lovers, and dated on and off for 12 years. 5RP 11. Throughout their relationship, Rochester continued to work on the house and Bauer paid him based on the difficulty of the work. 5RP 14. Rochester believed that he had not charged Bauer enough for the work on his kitchen. 5RP 57. The two had never resolved the underpayment issue. Id.

During the course of their initial investigation, officers identified Penny Green and Carla Smith, Harvey's girlfriend, as

potential suspects. 1RP 118. On May 21, 2009, Bauer picked out Green and Smith from photo montages; Green was the brunette who first pulled out the gun and Smith was her blond accomplice. 1RP 130-37; 5RP 62-65. Bauer also identified Green during trial. 5RP 67-68.

Both Green and Smith were arrested in Yakima in the days after the robbery. 1RP 119. Green admitted to knowing Harvey, Rochester, and Smith. 1RP 127-28. She also admitted that the vehicle in which Harvey and Rochester were found belonged to her niece. Ex. 15. Green explained that she had loaned her niece's car to Rochester, but denied being in Seattle on May 20, 2009. Id.

In an interview with Yakima Detective Curtis Oja, Smith admitted that she had accompanied Green during the robbery. Ex. 41 at 7. Consistent with Bauer's account, Smith explained that Green had displayed the gun and hit Bauer on the head during a struggle. Id. According to what Smith told Oja, the robbery was Rochester's idea. Ex. 41 at 5. At trial, Smith testified that she had lied to Oja and that she had implicated Green in order to avoid getting in trouble. 6RP 94. Smith claimed that she had actually robbed Bauer with a woman named "B." Id.

**C. ARGUMENT**

1. THE COURT SHOULD REJECT GREEN'S BELATED CHALLENGE TO THE SPECIAL VERDICT INSTRUCTION.

Relying on State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), Green argues that the firearm enhancement should be reversed and dismissed because the special verdict instruction told the jury that it must be unanimous in order to answer "no." Green failed to object to the instruction at the time it was offered. Because any error in the jury instruction is not a manifest error affecting a constitutional right, Green waived this argument by failing to preserve the objection.<sup>2</sup> Alternatively, any error was harmless because in order to convict Green of attempted robbery in the first degree, the jury necessarily found that Green was armed with a firearm.

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<sup>2</sup> The State acknowledges that this Court has recently held that a Bashaw claim may be raised for the first time on appeal. State v. Ryan, No. 64726-1-I, 2011 WL 1239796 (April 4, 2011). The State respectfully disagrees with the holding in Ryan and presents its argument in order to preserve the issue for further review.

a. Relevant Facts.

The court provided the jury with a special verdict form for the deadly weapon enhancement. CP 89. In regards to the special verdict forms, the court instructed the jury:

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "was," you must unanimously be satisfied beyond a reasonable doubt that "was" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "was not".

CP 83. This instruction is nearly identical to WPIC 160.00. Green did not take exception to the instruction at issue. 6RP 166.

b. Green Has Waived Any Challenge To The Special Verdict Instruction.

Under CrR 6.15(c), objections to proposed jury instructions must be made before the court instructs the jury, to allow the trial court the opportunity to correct any error. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Before error can be claimed on the basis of a jury instruction given by the trial court, the appellant must show that a timely objection was made in the trial court. State v. Salas, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995).

Similarly, under RAP 2.5(a)(3), appellate courts generally do not consider an issue raised for the first time on appeal unless it involves a "manifest error affecting a constitutional right." To raise an issue not previously preserved, an appellant must show that (1) the error is manifest, and (2) the error is truly of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Green must first identify a constitutional error and then must show how the asserted error actually affected her rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Only after the court determines that the claim does in fact raise a manifest constitutional error should the court move on to a harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Not all instructional error rises to the level of manifest constitutional error. Examples of manifest constitutional errors in jury instructions include: shifting the burden of proof to the defendant, State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); failing to define the "beyond a reasonable doubt" standard, State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); and omitting an element of the crime charged, State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), overruled on

other grounds, State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). On the other hand, failure to instruct on a lesser included offense, State v. Mak, 105 Wn.2d 692, 745-49, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986); and failure to define individual terms, State v. Scott, 110 Wn.2d at 688, are examples of instructional errors that do not fall within the scope of manifest constitutional error.

Division Three of the Court of Appeals recently held that a trial court's erroneous, pre-Bashaw instruction that a jury must be unanimous to acquit on a special verdict, was neither a constitutional error, nor was it manifest. State v. Nunez, 160 Wn. App. 150, 159-61, 248 P.3d 103 (2011). Similar to the defendant in Nunez, Green has failed to identify a constitutional provision that the special verdict instruction violated beyond the general provision in the state constitution protecting a criminal defendant's right to a unanimous jury verdict for purposes of conviction. Id. at 159.

Green relies heavily on Bashaw and its interpretation of State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). Bashaw was charged with three counts of delivering a controlled substance. Bashaw, 169 Wn.2d at 137. The State further alleged that the deliveries occurred within 1000 feet of a school bus stop. Id. The

court instructed the jury that "since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at 139. The Supreme Court held that the instruction was incorrect because it told the jury that they had to be unanimous to answer "no." Id. at 145-47. Citing Goldberg, supra, the court held that "a unanimous jury decision 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." Bashaw, 169 Wn.2d at 146.

In explaining its ruling, the Bashaw court explicitly acknowledged that the claimed error was not of constitutional magnitude: "This rule is not compelled by constitutional protections against double jeopardy, cf. State v. Eggleston, 164 Wn.2d 61, 70-71, 187 P.3d 233 (stating that double jeopardy protections do not extend to retrial of noncapital sentencing aggravators), cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 735, 172 L. Ed. 2d 736 (2008), but rather by the common law precedent of this court, as articulated in Goldberg." Bashaw 169 Wn.2d at 146 n.7. Instead, the common law rule adopted in Goldberg and reaffirmed in Bashaw is based on policy considerations. Noting that the costs and burdens of a new trial are substantial, the court reasoned that, where a defendant is already subject to a penalty for the underlying offense, "the

prospect of an additional penalty is strongly outweighed by the countervailing policies of judicial economy and finality." Bashaw, at 146-47.

Green does not acknowledge her failure to object to the instruction below and is unable to show that the issue raised is of constitutional magnitude. She has therefore waived her challenge to this instruction.

c. Any Error Caused By The Jury Instruction Was Harmless.

Moreover, even if this issue could be raised for the first time on appeal, the error was harmless. Although this Court has held that a Bashaw error generally is not harmless,<sup>3</sup> it has not addressed harmless error in a case involving a weapon enhancement when the use of the weapon was also an element of the crime.

A jury instruction is harmless if the court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147. In Bashaw, the court held that it could not find the error harmless because of a "flawed deliberative process." Id. However, in

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<sup>3</sup> Ryan, 2011 WL 1239796 at \*2.

Bashaw the distance from the school bus stop was a disputed issue, with the defense objecting to the State's measurements. Id. at 138.

In the present case, Green was convicted under the firearm prong of attempted robbery in the first degree. RCW 9A.56.200(a)(ii); CP 28-29, 67, 69. Before considering the special verdict, the jury unanimously found that Green was guilty of attempting to rob Bauer *with a firearm*. Green never disputed that someone had attempted to rob Bauer while armed with a firearm; she simply claimed that she was not involved. 6RP 191-98. Accordingly, while the Bashaw court speculated that the error in the instruction might have some impact on the jurors' verdict, here, the jurors resolved the firearm issue before deliberating on the special verdict. Unlike in Bashaw, this Court can conclude beyond a reasonable doubt that the jury verdict would have been the same absent any error in the instructions.

d. The Rule In Bashaw Is Contrary To Legislative Intent.

While this Court is bound by Bashaw, the State respectfully submits that the holding in that case is incorrect and offers the following argument in order to preserve the issue.

The state constitutional right to jury trial in criminal matters stems from Const. art. I, § § 21 and 22. Const. art. I, § 21, which provides that "[t]he right of trial by jury shall remain inviolate ....," preserves the right to a jury trial as that right existed at common law in the territory when section 21 was adopted. Sofie v. Fiberboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989). This right, in criminal cases, included a right to a twelve person jury, and a right to a unanimous verdict. State v. Stegall, 124 Wn.2d 719, 723-24, 881 P.2d 979 (1994); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

The right to a unanimous verdict in a criminal case is not reserved for the benefit of the defendant. Just as the State could not waive the unanimity requirement for a guilty verdict, a defendant cannot waive the unanimity requirement for acquittal. State v. Noyes, 69 Wn.2d 441, 446, 418 P.2d 471 (1966). In Noyes, the defendant's first trial resulted in a hung jury in which the

jury had voted 11 to 1 for acquittal. The defendant was convicted in a second trial and on appeal argued that he could waive a unanimous verdict and accept the vote of 11 jurors as an acquittal. The court rejected this notion, characterizing it as "without merit." Id. at 446.

When the legislature enacts a statute, it is presumed to be familiar with judicial interpretations of statutes. State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000). This presumption applies to the court's rulings on jury unanimity. Only RCW 10.95.080(2), which governs sentencing in aggravated first degree murder cases, assigns meaning to a non-unanimous verdict. All other sentencing statutes remain silent on the issue. Thus, for all other sentencing statutes, consistent with the dictates of Const. art. I, § 21, the legislature's procedure requires unanimity before a sentencing verdict can be rendered for conviction or acquittal.

The fixing of legal punishments for criminal offenses is a legislative function. State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). The judiciary may alter the sentencing process only when necessary to protect an individual from excessive fines or cruel and inhuman punishment. Id. Otherwise, the court may recommend or identify needed changes,

but must then wait for the legislature to act. See, e.g., State v. Pillatos, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007) (absent statutory authority, courts could not empanel juries to determine the existence of aggravating circumstances); State v. Martin, 94 Wn.2d 1, 7, 614 P.2d 164 (1980) (absent statutory authority, courts could not empanel juries to decide whether a defendant who pled guilty should receive the death sentence). Accordingly, it is for the legislature, not the court, to allow for acquittal based upon a non-unanimous jury.

2. THE PROPER REMEDY FOR ANY ERROR IS  
REMAND FOR RESENTENCING.

Green argues that this Court should vacate the 36-month firearm enhancement. However, Green's proposed remedy would result in a sentence below the standard range. Should this Court reverse based on the allegedly improper instruction, the proper remedy is remand for resentencing, rather than simply vacating the firearm enhancement.

If the combination of a base sentence and a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the statutory maximum is the

presumptive sentence. RCW 9.94A.533(3)(g); RCW 9.94A.599. In such a circumstance, the underlying sentence, not the firearm enhancement, must be reduced. Id.; State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003).

The statutory maximum sentence for attempted robbery in the first degree is 10 years. RCW 9A.20.021(1)(b); RCW 9A.28.020. Green's offender score was 15, giving her a standard range of 96.75 to 128.25 months. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.533; CP 92; 6RP 207. The mandatory confinement for the firearm enhancement was 36 months. RCW 9.94A.533(1). As the parties noted prior to sentencing, the combined total of the low end of the standard range and the firearm enhancement exceeded the statutory maximum. 6RP 207-15. In order to comply with RCW 9.94A.533(3)(g) and RCW 9.94A.599, the trial court imposed a base sentence of 84 months and a firearm enhancement of 36 months, to run consecutive to the underlying sentence. CP 91-95; 6RP 207-15.

In this case, remanding with instructions to simply vacate the firearm enhancement would result in a sentence of 84 months--

12.75 months below the low end of the standard range. The record is clear that the trial court reduced the base sentence below the standard range because such a result was mandated by statute. 6RP 214-15. Indeed, the court indicated that, without such a limitation, it was inclined to sentence Green to the high end of the standard range plus the 36-month firearm enhancement. 6RP 215.

Here, the appropriate remedy is remand for resentencing, rather than simply vacating the firearm enhancement. See In Re Personal Restraint of Habbitt, 96 Wn.2d 500, 502, 636 P.2d 1098 (1981) (where the trial court improperly applied firearm findings to enhance first degree robbery convictions, remand for resentencing, rather than striking firearm enhancements, is the appropriate remedy); see also State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (where trial court was mistaken about the period of community placement required by law, resentencing was appropriate to allow court to reconsider length of standard range in light of the correct period of community placement).

D. CONCLUSION

For the reasons cited above, this Court should affirm Green's enhanced sentence. Should this court find in Green's favor, the appropriate remedy is remand for resentencing.

DATED this 27 day of May, 2011.

Respectfully submitted,

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