

66006-3

66006-3

No. 66006-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MILORD GELIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

In this prosecution for assault and burglary, the State alleged that the crimes involved domestic violence and were committed within the sight or sound of the victim's minor-aged child, and that Milord Gelin was therefore subject to an exceptional sentence upward. The State also alleged Mr. Gelin was armed with a deadly weapon at the time of the crimes and was therefore subject to deadly weapon sentencing enhancements. The jury was provided with special verdict forms pertaining to these allegations.

Although one jury instruction informed the jury they must answer "no" on the special verdict forms if they could not agree on a verdict, a separate instruction informed them they could answer "no" on the form pertaining to the domestic violence aggravator only if they "ha[d] a reasonable doubt" that the allegation had been proved. In addition, a third instruction informed them that "each of [them] must agree" to return a verdict "as to each count." Thus, as a whole, the jury instructions did not make the unanimity requirement for the sentencing enhancements "manifestly clear" to the average juror. The exceptional sentence and deadly weapon enhancements must therefore be reversed.

B. ASSIGNMENTS OF ERROR

1. The jury instructions regarding the unanimity requirement for the special verdict forms on the domestic violence aggravator were erroneous.

2. The jury instructions regarding the unanimity requirement for the special verdict forms on the deadly weapon enhancements were erroneous.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Were the jury instructions regarding the unanimity requirement for the special verdict forms erroneous under State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), where they contained conflicting information and were therefore not manifestly clear to the average juror?

D. STATEMENT OF THE CASE

Milord Gelin was charged with one count of first degree burglary (RCW 9A.52.020); one count of attempted first degree murder (RCW 9A.36.011(1)(a)); one count of first degree assault (RCW 9A.36.011(1)(a)); and one count of theft of a motor vehicle (RCW 9A.56.065 and RCW 9A.56.020(1)). CP 66-69. The State alleged Mr. Gelin committed the crimes in counts one, two and three while armed with a deadly weapon and he was therefore

subject to 24-month sentence enhancements for each of those counts. CP 66-69 (RCW 9.94A.602 and RCW 9.94A.533(4)). The State also alleged Mr. Gelin was subject to an exceptional sentence upward for counts one, two and three, based on its allegation that the crimes "involv[ed] domestic violence, as defined in RCW 10.99.020," and were committed "within sight or sound of the victim's or the offender's minor child under the age of eighteen years." CP 66-69 (RCW 9.94A.535(3)(h)(ii)).

At the jury trial, Laurie Williams testified she had met Mr. Gelin about four years earlier, and they had a relationship and lived together for a period of time. 7/22/10RP 306-07. According to Ms. Williams, the couple began to argue about money and eventually separated. 7/22/10RP 311, 317-18. She and her daughter Taylor moved into a townhouse in Kirkland. 7/22/10RP 303-04, 317-18. Mr. Gelin was upset about the breakup and would call Ms. Williams several times a day. 7/22/10RP 325-30. She told him she did not want to talk to him anymore and eventually changed her phone number. 7/22/10RP 330-31.

According to Ms. Williams, early in the morning of October 12, 2009, she was sleeping in her bedroom when she woke up to see a man sitting on her bed. 7/22/10RP 338. His face was

distorted as though he was wearing a stocking and she did not recognize him. 7/22/10RP 338-39. The man did not say anything. 7/22/10RP 339, 344. Ms. Williams shot up out of bed and screamed but the man hit her on the head once or twice with an object. 7/22/10RP 340. As she tried to get to the window, she was hit in the mouth with the object. 7/22/10RP 341. As she tried to block her head with her hand, she was hit in the hand with the object. 7/22/10RP 341. She was then hit several more times on various parts of her body. 7/22/10RP 341-45. Ms. Williams believed the man hit her with a hammer, as she could see "the shadow of a hammer."¹ 7/22/10RP 341. Ms. Williams eventually made her way to the window and yelled for help. 7/22/10RP 341-42. She also called 911 on her cell phone. 7/21/10RP 346.

Ms. Williams's daughter Taylor was 14 years old at the time. 7/21/10RP 249. She was sleeping in the bedroom down the hall from her mother's when she awoke to hear her mother screaming in the next room and calling for help. 7/21/10RP 258. Taylor opened her bedroom door and saw Mr. Gelin run out of her mother's bedroom and down the stairs. 7/21/10RP 259-60. The police arrived soon afterward. 7/21/10RP 263.

¹ Police never found a hammer. 7/21/10RP 223.

Mr. Gelin testified he went to Ms. Williams's townhouse on October 12 in order to collect some of his tools, which he needed for work, and other personal effects such as his passport and important documents. 7/28/10RP 814, 816-17, 842. He had asked her earlier about coming over to pick up his things but she told him he could not. 7/28/10RP 817. That is why he went in the early morning hours while Ms. Williams and Taylor were sleeping; he did not want to wake them up. 7/28/10RP 817-18, 841. He opened the garage door by using the automatic garage door opener he obtained from Ms. Williams's Mitsubishi Montero. 7/28/10RP 820. He and Ms. Williams used to share the car and he still had the keys. Id.

Mr. Gelin spent some time in the garage looking for his things but when he could not find everything he decided to enter the house. 7/28/10RP 822-25. Because the door was locked, he broke through some of the sheetrock in the garage and entered the downstairs bathroom. 7/28/10RP 830-33. He did not have anything in his hands and did not intend to harm anyone. 7/28/10RP 835, 837. He never took anything from the house that did not belong to him. 7/28/10RP 834.

Mr. Gelin looked around downstairs for a while but did not find his important documents, such as his passport and insurance documents. 7/28/10RP 842. When he and Ms. Williams lived together, the documents were kept in a box under the bed. 7/28/10RP 843. Therefore he decided to go upstairs and look under Ms. Williams's bed. 7/28/10RP 847. He entered the bedroom but when he looked under the bed he saw the box was on the other side. 7/28/10RP 849. He was about to cross to the other side of the bed when Ms. Williams woke up and saw him. 7/28/10RP 849. She was very frightened and jumped up and then fell down. 7/28/10RP 849. The two struggled with each other and he pushed her as he tried to leave. 7/28/10RP 850-51. She fell hard against the table in the room. 7/28/10RP 855. Mr. Gelin denied striking Ms. Williams or having a hammer in his hand. 7/28/10RP 855. He drove away in Ms. Williams's Mitsubishi. 7/28/10RP 818.

The jury was provided with special verdict forms pertaining to the domestic violence and deadly weapon sentencing enhancement allegations for the assault and burglary charges.² CP 138-39. The jury was instructed that, in order to find the presence

² Copies of the relevant verdict forms and jury instructions are attached as an appendix.

of the domestic violence aggravator, it must find two elements were proved beyond a reasonable doubt:

- (1) That the victim and the defendant were family or household members; and
- (2) That the offense was committed within the sight or sound of the victim's child who was under the age of 18 years.

CP 132 (Instruction 48); see RCW 9.94A.535(3)(h)(ii). The jury was further instructed:

[I]f you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to answer "yes"
On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer "no"

CP 132 (Instruction 48).

As for the deadly weapon sentencing enhancement allegations, the jury was instructed it must find the State proved beyond a reasonable doubt that Mr. Gelin was "armed with a deadly weapon at the time of the commission of the crime." CP 131 (Instruction 47).

Two other instructions, one for the special verdict form for the assault charge and one for the special verdict form for the burglary charge, informed the jury:

In order to answer the blanks on the special verdict forms "yes," as to each answer, you must unanimously be satisfied beyond a reasonable doubt

that "yes" is the correct answer. If you unanimously agree that the answer to a question is "no," or if after full and fair consideration of the evidence you cannot agree as to an answer, you must fill in the appropriate blank with the answer "no."

CP 128, 130 (Instructions 44 and 46). But a separate instruction provided contrary information, stating

Because this is a criminal case, as to each count or any lesser included or lesser degree offense, 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.

CP 127 (Instruction 43).

The jury found Mr. Gelin guilty as charged of first degree burglary, first degree assault, and theft of a motor vehicle, but not guilty of attempted first degree murder. CP 137. The jury also found Mr. Gelin was armed with a deadly weapon at the time of the commission of the burglary and assault. CP 138-39. Finally, the jury answered "yes" on the special verdict forms regarding the domestic violence aggravator for the burglary and assault charges. CP 138-39.

At sentencing, the court imposed an exceptional sentence upward for the burglary and assault charges, relying on the jury's verdicts regarding the domestic violence aggravator. CP 157, 159.

The court also imposed two consecutive 24-month deadly weapon enhancements, relying on the jury's verdicts regarding the deadly weapon allegations. CP 159.

E. ARGUMENT

THE JURY INSTRUCTIONS FAILED TO MAKE THE
UNANIMITY REQUIREMENT FOR THE JURY'S
FINDINGS ON THE SPECIAL VERDICT FORMS
MANIFESTLY CLEAR

1. When asked to make a finding on a special verdict form for a sentencing enhancement allegation, the jury must be instructed it need not be unanimous in order to answer "no" on the form. In State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010), the Washington Supreme Court recently held "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." In Bashaw, the defendant was charged with three counts of delivery of a controlled substance based on three separate sales to a police informant. Id. at 137. The State sought sentence enhancements, pursuant to RCW 69.50.435(1)(c), based on the allegation each sale took place within 1,000 feet of a school bus route stop. Id. The jury was given a special verdict form for each charge, which asked the jury to find whether each delivery took place within 1,000 feet of a school bus

route stop. In the jury instruction explaining the special verdict forms, jurors were instructed: "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Id. at 139. The jury found Bashaw guilty of all three counts of delivery of a controlled substance and found that each took place within 1,000 feet of a school bus route stop. Id.

Relying on State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), the court held the jury need not be unanimous in a special finding for a sentence enhancement: "A nonunanimous jury decision on such a special finding is a final determination that the State has not proved that finding beyond a reasonable doubt."

Bashaw, 169 Wn.2d at 145. The Court explained:

The rule from Goldberg, then, is 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. A nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt.

Id. at 146. The rule adopted in Goldberg and reaffirmed in Bashaw serves several important policies: it avoids the substantial burdens and costs of a new trial; it effects the defendant's right to have the charges resolved by a particular tribunal; and it serves the interests of judicial economy and finality. Id. at 146-47.

Applying the Goldberg rule, the court held in Bashaw,

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.

Id. at 147. Further, the court held the error was not harmless, as it was impossible to discern what might have occurred had the jury been properly instructed. Id. at 148. The court therefore vacated the sentence enhancements. Id.

2. The jury instructions in this case were erroneous, because they failed to make the unanimity requirement for the special verdict forms "manifestly clear." To satisfy the constitutional demands of a fair trial, jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. State v. Mills, 154 Wn.2d 1, 7, 217 P.3d 756 (2005); U.S. Const. amend. XIV. "[A] jury instruction must be manifestly clear to the average juror." State v. Watkins, 136 Wn. App. 240, 243, 148 P.3d 1112 (2006). The standard for clarity in jury instructions is higher than for statutes, as juries lack interpretive tools to resolve ambiguous

instructions. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), abrogated on other grounds by State v. O'Hara, 167 Wash.2d 91, 217 P.3d 756 (2009). This Court reviews challenged jury instructions de novo. Mills, 154 Wn.2d at 7.

Here, the trial court was aware of the recent Bashaw decision and tried to accommodate it. See 7/29/10RP 930-32. In instructions 44 and 46, the court instructed the jury:

In order to answer the blanks on the special verdict forms "yes," as to each answer, you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to a question is "no," or if after full and fair consideration of the evidence you cannot agree as to an answer, you must fill in the appropriate blank with the answer "no."

CP 128, 130. This instruction applied to the special verdicts for both the deadly weapon sentence enhancement and domestic violence aggravator allegations. Id. Both aggravators appeared together on the same verdict form for each substantive charge. CP 138, 139.

But instructions 44 and 46 did not make the unanimity requirement for the special verdict forms "manifestly clear to the average juror," because they conflicted with information contained in other instructions. First, they conflicted with instruction 48, which applied specifically to the domestic violence aggravator. CP 132.

That instruction informed the jury they must have a "reasonable doubt" as to the presence of the aggravator in order to answer "no" on the special verdict forms. Id. The instruction therefore implied the jurors must *all* have a reasonable doubt in order to answer "no" on the forms. Because instruction 48 applied specifically to the domestic violence aggravator, the jury would presumably rely on that instruction as a more correct statement of the unanimity requirement for filling out the special verdict form for the domestic violence aggravator than instructions 44 and 46.

In addition, instructions 44 and 46 conflicted with instruction 43, which explicitly told the jury that "as to each count or any lesser included or lesser degree offense, each of you must agree for you to return a verdict." CP 127. It is unlikely the jury would understand this instruction applied only to their verdicts on the substantive charges and not the special allegations. The instruction informed the jury that "to return a verdict" they must be unanimous. CP 127. The jury was provided with "verdict forms" for the special allegations and thus "return[ed] a verdict" for each allegation. CP 138-39. The jury would undoubtedly understand that instruction 43, providing a unanimity requirement "as to each

count," applied to the special allegation verdicts as well as to the verdicts on the underlying offenses.

In sum, the jury instructions, as a whole, did not make the unanimity requirement for the special verdict forms "manifestly clear" to the average juror. See LeFaber, 128 Wn.2d at 902; Watkins, 136 Wn. App. at 243. The instructions are therefore erroneous.

3. Mr. Gelin did not waive his right to challenge the jury instructions. Mr. Gelin had a constitutional right to have the jury correctly instructed on the unanimity requirement for the special verdict forms and he may challenge the instructions for the first time on appeal.

Criminal defendants have both a federal and state constitutional right to have a jury determine, beyond a reasonable doubt, the facts required to impose a sentence enhancement. State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); U.S. Const. amend. VI; Const. art. I, §§ 21, 22. Article I, section 21 of the Washington Constitution requires, in turn, that jury verdicts in criminal cases be unanimous. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).

In Bashaw, the court concluded the defendant was entitled to have the jury correctly instructed it need not be unanimous in order to answer "no" on the special verdict form. 169 Wn.2d at 147. The jury instructions were erroneous because they informed the jury they must be unanimous in order to answer the special verdict form. Id. Thus, the error "was the procedure by which unanimity would be inappropriately achieved." Id. The result was a "flawed deliberative process" that "tells us little about what result the jury would have reached had it been given a correct instruction." Id. By implication, the error affected Bashaw's constitutional right to have a jury determine the special allegation beyond a reasonable doubt.

Generally, an error may be raised for the first time on appeal if it is a manifest error affecting 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." Roberts, 142 Wn.2d at 500 (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))).

As stated, "[t]o satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing Mills, 154 Wn.2d at 7); U.S. Const. amend. XIV; Const. art. I, § 3. The Supreme Court has held the following jury instruction errors were manifest constitutional errors that could be challenged for the first time on appeal: directing a verdict, State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); 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); failing to require a unanimous verdict, State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974); 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 by State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). O'Hara, 167 Wn.2d at 100. In contrast, instructional errors not falling within the scope of RAP 2.5(a), that is, not constituting manifest constitutional error, include the failure to instruct on a lesser included offense, State v. Mak,

105 Wn.2d 692, 745-49, 718 P.2d 407 (1986), and the failure to define individual terms, State v. Scott, 110 Wn.2d 682, 690-91, 757 P.2d 492 (1988). O'Hara, 167 Wn.2d at 100.

In this case, as in Bashaw, the jury instructions misstated the law regarding the unanimity requirement for the special verdict forms, resulting in a flawed deliberative process. The error is similar to the instructional errors the Supreme Court has held may be challenged for the first time on appeal. The jury instructions did not merely fail to define a term or fail to inform the jury of a lesser included offense. Because the instructions misstated the law, they deprived Mr. Gelin of his constitutional right to a fair trial. See O'Hara, 167 Wn.2d at 105. The error is a manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a); O'Hara, 167 Wn.2d at 100, 105.

Consistent with this reasoning, the Supreme Court addressed a similar error in Bashaw, even though the error was never raised at the trial court level. See State v. Bashaw, 144 Wn. App. 196, 198-99, 182 P.2d 451 (2009), rev'd, 169 Wn.2d 133 (2010) (defense counsel did not object to challenged jury instruction). In addition, in determining whether the error was harmless, the court applied the constitutional harmless error

standard. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). In other words, the Bashaw court treated the error as a manifest constitutional error that could be raised for the first time on appeal.

In sum, as in Bashaw, the error in the jury instructions is a manifest constitutional error that Mr. Gelin may raise for the first time on appeal.³

4. The sentence enhancements must be reversed. In determining whether the error in the jury instructions requires reversal of the sentence enhancements, the Court applies the constitutional harmless error standard. Bashaw, 169 Wn.2d at 147. The Court must be able to conclude beyond a reasonable doubt that the jury verdict would have been the same without the error. Id. The Court cannot reach that conclusion, because it can only speculate what the outcome would have been without the error.

The point of Bashaw is that when a jury is instructed it must be unanimous in order to return a verdict, the deliberative process, and ultimately the outcome of the trial, may be affected. "For instance, when unanimity is required, jurors with reservations might

³ Division Three of this Court recently issued a decision reaching a contrary result in State v. Nunez, ___ Wn. App. ___, 2011 WL 536431 (No. 28259-7-III, Feb. 15, 2011).

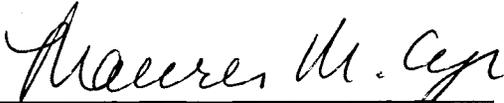
not hold to their positions or may not raise additional questions that would lead to a different result." Id. at 147-48. But the reviewing court "cannot say with any confidence what might have occurred had the jury been properly instructed." Id. at 148. Therefore, the jury instruction error cannot be harmless. Id.

As in Bashaw, it is impossible to discern in this case what the jury's verdicts might have been if the jury had been properly instructed. Therefore, the sentence enhancements must be vacated. Id.

F. CONCLUSION

Because the jury was incorrectly instructed regarding the unanimity requirement for the special verdict forms, the deadly weapon sentence enhancements and the exceptional sentence must be reversed.

Respectfully submitted this 11th day of March 2011.


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Washington Appellate Project - 91052
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APPENDIX

AUG 12 2010

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

SUPERIOR COURT CLERK
EILEEN L. MCLEOD
DEPUTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 MILORD GELIN)
)
 Defendant.)
)

No. 00-1-06880-8SEA

SPECIAL VERDICT FORM 1

First question:

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant, Milord Gelin, armed with a deadly weapon at the time of the commission of the crime of Burglary in the First as charged in count 1?

ANSWER: Yes (Write "yes" or "no")

Second question:

We the jury, having found the defendant, Milord Gelin, Guilty of the crime of Burglary in the First Degree as charged in count 1.

QUESTION: Was the crime an Aggravated Domestic Violence offense?

ANSWER: Yes (Write "yes" or "no")

8/12/10
Date

[Signature]
Presiding Juror

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IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

AUG 12 2010

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 MILORD GELIN)
 Defendant.)

No. 00-1-06880-8SEA
SPECIAL VERDICT FORM 3
SUPERIOR COURT CLERK
EILEEN L. MCLEOD
DEPUTY

First question:

We, the jury, return a special verdict by answering as follows:

QUESTION: Was the defendant, Milord Gelin, armed with a deadly weapon at the time of the commission of the crime of Assault in the First Degree as charged in count III?

ANSWER: Yes (Write "yes" or "no")

Second question:

We the jury, having found the defendant, Milord Gelin, Guilty of the crime of Assault in the First Degree as charged in count III.

QUESTION: Was the crime an Aggravated Domestic Violence offense?

ANSWER: Yes (Write "yes" or "no")

8/12/10
Date

[Signature]
Presiding Juror

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NO. 43

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. For this purpose, use the form provided in the jury room. 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 three verdict forms, Verdict Form A, Verdict form B, and verdict form C. 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 Burglary in the First Degree as charged in count I. If you unanimously agree on a verdict, you must fill in the appropriate blank provided in verdict form A 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 appropriate blank provided in Verdict Form A.

For verdict form B.

If you find the defendant guilty on verdict form A of Burglary in the First Degree as charged in count I, do not use verdict form B. If you find the defendant not guilty of the crime of Burglary in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Residential Burglary. If you unanimously agree on a verdict as to Residential Burglary, you must fill in the blank for B2 provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict as to Residential Burglary, do not fill in the blank provided in Verdict Form B for B2.

If you find the defendant guilty on verdict B2, do not use the blank for B3 on verdict form B. If you find the defendant not guilty of the crime of Residential Burglary, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Burglary in the Second Degree. If you unanimously agree on a verdict as to Burglary in the Second Degree, you must fill in the blank for B3 provided in verdict form B the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant guilty on verdict B3, do not use the blank for B4 on verdict form B. If you find the defendant not guilty of the crime of Burglary in the Second

Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Criminal Trespass in the First Degree. If you unanimously agree on a verdict as to Criminal Trespass in the First Degree, you must fill in the blank for B4 provided in verdict form B the words "not guilty" or the word "guilty," according to the decision you reach.

You will next consider the crime of Attempted Murder in the First Degree as charged in Count II. If you unanimously agree on a verdict as to Attempted Murder in the First Degree, you must fill in the appropriate blank provided in verdict form A 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 appropriate blank provided in Verdict Form A.

For verdict form C.

When completing the verdict forms, you will first next consider the crime of Assault in the First Degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A 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 appropriate blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A of Assault in the First Degree as charged in Count III, do not use verdict form C. If you find the defendant not guilty of the crime of Assault in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Second Degree. If you unanimously agree on a verdict as to Assault in the Second Degree,, you must fill in the blank for C2 provided in verdict form C the words "not guilty" or the word "guilty", according to the decision you reach on Assault in the

Second Degree. If you cannot agree on a verdict on Assault in the Second Degree, do not fill in the blank provided in Verdict Form C for C2.

If you find the defendant guilty on verdict form C of Assault in the Second Degree, do not use the blank for C3 on verdict form C. If you find the defendant not guilty of the crime of Assault in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Third Degree. If you unanimously agree on a verdict on Assault in the Third Degree, you must fill in the blank for C3 provided in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach on Assault in the Third Degree.

If you find the defendant guilty on verdict form C of Assault in the Third Degree, do not use the blank for C4 on verdict form C. If you find the defendant not guilty of the crime of Assault in the Third Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Fourth Degree. If you unanimously agree on a verdict, you must fill in the blank for C4 provided in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach on Assault in the Fourth Degree.

Because this is a criminal case, as to each count or any lesser included or lesser degree offense, 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.

No. 44

You will also be given special verdict form I for Burglary in the First Degree as charged in count I. If you find the defendant not guilty of the crime of Burglary in the First Degree as charged in count I, do not use special verdict form I. If you find the defendant guilty of this crime, you will then use special verdict form I and fill in the blanks with the answers "yes" or "no" according to the decisions you reach. In order to answer the blanks on the special verdict forms "yes," as to each answer, you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to a question is "no," or if after full and fair consideration of the evidence you cannot agree as to an answer, you must fill in the appropriate blank with the answer "no."

No. 46

You will also be given a special verdict form 3 for the crime of Assault in the First Degree as charged in count III. If you find the defendant not guilty of the crime of Assault in the First Degree, do not use special verdict form 3. If you find the defendant guilty of this crime, you will then use special verdict form 3 and fill in the blanks with the answers "yes" or "no" according to the decisions you reach. In order to answer the blanks on the special verdict forms "yes," as to each answer, you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to a question is "no," or if after full and fair consideration of the evidence you cannot agree as to an answer, you must fill in the appropriate blank with the answer "no."

No. 47

For purposes of the first question on each of special verdict forms 1, 2 and 3, the State must prove, as to each first question on each special verdict form, beyond a reasonable doubt, that the defendant was armed with a deadly weapon at the time of the commission of the crime.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. As to each first question on each special verdict form, the State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. As to each first question on each special verdict form, the State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime.

A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

No. 48

For purposes of special verdict forms 1, 2 and 3, to find that any of these crimes are an aggravated domestic violence offense and answer "yes" to the second question on the applicable special verdict forms, each of the following two elements must be proved beyond a reasonable doubt:

- (1) That the victim and the defendant were family or household members; and
- (2) That the offense was committed within the sight or sound of the ~~defendant's~~^{victim's} child who was under the age of 18 years.

As to each of the special verdict forms, if you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to answer "yes" to the second question on the special verdict form.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to element (1) or (2), then it will be your duty to answer "no" to the second question on the special verdict form.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66006-3-I
v.)	
)	
MILORD GELIN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
APPELLATE UNIT	()	HAND DELIVERY
KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] MILORD GELIN	(X)	U.S. MAIL
343765	()	HAND DELIVERY
WASHINGTON STATE PENITENTIARY	()	_____
1313 N 13 TH AVE		
WALLA WALLA, WA 99362		

[Handwritten Signature]
2011 MAR 11 PM 4:49
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DIVISION ONE

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF MARCH, 2011.

X _____
[Handwritten Signature]

Washington Appellate Project
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1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
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